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## **Comment, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws**

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# DISCRIMINATION IN ACCESS TO PUBLIC PLACES: A SURVEY OF STATE AND FEDERAL PUBLIC ACCOMMODATIONS LAWS

## CONTENTS

I.	INTRODUCTION .....	216
	A. <i>The Current Status of the Public Accommodations Laws</i> .....	216
	B. <i>The Concept of Public Accommodations</i> .....	217
II.	FEDERAL PUBLIC ACCOMMODATIONS LAWS .....	219
	A. <i>Title II of the Civil Rights Act of 1964</i> .....	219
	1. <i>Prohibited Discrimination</i> .....	220
	2. <i>Accommodations Covered by Title II</i> .....	221
	3. <i>Classifications Covered by Title II</i> .....	224
	4. <i>Remedies and Enforcement</i> .....	225
	B. <i>Alternative Federal Remedies</i> .....	226
	1. <i>The Civil Rights Act of 1866: Sections 1981 and 1982</i> .....	226
	2. <i>The State Action Doctrine: Section 1983 and the Fourteenth Amendment</i> .....	230
	3. <i>The State Action Doctrine and its Application to the States Without Public Accommodations Statutes</i> .....	233
	4. <i>The Equal Credit Opportunity Act</i> .....	235
	5. <i>Federal Law and the Handicapped</i> .....	236
III.	STATE STATUTES: THE SCOPE OF THE PUBLIC ACCOMMODATIONS LAWS .....	238
	A. <i>The History of the State Statutes</i> .....	238
	B. <i>The Drafting of a Definition of "Public Accommodations"</i> .....	240
	C. <i>Discrimination: The Elements of the Offense</i> .....	243
	D. <i>Places Covered by the State Statutes</i> .....	245
	1. <i>Freedom of Movement</i> .....	245
	a. <i>Transport Facilities</i> .....	246
	b. <i>Restaurants</i> .....	247
	c. <i>Lodgings</i> .....	247
	2. <i>Leisure Time Activities</i> .....	248
	a. <i>The Passive/Participatory Distinction</i> .....	248
	b. <i>Controversial Recreational Facilities</i> .....	249
	(i) <i>Bars</i> .....	251
	(ii) <i>Private Clubs</i> .....	251
	(iii) <i>Religious Organizations</i> .....	252
	3. <i>Transactional Freedom</i> .....	253
	a. <i>The Scope of Coverage</i> .....	253
	b. <i>Controversial Transactional Freedoms</i> .....	255
	(i) <i>Barber Shops and Beauty Parlors</i> .....	255

(ii) Professional Services .....	256
(iii) Cemeteries .....	257
(iv) Credit Institutions .....	257
4. State Facilities .....	259
E. Classifications Covered by the State Statutes .....	260
1. Race and Color .....	261
2. National Origin and Ancestry .....	262
3. Creed and Religion .....	263
4. Sex .....	264
5. Handicap .....	265
6. Marital Status .....	268
7. Age .....	269
8. Sexual Orientation .....	270
9. Other Innovative Coverage .....	271
F. Remedies and Enforcement Under the State Statutes .....	272
1. Administrative Agencies .....	273
a. Advisory Agencies .....	273
b. Regulatory Agencies .....	274
(i) Complaint .....	274
(ii) Investigation .....	276
(iii) Conciliation and Persuasion .....	276
(iv) Hearing .....	278
(v) Agency Remedies .....	280
(vi) Judicial Review and Enforcement .....	281
c. Access and Jurisdiction .....	283
2. Judicial Remedies .....	285
IV. CONCLUSION .....	287
Appendix A: Places Covered Under the Public Accommodations Statutes .....	290
Appendix B: Classifications Covered Under the Public Accommodations Statutes .....	292
Appendix C: Remedies Offered Under the State Public Accommodations Statutes .....	294
Appendix D: The District of Columbia Public Accommodations Law .....	299

## I

### INTRODUCTION

#### A. *The Current Status of the Public Accommodations Laws*

The civil rights movement in the United States has made enormous advances since Lester Maddox used a gun to eject three black students who entered his Atlanta restaurant in 1964.<sup>1</sup> As progress has been made, the objectives of civil rights agitators and the character of their activities have changed. There is no longer a single "movement" composed of large numbers of people

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1. CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY 551-52 (A. Blaustein & R. Zangrando eds. 1968) [hereinafter cited as CIVIL RIGHTS AND THE AMERICAN NEGRO].

united around common issues.<sup>2</sup> As the most egregious forms of racial discrimination have been eliminated, numerous smaller movements have arisen focusing on discrimination against women, handicapped people, and homosexuals.<sup>3</sup> The most substantial development during the last decade has been the amendment of most state public accommodations laws to prohibit sex discrimination. A conspicuous gap remaining in the federal law is the absence of any prohibition of sex discrimination. Also, state and federal legislation has been enacted to prohibit discrimination against handicapped persons and to bar discrimination by credit institutions. These, however, have not been adequately implemented.

Although explicit racial segregation in places which are clearly public is now rare, the eradication of all types of discrimination in public accommodations is far from complete. Title II of the Civil Rights Act of 1964, the basic federal public accommodations statute, is extremely narrow and provides only minimal assistance where it is most needed—in the twelve states which have no public accommodations laws. Of the states which do have public accommodations statutes, some do not prohibit discrimination in places which are obviously public, such as cemeteries, barber shops, bars, hospitals, and retail stores. Other statutes offer little or no protection against discrimination on the basis of handicap, sex, marital status, or sexual preference.

Most states offer criminal and/or civil remedies for violation of the public accommodations statutes. However, in many cases, the remedies offered are insubstantial, and public accommodations issues rarely reach the courts. The majority of the states have organized civil rights agencies with substantial enforcement powers to augment existing civil and criminal remedies. The responsibility for enforcement of the public accommodations statutes now rests primarily with these agencies.

The purpose of this Project is to chart recent developments in public accommodations law, including the expansion of access rights to places not previously regarded as public, the proscription of discrimination against groups other than racial minorities, and the increasing role of the state civil rights commissions in enforcing discrimination law. This survey provides a basis for assessing the adequacy of existing remedies and suggests changes in state and federal law. The Project conducts a mechanical examination of the statutes on the books. It does not discuss how those laws came into existence<sup>4</sup> or the actual workings of the agencies which enforce them.

### *B. The Concept of Public Accommodations*

“Public accommodations” is a term of art which was developed by the drafters of discrimination laws to refer to places other than schools, work places, and homes. Specific sections of these laws cover housing, education,

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2. N.Y. Times, Feb. 5, 1978, § E, at 5, col. 1.

3. *Id.*

4. See generally M. BERGER, EQUALITY BY STATUTE: THE REVOLUTION IN CIVIL RIGHTS 206 (1967).

and employment; the public accommodations sections deal with all other places.<sup>5</sup>

Proscription of discrimination in public accommodations is premised on the notion that many privately-owned establishments are to some extent public. Citizens' rights of access to public places must, therefore, be balanced against the right of the owner to control his or her property. With the enactment of public accommodations statutes during the past fifteen years, and of legislation prohibiting discrimination by credit institutions and against disabled persons, the emphasis of the law has shifted dramatically toward protection of the access rights of the public.

The scope of traditional public accommodations laws is defined by a narrow concept of what places would be open to the public, based on the common law obligation of innkeepers and "common carriers" to admit all travellers.<sup>6</sup> The current view is so much broader, however, that the use of the word "accommodations" is a misnomer; any establishment which offers goods and services of any kind to the public may now be covered.<sup>7</sup> The modern concept is limited to coverage of establishments which operate from a particular place, but the laws could be expanded to include services which are performed at the home or office of the buyer, or goods which are sold in the street.<sup>8</sup>

Traditional public accommodations laws were drafted under the assumption that the proprietor of an establishment could not be required to take affirmative action to avoid discrimination. The newly enacted laws protecting handicapped persons have diverged from this model by prescribing building specifications to eliminate architectural barriers to access.<sup>9</sup> Other public accommodations laws might be similarly extended to require other affirmative acts, such as solicitation of business from all groups or delivery of services to all groups. Though this Project reflects an expansive view of public accommodations, it only examines coverage of those places which are designated as public accommodations in the civil rights statutes. General references to public accommodations laws are, therefore, only to these provisions. There is no discussion of laws which protect access rights to certain goods and services, such as those which prohibit discrimination by employment agencies, real estate agencies, or schools. Discussion of discrimination in these areas is best left to articles dealing with education, housing, or employment discrimination. In examining recent developments in access laws, this Project will focus on the scope of the state statutes, and the extent and manner in which they are enforced. Particular attention will be given to how public accommodations is defined, and to what classifications of persons are protected. The remedies provided by the public accommodations laws will then be explained and evaluated.

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5. J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 79 (1959).

6. See note 211 *infra*.

7. See, e.g., CAL. CIV. CODE § 51 (West Supp. 1978).

8. Garbage collectors, milkmen, and housepainters do business in the private homes of their customers; the absence of a "place" of business provides no conceptual basis for exempting these public services from coverage under the discrimination laws.

9. See note 376 *infra*.

## II FEDERAL PUBLIC ACCOMMODATIONS LAWS

Title II of the Civil Rights Act of 1964<sup>10</sup> is the basic federal statute guaranteeing equal access to public accommodations. Title II, however, does not touch significant areas of discrimination in public accommodations; the Civil Rights Act of 1866<sup>11</sup> and the fourteenth amendment extend beyond its scope. The following discussion examines the current status and application of federal public accommodations legislation and the remedies available under each provision.

### A. *Title II of the Civil Rights Act of 1964*

At the time of its passage, Title II was perceived as prohibiting acts of discrimination in privately-owned facilities to the extent that this goal was constitutionally permissible. Congress was constrained by the Supreme Court's invalidation in 1883 of the Civil Rights Act of 1875,<sup>12</sup> which had contained provisions similar to but broader than those of the 1964 Act. Justice Bradley's majority opinion in the *Civil Rights Cases*<sup>13</sup> held that the fourteenth amendment's equal protection clause restricts only state action. An individual wrongful act, unsupported by state authority in the form of law, custom, or judicial or executive proceedings was "simply a private wrong, or a crime of the individual";<sup>14</sup> the person wronged had recourse only in the laws of the state.

Because the Warren Court had given hints of a willingness to expand Bradley's antiquated construction, the fourteenth amendment was used as a partial basis for Title II.<sup>15</sup> In light of the 1883 precedent, however, Congress endeavored to lay additional constitutional foundations.<sup>16</sup> The scope of the commerce

10. 42 U.S.C. § 2000a (1970). Title II, 42 U.S.C. §§ 2000a to 2000a-6 is divided into seven sections. The first three describe the substantive rights protected, and the remaining sections describe the remedial provisions. Title III of the 1964 Civil Rights Act, which provides for the desegregation of all public facilities owned, operated, or managed by the state or any subdivision thereof, is an aspect of federal public accommodations law which will not be discussed in this Note.

11. 42 U.S.C. §§ 1981, 1982 (1970).

12. 109 U.S. 3 (1883). The Civil Rights Act of 1875 provided in part:

That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

13. 109 U.S. 3 (1883).

14. *Id.* at 17.

15. See *Lomard v. Louisiana*, 373 U.S. 267 (1963); *Garner v. Louisiana*, 368 U.S. 157 (1961). In both of these cases, the majority avoided the question whether the fourteenth amendment prohibited discrimination in public accommodations by voiding the defendants' arrests for trespassing, but Justice Douglas, writing concurring opinions in both cases, endorsed expansion of the fourteenth amendment.

16. See *Hearings Before the Senate Committee on Commerce on S. 1732*, 88th Cong., 1st Sess. 26-28 (1963) (statement of Senator Robert Byrd) [hereinafter cited as *Commerce Hearings*]. See also 110 CONG. REC. 12,700 (1964).

power had been tested and found to be enormous.<sup>17</sup> Also, the Interstate Commerce Commission had established a policy of desegregation in interstate transportation in the 1950's which had withstood challenges under the Interstate Commerce Act.<sup>18</sup> As a result, Title II was drafted to draw upon both fourteenth amendment and commerce clause authority; establishments whose operations "affect commerce" or are "supported by State Action" were covered.<sup>19</sup>

The Supreme Court upheld Title II in two test cases presented soon after its passage, sustaining it under Congress' plenary power to regulate interstate commerce.<sup>20</sup> Although Justices Douglas and Goldberg further argued that Title II could rest on the equal protection clause of the fourteenth amendment,<sup>21</sup> the initial judicial reliance on the commerce clause by the majority established a pattern for all subsequent litigation. The basic question of fact thus became whether the particular accommodation "affected commerce."<sup>22</sup>

### 1. *Prohibited Discrimination*

Title II not only prohibits denial of services but guarantees "full and equal access" to accommodations covered by the statute.<sup>23</sup> Under this formulation, Title II prohibits disparate service or treatment and bans facilities segregated under "Jim Crow" laws or customs,<sup>24</sup> but the Act does not proscribe selective admissions standards or ejection of unruly patrons, so long as those standards are applied without regard to race, creed, color, religion, or national origin.<sup>25</sup>

17. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

18. The Interstate Commerce Commission ordered cessation of segregation on buses and trains in *NAACP v. St. Louis-S.F. Ry. Co.*, 297 I.C.C. 335, 1 Race Rel. Rep. 263 (1955) and *Keys v. S.C. Coach Co.*, 64 M.C.C. 769, 1 Race Rel. Rep. 272 (1955). Following these decisions, the Interstate Commerce Act was amended to concur with this policy. 49 U.S.C. § 43 (1970). By 1962, the policy was extended to cover intrastate transportation. See *Bailey v. Patterson*, 369 U.S. 31, 33 (1962).

19. 42 U.S.C. § 2000a(b) (1970).

20. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). In *Katzenbach*, the Court was willing to extend the scope of the commerce power to bring under the Act a restaurant that served primarily local residents but received \$70,000 worth of food which had moved in interstate commerce.

21. Justice Douglas highlighted the appropriateness of reliance on the fourteenth amendment:

It is rather my belief that the right of people to be free of state action that discriminates against them because of race . . . "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." (citations omitted).

*Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 279 (1964) (concurring opinion). Justice Goldberg agreed. *Id.* at 291.

22. The courts have applied conventional commerce rationale to bring various accommodations under the Act, straining to find the requisite effect. For examples of the application of the "aggregate burden" effect, see *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Daniel v. Paul*, 395 U.S. 298 (1969).

23. 42 U.S.C. § 2000a(a) (1970).

24. For a discussion of Jim Crow laws, see M. KONVITZ, *A CENTURY OF CIVIL RIGHTS* 125-35 (1961).

25. See, e.g., *Rosado Maysonet v. Solis*, 409 F. Supp. 576 (D.P.R. 1975).

Section 2000a-2 defines more precisely the elements of a discriminatory act:

No person shall (a) withhold, deny or attempt to withhold or deny, or deprive or attempt to deprive any person of any right or privilege secured by Title II, or (b) intimidate, threaten or coerce, or attempt to intimidate, threaten or coerce any person with the purpose of interfering with any right secured by Title II, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Title II.<sup>26</sup>

This section, the "punishment clause," may be enforced not only against the proprietor of a covered establishment and his agents, but also against third parties who prevent entrance into an establishment.<sup>27</sup>

The most significant consequence of the "punishment clause" has been to undermine the use of state criminal trespass and disorderly conduct statutes against persons seeking to exercise their Title II rights. Immediately after the passage of the Act, the Supreme Court held that state criminal prosecutions against those merely seeking entry were unlawful,<sup>28</sup> thus calling a halt to "sit-in" arrests. The Court has further frustrated state reprisals and delaying tactics by authorizing removal to a federal forum of state criminal actions stemming from the defendant's assertion of Title II rights.<sup>29</sup>

## 2. Accommodations Covered by Title II

The accommodations covered by Title II fall into five categories: (1) lodgings for transients; (2) facilities selling food for consumption on the premises; (3) gasoline stations; (4) places of exhibition or entertainment; and (5) "captive establishments," *i.e.* those which house or are located within a covered establishment and which hold themselves out as serving the patrons of the covered establishment.<sup>30</sup> Since 1964, federal courts have pushed the commerce clause analysis to its logical extreme in order to draw particular accommodations into these categories. Virtually every lodging place or restaurant has been deemed to fit under Title II.<sup>31</sup> The commerce clause has been applied so liberally that the courts have rarely had to rely on a finding of state action to reach discriminatory accommodations; for those few establishments which have no conceivable effect on commerce, very small degrees of state action have been found sufficient to trigger the application of the statute.<sup>32</sup>

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26. 42 U.S.C. § 2000a-2 (1970).

27. *United States v. Johnson*, 390 U.S. 563 (1968).

28. *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

29. *Georgia v. Rachel*, 384 U.S. 780 (1966).

30. 42 U.S.C. § 2000a(b)(1)-(4) (1970). Title II includes the "Mrs. Murphy" exemption for small, proprietor-occupied lodgings, 42 U.S.C. § 2000a(b)(1) (1970), and a private club exemption, *id.* § 2000a(e) (1970). See text accompanying notes 48-59 *infra*.

31. See, e.g., *Pinkney v. Meloy*, 241 F. Supp. 943 (N.D. Fla. 1965) (barbershop with predominantly local trade covered by the Act because located within hotel); *Willis v. Pickrick Restaurant*, 231 F. Supp. 396 (N.D. Ga. 1964), *appeal dismissed sub. nom.* *Maddox v. Willis*, 382 U.S. 18 (1965) (small restaurant covered).

32. See *Auerbach v. African American Teachers Ass'n*, 356 F. Supp. 1046 (E.D.N.Y. 1973)



Since the passage of Title II, interpretation of the phrase "place of entertainment and exhibition" has been broadened by the courts. The drafters of the Act intended it to cover only spectator-oriented and not participatory forms of entertainment.<sup>33</sup> No doubt Congress was reluctant to breach the strong barriers of custom and tradition which restricted intimate social contact between races. Some early cases did distinguish "places of entertainment" from "places of enjoyment,"<sup>34</sup> thus limiting the application of Title II to places where the public merely watched performances. This distinction began to erode in *Miller v. Amusement Enterprises, Inc.*,<sup>35</sup> where the Fifth Circuit held an amusement park to be a place of entertainment because it presented the "performance" of children riding merry-go-rounds and ferris wheels. The court, in effect, took judicial notice of the fine art of people-watching.<sup>36</sup> Recently, courts have made further inroads into this highly academic distinction and have prohibited discrimination in recreational facilities where customers come into considerable personal contact with one another. Now, beauty parlors and health spas, pool-rooms, community swimming pools, and even youth football programs are considered places of entertainment.<sup>37</sup> Bars which neither serve food nor provide entertainment are still beyond the scope of Title II; perhaps the neighborhood tavern is accorded respect as a "blue collar private club."<sup>38</sup> If, however, the tavern offers any relatively meager form of amusement such as a juke box, television, pinball machine, or piano, it is brought under the sway of the statute.<sup>39</sup>

Title II is directed primarily toward eliminating restrictions on freedom of movement, *i.e.*, interference with travel and the right to spend leisure time as one sees fit. Within this framework Title II has been effective; virtually no hotel, motel, restaurant, theater, or gas station is outside its purview. Nevertheless, a great many establishments are not covered, including retail stores, many establishments offering services (professional and other), private hospitals, and proprietary schools. The captive establishment clause<sup>40</sup> has reached some of these places: barber shops located within a hotel,<sup>41</sup> a bowling alley

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(exclusion of white faculty members from meeting in school auditorium violated Title II). *But see* *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973).

33. *Commerce Hearings*, *supra* note 16, at 107.

34. *Kyles v. Paul*, 263 F. Supp. 412 (E.D. Ark. 1967), *aff'd sub nom. Daniel v. Paul*, 395 F.2d 118 (8th Cir. 1968), *rev'd*, 395 U.S. 298 (1969); *Robertson v. Johnston*, 249 F. Supp. 618 (E.D. La. 1966), *rev'd on other grounds*, 376 F.2d 43 (5th Cir. 1967).

35. 394 F.2d 342, 348-49 (5th Cir. 1968).

36. *Id.* at 349.

37. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Rousseve v. Shape Spa for Health and Beauty, Inc.*, 516 F.2d 64 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474 (E.D. La. 1974); *United States v. Williams*, 376 F. Supp. 750 (M.D. Fla. 1974).

38. *Selden v. Topaz 1-2-3 Lounge, Inc.*, 447 F.2d 165 (5th Cir. 1971).

39. *United States v. Deyorio*, 473 F.2d 1041 (5th Cir. 1973); *United States v. Deetjen*, 356 F. Supp. 688, 691 (S.D. Fla. 1973).

40. 42 U.S.C. § 2000a (1970).

41. *Pinkney v. Meloy*, 241 F. Supp. 943 (N.D. Fla. 1965).

with a snack bar on the premises,<sup>42</sup> and, in a more sweeping application of this clause, retail stores which contain restaurants.<sup>43</sup> The scope of the captive establishment clause is potentially vast. Any office within a large hotel or building containing a restaurant might be covered. Such an approach was suggested by the plaintiffs in *Dombrowski v. Dowling*,<sup>44</sup> who argued that the presence of a restaurant in the lobby of an office building placed the entire building within the scope of Title II.<sup>45</sup> The *Dombrowski* court, however, rejected this expansive reading and found that the restaurant must do more than merely serve some patrons of the building; a substantial symbiotic relationship must exist between the covered and captive establishments.<sup>46</sup>

The captive establishment clause has been a tool of uneven reliability for parties seeking the protection of Title II. The clause could nevertheless embrace a broad range of personal services frequently offered by large hotels and recreation complexes, including ticket services, car rentals, barber and beauty shops, and shoeshine parlors. The spillover effect of the clause reaches beyond the captive establishments found to be covered. Once an establishment is covered in this context, the courts have been willing to apply Title II to the same sort of accommodation standing alone.<sup>47</sup>

The single major exemption from coverage under Title II is the "private club or other establishment not in fact open to the public."<sup>48</sup> Such a club, however, must be truly private and not simply a sham designed to circumvent the law. Congress feared evasion of the Act via the private club exemption,<sup>49</sup> and the federal courts have been intolerant of any such attempts at subterfuge.<sup>50</sup>

A private club defense has never been successfully asserted before the Supreme Court, but the Court has discussed the requisite features of the private club in cases where an alleged club was adjudged a public accommodation. The existence of a profit motive invariably marks the "club" as a public accommodation.<sup>51</sup> A club must follow some "plan or purpose of exclusiveness;" if membership is granted solely on the basis of race, the defense will fail.<sup>52</sup> Elaborating on these pronouncements, a number of lower courts have outlined the indicia of the private club. One of the most thoughtful analyses is

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42. *Fazzio Real Estate Co. v. Adams*, 396 F.2d 146, 149 (5th Cir. 1968).

43. *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

44. 459 F.2d 190 (7th Cir. 1972).

45. *Id.*

46. *Id.* at 197-98.

47. Courts often have sought to bring a recreational facility within the scope of Title II by holding that an eating establishment within the facility was covered. *See, e.g.*, *Fazzio Real Estate Co. v. Adams*, 396 F.2d 146 (5th Cir. 1968). Such holdings, while avoiding the question of the coverage of the recreational facility itself, may have forged a path for an expanded definition of "place of amusement."

48. 42 U.S.C. § 2000a(e) (1970).

49. *See, e.g.*, 110 CONG. REC. 13,697-98 (1964) (remarks of Senator Humphrey).

50. *See Tillman v. Wheaton-Haven Recreational Ass'n*, 410 U.S. 431 (1973); *Daniel v. Paul*, 395 U.S. 298 (1969); *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90 (E.D. La. 1967).

51. *See Daniel v. Paul*, 395 U.S. 298 (1969).

52. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1968).

found in *Wright v. Cork Club*,<sup>53</sup> in which the court developed the following guidelines to distinguish the truly private club from the disguised accommodation. A private club must: (1) have machinery to carefully screen applicants for membership; (2) limit the use of its facilities to members and bona fide guests; (3) be controlled by the membership through meetings and elections; (4) be operated on a non-profit basis solely for the benefit and pleasure of its members; and (5) direct any publicity solely to its members.<sup>54</sup> In *Cornelius v. Benevolent Protective Order of the Elks*,<sup>55</sup> a rare case upholding the private club defense, the court also questioned the substantiality of dues and the history of the organization's formation. Inquiry into formation necessarily conflicts with the privacy interest protected by the private club exemption and such information should be relevant only as evidence that a club was organized to circumvent Title II. If a club is truly private—a selective organization, controlled by and for its members on a non-profit basis—the motive for formation should not be grounds for denying the defense.<sup>56</sup>

Courts have severely restricted the private club exemption. The defense has been successful when the organization has a primarily social function and can be described as an extension of the home rather than business.<sup>57</sup> The exemption is at present strictly a statutory requirement, not a constitutional one. Certainly the exemption safeguards the freedoms of association and privacy; both Congress and the courts have acknowledged that intention.<sup>58</sup> Concurrently, however, the exemption seems to grant the bona fide private club the right to use race as one criteria of membership. However, the degree to which this "right to discriminate" is constitutionally protected has yet to be established.<sup>59</sup>

### 3. *Classifications Covered by Title II*

Although Title II prohibits discrimination on account of race, color, religion, and national origin,<sup>60</sup> litigation under the statute has focused almost exclusively on racial discrimination. This was the great evil sought to be corrected by Title II; the Senate hearings and debates dealt extensively with the problems and humiliation faced by blacks living and traveling in a segregated society.<sup>61</sup> The statute has also been applied to whites who have been denied access because of their association with blacks or their participation in the civil

53. 315 F. Supp. 1143 (S.D. Tex. 1970).

54. *Id.* at 1153.

55. 382 F. Supp. 1182 (D. Conn. 1974). Other cases where a club was found to be private include *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir.), *cert. denied*, 429 U.S. 872 (1976), and *Solomon v. Miami Woman's Club*, 359 F. Supp. 41 (S.D. Fla. 1973). In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the Supreme Court assumed the facility was a private club.

56. See *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970).

57. 382 F. Supp. at 1204.

58. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1971); *Wright v. Cork Club*, 315 F. Supp. 1143, 1157 (S.D. Tex. 1970); 110 CONG. REC. 13,697-98 (1964).

59. See generally Note, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460 (1970).

60. 42 U.S.C. § 2000a-1 (1970).

61. See *Commerce Hearings*, *supra* note 16, at 692-97.

rights movement.<sup>62</sup> Religious discrimination is prohibited by Title II but public concern over this issue, particularly anti-Semitic advertising by hotels and resorts, had dissipated before its enactment.<sup>63</sup> Title II does not cover sex discrimination; all attempts to invoke the statute toward that end have failed.<sup>64</sup> In this respect, federal law is far behind the law in most states.<sup>65</sup>

Although federal coverage is narrow, when a charge of discrimination violative of Title II is made, the courts will tolerate few defenses. Proprietors' arguments that their religious belief in the separation of the races required them to refuse service to black customers,<sup>66</sup> that they would be unable to adequately serve black clients,<sup>67</sup> or that business would suffer because whites would not patronize integrated establishments<sup>68</sup> have met with summary rejection.

#### 4. Remedies and Enforcement

Title II only provides for injunctive relief against present or proposed discrimination.<sup>69</sup> A civil suit may be initiated by the aggrieved party suing on his own behalf or on behalf of a class.<sup>70</sup> In addition, the Attorney General may initiate a suit or intervene in private actions certified to be of "general public importance."<sup>71</sup> There is no mechanism for agency enforcement of the Act or for criminal prosecution. Plaintiffs cannot obtain monetary damages, but the prevailing party may recover reasonable attorneys' fees.<sup>72</sup> The attorneys' fees provision has been liberally interpreted and may serve to counteract in part the lack of a damages remedy.<sup>73</sup> The expense of bringing suit would normally outweigh any out-of-pocket costs incurred as a result of the discriminatory act. A private plaintiff is therefore not obliged to personally finance the vindication of his right of equal access.

If a violation of Title II occurs in a state with its own public accommodations laws, no private action may commence until thirty days after the appropriate state official has been notified of the alleged act or practice.<sup>74</sup> This has generally been interpreted as requiring exhaustion of state remedies.<sup>75</sup> If the

62. Reprisals against civil rights workers are treated as punishments or attempts to punish persons for exercising or attempting to exercise Title II rights under 42 U.S.C. § 2000a-2(c) (1970). See *Offner v. Shell's City, Inc.*, 376 F.2d 574 (5th Cir. 1967).

63. *Camp of Pines v. New York Times Co.*, 184 Misc. 389, 53 N.Y.S.2d 475 (1945). There has been little litigation in this area and that has been under state statutes. See M. KONVITZ, *supra* note 24, at 168-70.

64. *Seidenberg v. McSorely's Old Ale House*, 317 F. Supp. 593 (S.D.N.Y. 1970); *DeCrow v. Hotel Syracuse Corp.*, 288 F. Supp. 530 (N.D.N.Y. 1968).

65. See text accompanying notes 353-66 *infra*.

66. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1969) *modifying and aff'g* 377 F.2d 433, 437-38 (4th Cir. 1967) (Winter, J., concurring).

67. *Pinkney v. Meloy*, 241 F. Supp. 943, 947 (N.D. Fla. 1965).

68. *United States v. Gulf-State Theaters, Inc.*, 256 F. Supp. 549, 552 (N.D. Miss. 1966).

69. 42 U.S.C. § 2000a-3(a) (1970).

70. 42 U.S.C. §§ 2000a-3, 2000b(a) (1970); *Lance v. Plummer*, 353 F.2d 585 (5th Cir. 1965).

71. 42 U.S.C. § 2000a-3(a) (1970).

72. 42 U.S.C. § 2000a-3(b) (1970).

73. See *Newmann v. Piggie-Park Enterprises, Inc.*, 390 U.S. 400 (1968).

74. 42 U.S.C. § 2000a-3(c) (1970).

75. *Harris v. Ericson*, 457 F.2d 765 (10th Cir. 1972).

violation occurs in a state with no applicable law, and the federal court believes voluntary compliance is a reasonable possibility, it may refer the matter to the Community Relations Service, established by Title X of the Civil Rights Act of 1964, for conciliation of the grievance.<sup>76</sup> If there is cause to believe that a "pattern or practice of resistance" to Title II exists, the Attorney General may seek judicial relief without first giving notice and attempting settlement.<sup>77</sup>

Section 2000a-5 confers jurisdiction for Title II proceedings on the federal courts. Suits by the Attorney General must proceed in federal court,<sup>78</sup> but no such express limitation applies to private suits. Although most state courts will take jurisdiction over private Title II claims, at least one has implied that it will not accept claims brought under the Civil Rights Act of 1964.<sup>79</sup>

### B. *Alternative Federal Remedies*

Section 2000a-6 provides that the remedies described in the Act are the exclusive means of enforcing the rights guaranteed in Title II.<sup>80</sup> The legislative history indicates the Congress did not wish proprietors to "fear a jail sentence or a damage action if his judgment as to coverage of Title II is wrong."<sup>81</sup> But Title II states explicitly that its existence does not preclude the assertion of rights or the pursuit of remedies available under any other state or federal statute which prohibits discrimination.<sup>82</sup> On the basis of this language, and because Title II is limited in its coverage and the remedies it authorizes, other federal provisions have frequently been invoked to protect the right of access. Criminal penalties have been imposed on non-proprietors breaching Title II, although Title II on its own terms prohibits third party interference.<sup>83</sup> Other statutes cover accommodations and services and protect classes not included in Title II. Because no damage remedy has evolved from Title II, a plaintiff may superimpose other federal provisions, such as the Civil Rights Act of 1866 or the fourteenth amendment, onto a Title II claim to supplement Title II injunctive relief.

#### 1. *The Civil Rights Act of 1866: Sections 1981 and 1982*

After a century of lying dormant, the Civil Rights Act of 1866,<sup>84</sup> guaran-

76. 42 U.S.C. §§ 2000a-3(d), 2000g (1970).

77. 42 U.S.C. § 2000a-5(a) (1970).

78. 42 U.S.C. § 2000a-6 (1970).

79. Compare *Dudley v. Bell*, 50 Mich. App. 678, 213 N.W.2d 805 (1973) with *State Comm'n for Human Rights v. Kennelly*, 59 Misc. 2d 278, 299 N.Y.S.2d 342 (1969).

80. 42 U.S.C. § 2000a-6 (1970).

81. 110 CONG. REC. 9767 (1964).

82. 42 U.S.C. § 2000a-6 (1970).

83. *United States v. Johnson*, 390 U.S. 563 (1968) (applying 18 U.S.C. § 241 (1970)).

84. The Civil Rights Act of 1866 comprises 42 U.S.C. §§ 1981, 1982. Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

teeing equality of the right to contract and to hold property, has been re-vitalized. Prior to 1968, it was generally accepted that this act was directed only toward governmental action.<sup>85</sup> In *Jones v. Alfred H. Mayer Co.*,<sup>86</sup> however, the Supreme Court declared that section 1982 barred racial discrimination in the sale and rental of real and personal property by both public and private individuals. The authority to reach private acts derived not from the equal protection clause of the fourteenth amendment, but from the thirteenth amendment's power to eradicate slavery:

[A]t the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.<sup>87</sup>

Thus, Section 1982 may guarantee access to accommodations not covered by Title II. Combining section 1982 with Title II has been most successful when the question of access is incidental to a purchase of some real property interest, such as a burial plot<sup>88</sup> or use of a private recreational facility which has a residency requirement.<sup>89</sup> But section 1982 has also protected such personal property interests as the purchase of life insurance.<sup>90</sup>

The extension of section 1982 to prohibit wholly private acts of discrimination in the sale and purchase of property is mirrored in the expanded interpretation of section 1981 to prohibit discrimination in the right to make and enforce contracts.<sup>91</sup> Protection of contractual rights under section 1981 overlaps with coverage under Title II in many respects and exceeds it in others. For example, the purchase of an admission ticket to an amusement park has been termed a contract,<sup>92</sup> and accommodations such as taverns<sup>93</sup> and proprietary schools,<sup>94</sup> which are not covered by Title II, have been brought under the purview of section 1981. Arguably, any business which opens its doors to the public makes a general offer to contract; thus, denial of access to the goods

42 U.S.C. § 1981 (1970).

Section 1982 provides:

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.

42 U.S.C. § 1982 (1970).

85. Seldin, *Eradicating Racial Discrimination at Public Accommodations not Covered by Title II*, 28 RUTGERS L. REV. 1, 6-12 (1974).

86. 392 U.S. 409 (1968).

87. *Id.* at 443.

88. *Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala. 1969).

89. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1968).

90. *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112 (1972).

91. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), *cited with approval in Runyon v. McCrary*, 427 U.S. 160 (1976).

92. *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970).

93. *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 755 (D. Or. 1973).

94. *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856, 862 (W.D.N.C. 1971).

and services therein may trigger a 1981 action. Operating in tandem, sections 1981 and 1982 may embrace the right of access to any accommodation open to the public, thereby eclipsing Title II.

Another advantage of the Civil Rights Act of 1866 over Title II is that claims for damages are permitted under the former.<sup>95</sup> Until recently, attorneys' fees were not awarded in section 1981 or 1982 actions. In order to recover both monetary damages and attorneys' fees, plaintiffs had to sue simultaneously under the Civil Rights Act of 1866 and Title II. Parties using this strategy had been granted the whole spectrum of remedies—injunctive relief and attorneys' fees under Title II and compensatory and punitive damages under section 1981 or 1982.<sup>96</sup> The Attorneys' Fees Act,<sup>97</sup> however, may make such dual actions unnecessary. Passed in 1977, the Act authorizes courts to award attorneys' fees in addition to monetary damages in suits brought under various Reconstruction-era statutes, including the Civil Rights Act of 1866.<sup>98</sup>

Although sections 1981 and 1982 cover a greater variety of accommodations and allow more substantial remedies than does Title II, all three of the provisions suffer a common limitation. Each has been construed to apply only to racial and ethnic discrimination.<sup>99</sup> As with Title II, the courts have consistently held that the Civil Rights Act of 1866 cannot be construed to proscribe sex discrimination.<sup>100</sup>

95. *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 756 (D. Or. 1973). See 42 U.S.C.A. § 1988 (West Supp. 1978), which authorizes damages for violations of 42 U.S.C. §§ 1981-1987.

96. *Tillman v. Wheaton-Haven Recreational Ass'n*, 517 F.2d 1141 (4th Cir. 1975).

97. 42 U.S.C.A. § 1988 (West Supp. 1978).

98. Section 1988 provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C.A. § 1988 (West Supp. 1978).

99. *Fitzgerald v. United Methodist Community Center*, 335 F. Supp. 965 (D. Neb. 1972). Section 1981 was held to apply to ethnic discrimination in *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Or. 1973). *But see* *National Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Supp. 1224, 1228 (D.D.C. 1976), which held that section 1981 applies solely to racial and not ethnic discrimination.

100. *Wisconsin Nat'l Organization for Women v. Wisconsin*, 417 F. Supp. 978 (W.D. Wis. 1976); *Fitzgerald v. United Methodist Community Center*, 335 F. Supp. 965 (D. Neb. 1972).

The private club exemption is not explicit in sections 1981 and 1982, and the Supreme Court has not decided whether an exemption similar to the one contained in Title II should be implied.<sup>101</sup> The district courts which have faced the issue have concluded that excluded persons may not avail themselves of the Civil Rights Act of 1866 to obtain membership in a private organization.<sup>102</sup> Moreover, these courts have applied the same tests which are employed in Title II cases for determining the validity of a private club.

The recent decision in *Runyon v. McCrary*<sup>103</sup> casts new light on the private club question. *Runyon* held that section 1981 precludes a private, non-sectarian elementary school from denying admission to prospective students on the basis of race. No state action was involved; the school did not receive state or federal aid and did not claim tax-exempt status. The Court found that the admission of minority students to the school did not violate the constitutionally protected rights of free association, privacy, or the right of parents to direct the education of their children. Although the Court avoided the question of whether section 1981 applies to private clubs, it made two points which may have significant bearing on the constitutional underpinnings of the club exemption. First, the Court cast aside the argument that the Civil Rights Act of 1964 repealed by implication the 1866 Act, reaffirming that an implied repeal occurs only when two acts are in irreconcilable conflict.<sup>104</sup> In doing so, the Court refused to analogize a "private school" exemption in the context of section 1981 to the "private club" exemption of Title II. Although the desirability of statutory harmony between the two statutes may be greater in the case of clubs, the Court has acknowledged that section 1981 regulates certain private actions which are not only beyond the limits of Title II but beyond those intended by the Congress which originally enacted section 1981.<sup>105</sup> Second, the Court distinguished between the right of a private school to promulgate a philosophy of racial segregation and the right to practice its philosophy by excluding racial minorities. A similar distinction could honor the right of clubs to promote belief in racial discrimination, yet prohibit discriminatory membership policies.

The Court made clear its intent to distinguish the private club issue from the one facing it, particularly with regard to the contractual rights involved. The educational program of the private school in *Runyon* was widely advertised and the admissions requirements were negligible. A private club with equally lax entrance requirements and which advertised just as broadly would not have passed muster under Title II. Although the Court did not find the rights of association and privacy to be violated by their decision,<sup>106</sup> those concerns may

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101. This question was patently left open in *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438-39 (1973).

102. *Golden v. Biscayne Bay Yacht Club*, 370 F. Supp. 1038 (S.D. Fla. 1975), *rev'd*, 530 F.2d 16 (5th Cir. 1976), *cert. denied*, 429 U.S. 872 (1976); *Cornelius v. B.P.O.E.*, 382 F. Supp. 1182 (D. Conn. 1974); *Solomon v. Miami Woman's Club*, 359 F. Supp. 41 (S.D. Fla. 1973).

103. 427 U.S. 160 (1976).

104. *Id.* at 172-73 & n.10 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154-55 (1976)).

105. *Id.* at 189-90 (Stevens, J., concurring).

106. *Id.* at 175-79.



be more pressing in a case involving a discriminatory private club. Government intervention in the latter instance might seriously impinge on the right to fashion one's personal life as one wishes and to choose one's friends and personal associates. Mr. Justice Powell's concurring opinion offered an especially strong defense for the position that certain contractual relationships should be shielded from governmental scrutiny: "[O]ur holding . . . does not imply the intrusive investigation into the motives of every refusal to contract by a private citizen. . . . [S]ome contracts are so personal 'as to have a discernible rule of exclusivity which is inoffensive to § 1981.'" <sup>107</sup>

As the privacy interest increases, and as the club moves farther out of the public domain and becomes more an extension of the home, the constitutional interests supporting section 1981 become less pertinent. The individual denied access to a private club is not denied a right to which the rest of the public is entitled, but is denied something granted only to a specific group of social intimates. The exclusionary practice in such a situation represents a personal whim of the club members rather than one of the "badges of slavery" which the Civil Rights Act of 1866 sought to abolish. <sup>108</sup>

If the Court does find, as seems likely, that a private club exemption is constitutionally mandated, the scope of that exemption could be narrower than the one developed in Title II litigation. If a certain level of intimacy is to be protected from government regulation, then organizations whose goals are not purely social and whose members are chosen on the basis of objective, impersonal criteria, may be prevented from practicing exclusionary policies. Thus national organizations, in which members need not be personal acquaintances, or civic-minded associations which have a purpose beyond membership conviviality, might not be private enough to warrant constitutional protection.

## 2. *The State Action Doctrine: Section 1983 and the Fourteenth Amendment*

Section 1983 <sup>109</sup> is derived from the Civil Rights Act of 1871, a Reconstruction enforcement statute which permits the recovery of damages for violation of the equal protection clause. Although the fourteenth amendment is effective against governmental, not private, behavior, "state action" may be inferred if private discriminatory conduct is supported or compelled by state law, usage, or custom.

The point at which state involvement becomes sufficient to constitute a violation of the fourteenth amendment has been a matter of considerable con-

107. *Id.* at 187 (Powell, J., concurring).

108. *See Note, supra* note 59, at 461.

109. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

trovsky. The traditional restrictive approach exemplified by the *Civil Rights Cases*<sup>110</sup> required some affirmative action by the state adversely affecting the rights of citizens. The doctrine was expanded to reach private discrimination condoned by the state in *Shelley v. Kraemer*.<sup>111</sup> Later, in *Burton v. Wilmington Parking Authority*,<sup>112</sup> the Court held that where the state has "insinuated itself into a position of interdependence with [the defendant] it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."<sup>113</sup> Further expansion occurred when the Court found that more oblique forms of state encouragement, enforcement, and control warranted a finding of state action.<sup>114</sup> As a result, some commentators had concluded that the doctrine had been judicially buried.<sup>115</sup> This liberal trend began to reverse in *Moose Lodge No. 107 v. Irvis*,<sup>116</sup> followed by *Jackson v. Metropolitan Edison Co.*<sup>117</sup> In both cases, the Court articulated the same restrictive "nexus" test, requiring state involvement with the particular act challenged, not merely generalized regulation and support.

The nexus requirement has blocked findings of state action in suits against public facilities over which the state has typically exercised extensive control, including hospitals<sup>118</sup> and public utilities.<sup>119</sup> Lower courts have elaborated the *Jackson* holding into a three-pronged test: state involvement must be significant, must relate to the specific policy or decision which caused the injury, and must aid, encourage, or tacitly approve the challenged activity.<sup>120</sup>

Attacks made against clubs deemed private under Title II or the Civil Rights Act of 1866, on the grounds that the clubs have received benefits from the state sufficient to constitute state action, have met with even less success. Neither a lease for nominal rent from a municipality to the club,<sup>121</sup> nor the receipt of state funds where those funds have been used in a non-discriminatory fashion,<sup>122</sup> nor the possession of a state liquor license<sup>123</sup> have triggered application of the state action doctrine. The barriers to a finding of state involvement in cases of truly private organizations appear insurmountable, for once the clubs are placed outside the public sphere, the nexus require-

110. 109 U.S. at 11 (1883).

111. 334 U.S. 1, 18-20 (1948).

112. 365 U.S. 715 (1961).

113. *Id.* at 725.

114. *See* *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Newton*, 382 U.S. 296 (1966). *See generally* *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

115. *See* *Williams, The Twilight of State Action*, 41 *TEX. L. REV.* 347, 389-90 (1963).

116. 407 U.S. 163, 177 (1972).

117. 419 U.S. 345 (1974).

118. *See, e.g.,* *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975).

119. *See, e.g.,* *Strack v. Northern Natural Gas Co.*, 391 F. Supp. 155 (S.D. Iowa 1975).

120. *See* *Aasum v. Good Samaritan Hosp.*, 395 F. Supp. 363, 367 (D. Or. 1975), *aff'd*, 542 F.2d 792 (9th Cir. 1976).

121. *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir.), *cert. denied*, 429 U.S. 872 (1976); *Solomon v. Miami Woman's Club*, 359 F. Supp. 41 (S.D. Fla. 1973).

122. *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975).

123. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

ment is necessarily more difficult to meet. Findings of state action must rest on the state's involvement in the particular activity challenged and can draw no support from other signs of state control. The Court in *Moose Lodge* implied that a symbiotic relationship between the state and the privately-run facility would be especially difficult to find if the facility were not in fact open to the public.<sup>124</sup>

The factual concerns relevant to clubs and non-profit organizations have been more clearly outlined by at least one lower court: (1) the degree of and dependence on governmental aid; (2) the extent of governmental regulation; (3) any implication of governmental approval of the challenged act; (4) the extent to which the organization serves a public function; and (5) the claims of members of the organization to protection of their rights of privacy and free association.<sup>125</sup> Most of these factors must be considered in order to determine whether the organization is by nature truly private, so it is unlikely that a club, once past the hurdle of the privacy determination, will find itself subject to the state action doctrine.

After *Jackson* and *Irvis*, lower court opinions noted that the sufficiency of state action is inextricably grafted to the nature of the right vitiated. Thus, the type of discrimination and the nature of the public accommodation are considered along with the degree of state involvement.<sup>126</sup> For example, the Second and Fifth Circuits have applied less rigorous standards to cases involving charges of racial discrimination<sup>127</sup> than those involving other forms of discrimination. Also, the degree of state action necessary to invoke the state action doctrine will vary with the type of accommodation. A liquor license, which represents insufficient state involvement to trigger the state action doctrine in the private club context, has been relied upon to prohibit discriminatory practices in public restaurants. The court in *Bennet v. Dyer's Chop House, Inc.*<sup>128</sup> distinguished *Moose Lodge* on its facts as a case concerning a private club and pointed out that the defendant restaurant was more dependent on a liquor license for economic survival than was a club not operating for profit.

Although the standards for applying the state action doctrine have become more stringent, once they are met, the equal protection clause may reach all forms of arbitrary discrimination, even if the conduct or accommodations under attack are not subject to Title II or sections 1981 and 1982. For instance, sex discrimination has been successfully attacked in this manner by finding state action in agreements with local police<sup>129</sup> and in the exclusion of women by accommodations which are dependent on a state authorized liquor license.<sup>130</sup>

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124. *Id.* at 175.

125. *Jackson v. Statler Foundation*, 496 F.2d 623, 629 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

126. *See, e.g.*, *Curtis v. Rosso & Mastracco, Inc.*, 413 F. Supp. 804, 807 (E.D. Va. 1976).

127. *Weise v. Syracuse Univ.*, 522 F.2d 397, 405 (2d Cir. 1975); *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873, 879 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975).

128. 350 F. Supp. 153, 155 (N.D. Ohio 1972).

129. *Johnson v. Heinemann Candy Co.*, 402 F. Supp. 714 (E.D. Wis. 1975).

130. *Bennett v. Dyer's Chop House, Inc.*, 350 F. Supp. 153 (N.D. Ohio 1972); *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F. Supp. 593 (S.D.N.Y. 1970).

### 3. *The State Action Doctrine and its Application to the States Without Public Accommodations Statutes*

At present, twelve states have no affirmative public accommodations legislation.<sup>131</sup> A few states not only lack affirmative statutes but have laws which authorize discrimination.<sup>132</sup> Some of these statutes are patently unconstitutional, but have not been repealed or judicially invalidated.<sup>133</sup> All states, including those discussed herein, have laws protecting the rights of the visually and physically handicapped, as well as architectural barriers legislation which requires certain buildings to comply with accessibility standards. These statutes are often vague, lack enforcement provisions, and impose meager penalties upon violators.<sup>134</sup>

In the absence of any meaningful state remedy, an aggrieved party may gain access to places of public accommodation only by bringing suit under a federal statute. Federal law offers limited protection of the right of access, but its scope, in terms of covered establishments, protected classes, and available remedies, is limited. However, in states where discrimination is affirmatively permitted by statute, federal law may be useful. Statutes which encourage discrimination may represent sufficient state involvement with the challenged private behavior to trigger the state action doctrine. The Mississippi statute provides an example:

Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi . . . is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon, or serve any persons that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve.<sup>135</sup>

Under this statute a proprietor may discriminate on any grounds whatever, including race, ethnicity, or religion. Such statutes are commonly interpreted to apply only to accommodations outside the ambit of federal law. Federal courts have been reluctant to tamper with state statutes, as the posture of *Clark v.*

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131. Alabama, Arkansas, Florida, Georgia, Hawaii, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia have no public accommodations legislation except minor provisions for the handicapped.

132. MISS. CODE ANN. § 97-23-17 (1972); TENN. CODE ANN. § 62-710 (1976); TEX. CIV. CODE ANN. tit. 6, § 178 (Vernon 1969). The Florida Statute, FLA. STAT. ANN. § 509.092 (West 1972), permits proprietors to exclude any customer on a variety of grounds, but refusal may not be based on grounds of race, creed, color, or national origin. Since this statute neither offers enforcement provisions nor proscribes behavior, it will not be considered as a civil rights statute.

133. Alabama and South Carolina have statutes mandating segregation on their books, e.g., ALA. CODE tit. 48, § 196 (1973); S.C. CODE § 24-1-140 (1977). As of 1966, "there were 44 sections of the Alabama Code devoted to the maintenance of segregation in various state and privately owned facilities." United States v. Alabama, 252 F. Supp. 95 (N.D. Ala. 1966). Few of these statutes have since been repealed.

134. E.g., GA. CODE ANN. § 79-601 (1973); LA. REV. STAT. ANN. § 46:1952 (West Supp. 1977); S.C. CODE § 41-29-10 (1977).

135. MISS. CODE ANN. § 97-23-17(1) (1972).

*Dodge*<sup>136</sup> indicates. Rather than enjoin enforcement of the Mississippi statute, the federal district court simply ordered the facility, which had relied on the statute in defense of its exclusionary policies, to open its doors to the plaintiff.<sup>137</sup>

A majority of the Supreme Court in *Adickes v. S.H. Kress & Co.*<sup>138</sup> followed the same approach. Without invalidating the statute itself, the Court held that the arrest of plaintiff for loitering was a violation of the fourteenth amendment. Mr. Justice Brennan, in a concurring opinion, argued that the mere existence of a state law supporting racial discrimination established state involvement in any act of private discrimination. Whether the proprietor were actually influenced by the statute would be irrelevant: "When private action conforms with state policy it becomes a manifestation of that policy and is thereby drawn within the ambit of state action."<sup>139</sup> Under Justice Brennan's analysis, any evidence of state support, whether legislative or executive, by policy or practice, for private acts of discrimination would warrant the application of section 1983 to reach the private act. Therefore, if a state switched from a neutral policy on discrimination, *i.e.*, if it had no statute on point, to one hostile to federal statutory or constitutional law, acts which conformed to that hostile policy, even though not directly supported by the state, could be subject to section 1983. The same acts occurring in a state with an affirmative public accommodations law would not be unlawful. *Adickes* concerned racial discrimination, but section 1983 applies as well to all other forms of arbitrary discrimination. Although federal legislation contains no specific prohibition against discrimination in public accommodations on the basis of sex, age, or disability, such discrimination in states with Mississippi-type statutes could be prohibited under the Brennan analysis. For example, a tavern-keeper in Mississippi who refused service to female customers might be subject to a section 1983 suit, whereas the same tavern-keeper in Missouri,<sup>140</sup> a state which has remained silent on the issue of sex discrimination in public accommodations, would not. The Mississippi statute would be deemed an endorsement by the state of the discrimination practiced by the individual proprietor, and thus, state action.

The state action doctrine has not yet been pushed to this extreme. The Mississippi statute can realistically be read only as countenancing exclusionary practices, but it does not blatantly encourage discrimination. Instead it emphasizes proprietors' free choice in selecting patrons. Furthermore, the statute, standing alone, without further support or enforcement, would not satisfy the nexus requirement of *Jackson and Moose Lodge*.<sup>141</sup> The recent ruling of *Flagg Brothers, Inc. v. Brooks*<sup>142</sup> has more thoroughly undermined the notion that state endorsement via statutory encouragement constitutes state action. There, the Court upheld a New York warehouseman's lien statute which permitted the

136. 206 F. Supp. 539, *aff'd per curiam*, 313 F.2d 637, *cert. denied*, 375 U.S. 951 (1963).

137. *Id.* at 543.

138. 398 U.S. 144 (1970).

139. *Id.* at 203 (Brennan, J., concurring).

140. MO. ANN. STAT. § 314.030(1) (Vernon Supp. 1978).

141. See text accompanying notes 118-24 *supra*.

142. 98 S. Ct. 1729 (1978).

warehouseman, by self-help measures, to sell goods stored with him in the event that storage fees were not paid. The Court rejected respondent's argument that the sale by the individual warehouseman was attributable to the state because the state had authorized and encouraged the sale via the statute: "This Court, has never held that a State's mere acquiescence in a private action converts that action into that of the State."<sup>143</sup> When a statute offers no rewards or sanctions to the proprietor who discriminates and promises no support or other form of concrete state approval, an argument seeking to invalidate the statute or the private action taken in accordance with that statute, will not succeed under the existing state action doctrine.

#### 4. *The Equal Credit Opportunity Act*

Traditionally, credit has not been thought to fit into the category of public accommodations. Since special rules and problems apart from those associated with traditional accommodations are involved in any detailed discussion of equal credit, the subject will be discussed only briefly herein. Nonetheless, access to lending institutions and the services they provide is most assuredly an access right of as great significance as admission to restaurants, hotels, and theaters. The Equal Credit Opportunity Act offers a viable remedy for discriminatory denials of credit. The Equal Credit Opportunity Act of 1974 (ECOA)<sup>144</sup> was added to the Consumer Credit Protection Act to require financial institutions to make credit available to all customers regardless of sex or marital status.<sup>145</sup> The 1976 amendment to the ECOA extended protection to all persons regardless of race, color, religion, national origin, age, receipt of public assistance benefits, or exercise by the applicant of any right under the Consumer Credit Protection Act.<sup>146</sup>

The Federal Reserve Board Regulations, promulgated after the 1974 Act, specify a number of practices which may not be used in making a determination of the applicant's credit-worthiness. Creditors may not discount income on the basis of sex or marital status or inquire into the applicant's birth control methods or childbearing plans.<sup>147</sup> All inquiries about marital status, change of name, alimony, child support, or maintenance obligations, and requests for information about a spouse are limited.<sup>148</sup> The regulations adopted after the 1976 amendments refine and update the prior regulations to reflect the expansion in

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143. *Id.* at 1741.

144. Equal Credit Opportunity Amendments of 1974, Pub. L. No. 93-495, § 503, 88 Stat. 1521 (current version at 15 U.S.C. § 1691 (1976)).

145. 15 U.S.C. § 1691(a) (1976).

146. Equal Credit Opportunity Amendments of 1976, Pub. L. No. 94-239, § 701, 90 Stat. 251 (amending 15 U.S.C. § 1691 (Supp. V 1975) (current version at 15 U.S.C. § 1691(a) (1976)).

147. 12 C.F.R. § 202.4-7 (1977). The Federal Reserve Board, as part of its rule-making power, was granted authority to exempt from the Act certain types of credit transactions, including transactions not primarily for personal, family, or household purposes. In its regulations, the Board has afforded special treatment to credit for business, incidental (credit extended as a service by tradespeople), securities, and utilities transactions.

148. *Id.* § 202.7 (1977). For a more detailed discussion of prohibited credit practices and the Board's regulations, see Comment, *Equal Credit: Promise or Reality?*, 11 HARV. C.R.-C.L. L. REV. 186 (1976).

coverage.<sup>149</sup> The creditor may inquire into an applicant's marital status to ascertain the rights and remedies available to the creditor.<sup>150</sup> Creditors may also inquire about the applicant's age or whether the applicant derives any portion of income from public assistance for "the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent elements of credit-worthiness."<sup>151</sup> The permissible extent and manner of use of information gained from inquiries into applicants' public assistance benefits is unclear. While applicants cannot be denied credit solely because they receive public assistance, that information could easily be used for discriminatory purposes, and proof of such discrimination would be difficult to establish. Nevertheless, information on the receipt of public assistance does have a direct bearing on the amount and source of the applicant's income, which are matters of justifiable concern to the credit grantor.

The ECOA provides for both administrative and civil enforcement. The Federal Trade Commission has the general power to enforce the Act, including the power to enforce any pertinent regulations of the Federal Reserve Board.<sup>152</sup> The Attorney General may bring suit upon referral from any federal agency or on his own initiative in cases of serious or multiple violations of the Act.<sup>153</sup> The ECOA also permits aggrieved parties to bring individual or class actions for injunctive, compensatory, and punitive relief.<sup>154</sup> Punitive damages of up to \$10,000 may be awarded to individuals, and in class actions the ceiling is \$500,000 or one percent of the creditor's net worth, whichever is less.<sup>155</sup>

The most effective policing mechanism may prove to be the notice provision, which focuses on initial compliance rather than subsequent enforcement. All applicants who are denied credit or whose present credit arrangement is changed or revoked are entitled to a statement from the lending institution. Lenders are given a choice either to provide the statement as a matter of course or to inform applicants of their right to such a statement when notified of an adverse action.<sup>156</sup>

The Act also provides that when a denial of credit violates both state and federal law, the aggrieved party is entitled to only one recovery for monetary damages, whether suing under the federal credit law or a state statute.<sup>157</sup> Therefore, state laws with similar or stronger protections will not be preempted by the Equal Credit Opportunity Act, but state laws inconsistent with the Act will be displaced by the possibility of a federal recovery.

##### 5. *Federal Law and the Handicapped*

Protecting the access rights of the handicapped presents special problems. The handicapped have often faced outright refusals of access by proprietors, but

149. 42 Fed. Reg. 1254-56 (1977).

150. 15 U.S.C. § 1691(b)(1) (1976).

151. *Id.* § 1691(b)(2) (1976).

152. *Id.* § 1691(c) (1976).

153. *Id.* § 1691(d) (1976).

154. *Id.* § 1691(e) (1976).

155. *Id.*

156. *Id.* § 1691(d) (1976).

157. *Id.* § 1691(d), (e) (1976).

even more often such persons, particularly those confined to wheelchairs, have been physically unable to enter public establishments. Three federal statutes offer some protection to the access rights of the disabled. The Vocational Rehabilitation Act of 1973 provides in part:

No otherwise qualified handicapped individual . . . shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>158</sup>

The Urban Mass Transit Act of 1964 mandates that:

[E]lderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation . . . should contain provisions implementing this policy.<sup>159</sup>

Finally, the Architectural Barriers Act imposes an affirmative duty on all recipients of federal funds to conform to building standards which assure accommodation of the disabled.<sup>160</sup>

Courts have required that the rights of the handicapped be considered before beginning construction of federally-funded facilities or during the planning of mass transit systems. In *Bartels v. Biernat*,<sup>161</sup> the court enjoined the Milwaukee Transit Authority from executing contracts for the construction of public passenger buses until the needs of the mobility handicapped were given greater consideration. A similar order was issued to the Washington Metropolitan Area Transit Authority to adhere to the Architectural Barriers Act by constructing an elevator in a subway station which would otherwise have been inaccessible to the disabled.<sup>162</sup>

Although federal law establishes an affirmative duty on the part of those receiving federal funds to accommodate the handicapped and creates a private cause of action for those denied the use of public transportation systems,<sup>163</sup> the extent of this duty remains unclear. In the past, the affirmative action duty has been construed narrowly. Some courts have held that when technical difficulties made accessibility impossible or impractical, a transit system which failed to promise assistance to the handicapped would not be denied federal funds.<sup>164</sup> With the issuance of stricter regulations under the Urban Mass Transit Author-

158. 29 U.S.C.A. § 794 (Supp. 1977).

159. 49 U.S.C. § 1612(a) (1970).

160. 42 U.S.C. §§ 4151-4156 (1970). *See also* 45 C.F.R. §§ 100a.189, 100b.189 (1976).

161. 405 F. Supp. 1012 (W.D. Wis. 1975).

162. Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1507 n.47 (1973).

163. *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977).

164. *United Handicapped Fed'n v. Andre*, 409 F. Supp. 1297 (D.C. Minn. 1976), *vacated*, 558 F.2d 413 (8th Cir. 1977); *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977).



ity Act, these earlier findings of technological impossibility have been seriously undermined. The affirmative action requirement has been reshaped into a mandate that federally-funded mass transit authorities exhibit satisfactory "special efforts" in planning facilities that can be utilized by the elderly and handicapped.<sup>165</sup> To further strengthen the mandate, transit authorities were required to demonstrate concrete progress in implementing their accessibility projects by September 30, 1977.<sup>166</sup> Other regulations offer specific guidelines to insure that the handicapped will be able to utilize public transportation by requiring, for example, transit authorities to purchase a substantial percentage of wheelchair accessible vehicles or that they guarantee substitute transportation to the mobility handicapped.<sup>167</sup>

Recent suits brought by handicapped individuals and representative organizations seek stricter enforcement of these guidelines in an effort to assure accessible public transportation.<sup>168</sup> The courts, guided for the first time by specific and extensive administrative directives, are beginning to impose a meaningful obligation of affirmative action upon urban transit authorities and to direct that relief be granted to those currently denied access to public buses and trains.<sup>169</sup>

### III

#### STATE STATUTES: THE SCOPE OF THE PUBLIC ACCOMMODATIONS LAWS

##### A. *The History of the State Statutes*

Discrimination in public accommodations was recognized and prohibited by many states long before Congress passed Title II. The earliest legal recognition of the right of access was a statute<sup>170</sup> passed by the Massachusetts state legislature in 1865, in the wake of the Civil War. The law prohibited discrimination based on race and color in places which provided certain essential goods and services. Nine years later, two other Northern states, New York<sup>171</sup> and Kansas,<sup>172</sup> passed public accommodations statutes. During the decade following the Civil War, many Southern states, while under the military rule of the Reconstruction Acts, passed similar laws.<sup>173</sup> In 1875, Congress passed a civil rights

165. 49 C.F.R. § 613.204(a) (1977).

166. *Id.* § 613.204(c) (1977).

167. 49 C.F.R. Part 613, Subpart B (Appendix 1977).

168. *Leary v. Cropsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977), *rev'g* 409 F. Supp. 1297 (D.C. Minn. 1977).

169. *Id.*

170. Act of May 16, 1865, ch. 277, § 1, 1865 Mass. Stat. (1864-1865 Mass. Laws 650) (version no longer in force), *reprinted in* M. KONVITZ, *supra* note 24, at 156.

171. IX N.Y. Stat. at Large 583-84 (1884) (version no longer in force), *noted in* M. KONVITZ, *supra* note 24, at 156.

172. Act of April 25, 1874, ch. 49, § 1, 1874 Kan. Laws (version no longer in force), *noted in* M. KONVITZ, *supra* note 24, at 156.

173. *See, e.g.*, THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW 1849-1970, at 72-74 (R. Bardolph ed. 1970) [hereinafter cited as CIVIL RIGHTS RECORD], which includes refer-

act,<sup>174</sup> but in 1883, the Supreme Court invalidated the public accommodations section of the act,<sup>175</sup> leaving the protection of the civil rights of blacks to the state legislatures.<sup>176</sup> Congress was not to enact another statute guaranteeing rights to blacks until 1957.<sup>177</sup> Of the Southern states, only Tennessee enacted a public accommodations law to fill the statutory gap left by the Supreme Court decisions.<sup>178</sup> Between 1883 and 1885, however, eleven Northern and Western states passed public accommodations statutes.<sup>179</sup> By 1910, eight others were added to the list.<sup>180</sup> In contrast to the trend in Northern legislatures of replicating the Civil Rights Act of 1875, most Southern states and Delaware passed laws during the last quarter of the nineteenth century which permitted or required separation of blacks and whites.<sup>181</sup> Some of these laws banned racial intermarriage; others prescribed segregation of the races in public conveyances, schools, and jails.<sup>182</sup> The statutes did not change the behavior of whites toward blacks in the South,<sup>183</sup> but merely codified existing social conventions.

During the first quarter of the twentieth century some new state public accommodations laws were passed, both in Northern and Southern states, but enforcement was apathetic.<sup>184</sup> State legislatures in the South may have been motivated to enact civil rights laws by a fear that continued inaction would lead to greater federal intervention in racial matters.<sup>185</sup> Until the end of the Depression, there was a lull in civil rights activity in the United States. Litigation was rare, and statutory development was comparatively limited.<sup>186</sup> Access to public accommodations was not regarded as a state or federal constitutional right, so denial of access only could be challenged where state legislation had been passed.<sup>187</sup>

The economic and political position of blacks was boosted by the end of the Depression and by the economic boom which accompanied World War II, but the changing social structure generated very little civil rights legislation. A 1949 study listed eighteen states as having public accommodations legisla-

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ences to ch. 1947, §§ 1-4, 1873 Fla. Laws 25 (version no longer in force), and §§ 1-3, 1869 La. Laws 57 (version no longer in force).

174. See note 12 *supra*.

175. See text accompanying note 12 *supra*.

176. CIVIL RIGHTS RECORD, *supra* note 173, at 126-27.

177. *Id.* at 99.

178. Sections 1-5, ch. 68, 1885 Tenn. Acts 124-25 (version no longer in force), reprinted in CIVIL RIGHTS RECORD, *supra* note 173, at 126-27.

179. M. KONVITZ, *supra* note 24, at 157, lists Connecticut, Iowa, New Jersey, Ohio, Colorado, Illinois, Indiana, Michigan, Minnesota, Nebraska, and Rhode Island.

180. CIVIL RIGHTS RECORD, *supra* note 173, at 128.

181. *Id.* at 75-76, 82.

182. *Id.* at 130-37.

183. *Id.* at 130. The intensity of racial hostility is visible in the enormous number of lynchings which occurred in the South during this period. In 1892 alone, 235 black people were lynched; nearly a thousand were lynched between 1900 and 1910. *Id.* at 99, 167.

184. *Id.* at 188.

185. *Id.*

186. *E.g.*, § 1, ch. 265, 1913 N.Y. Laws 481-82 (version no longer in force), reprinted in CIVIL RIGHTS RECORD, *supra* note 173, at 192.

187. See, *e.g.*, Warley v. Bd. of Park Comm'rs, 233 Ky. 688, 26 S.W.2d 554 (1930).

tion.<sup>188</sup> These laws generally prohibited a short list of places from excluding blacks because of their race. The places most commonly covered were inns, taverns, hotels, public conveyances, restaurants, theaters, and barber shops.<sup>189</sup> The study found that thirty-five states had laws authorizing or requiring some form of discrimination.<sup>190</sup> Fourteen states required segregation on trains, thirteen required separate mental hospitals, and ten required that blacks and whites be placed in separate prisons.<sup>191</sup>

During the 1940's and 1950's the federal executive and judicial departments began to give more serious attention to racial problems.<sup>192</sup> The increasing involvement by federal officials in issues which had previously been regarded as local was a product of growing recognition of the need to integrate American society.<sup>193</sup> The state civil rights laws increased in number during the 1950's, and some of the older laws were amended to expand their coverage. Enforcement was, however, still largely ineffective.<sup>194</sup> Even in the South, some progress was made; ordinances requiring segregation were repealed in several cities.<sup>195</sup>

The integration controversy came to a head in the 1960's when demand for civil rights by activist groups met violent resistance by white Southerners;<sup>196</sup> the desegregation drive led to thousands of arrests and many deaths.<sup>197</sup> As a result of this period of controversy over civil rights, much state and federal legislation was passed prohibiting discrimination. In each city the activists publicized the integration issue and consolidated their support by conducting marches and sit-ins. These actions led to meetings with city officials where civil rights ordinances were drawn up in exchange for promises to stop the demonstrations. When enough cities in a state had passed ordinances, the groundwork was laid for passage of a state law.<sup>198</sup> Similarly, the existence of numerous state laws facilitated Congress' acceptance of Title II.

### B. *The Drafting of a Definition of "Public Accommodations"*

The definition of "public accommodations" is controversial. Limits imposed on the concept by the Supreme Court are based on statutory rather than constitutional interpretation. The states are, therefore, free to adopt a broader definition of what is public than that used in Title II.<sup>199</sup> Establishments com-

188. CIVIL RIGHTS RECORD, *supra* note 173, at 251.

189. *Id.*

190. *Id.* at 259.

191. *Id.* at 260.

192. CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 1, at 355. Murroe Berger notes that "[s]ince 1937 the Supreme Court has [given] to civil rights the same preferred position which earlier Courts had given the property rights." M. BERGER, *supra* note 4, at 88. *See generally id.* at 88-159.

193. CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 1, at 356.

194. CIVIL RIGHTS RECORD, *supra* note 173, at 367-68.

195. *Id.* at 367.

196. CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 1, at 477.

197. *See* CIVIL RIGHTS 1960-1966, at 6-19, 60-74 (1967).

198. *Id.*

199. *See* Human Relations Comm'n v. Loyal Order of Moose Lodge No. 107, 448 Pa. 451, 294 A.2d 594, *appeal dismissed*, 409 U.S. 1052 (1972), in which the United States Supreme Court

monly covered are hotels, restaurants, transport facilities, places of entertainment, retail stores, lodgings, and state facilities.

A comparison of the scope of the definition of public accommodations under the state statutes, and of the different ways that the statutes are drafted, is useful for three reasons. First, it shows the advantages and disadvantages of the various statutory forms. Second, it makes clear the narrow limits of federal law and indicates in which states a plaintiff in a discrimination case would be better advised to use the state statute than to base a claim solely on Title II. Third, it demonstrates the lack of any valid conceptual basis for the failure of many statutes to protect the rights of groups other than racial minorities.

Rights of access to places of public accommodation are protected by several different types of statutes. Most states have a single civil rights act with a section on public accommodations and, in some cases, sections on credit and disability. (The parts of these laws which deal with discrimination in housing, employment, and education will not be discussed). Some states have enacted a separate public accommodations act. Other states protect particular access rights by specific statutes prohibiting credit discrimination or protecting disabled persons.

The definitions of public accommodations stated in the civil rights laws take three forms:<sup>200</sup> some provide a long and specific list of covered accommodations, others employ a long specific list but specify that coverage is not limited to the establishments listed, and still others use a general characterization of what constitutes a public place. There is no necessary correlation between the drafting form chosen and the breadth or narrowness of the statutes. For example, those which use a long specific list may be narrower than the others unless frequent amendments have added new places to the list. But it should not be assumed that any particular category of accommodations is covered because a statute is drafted in a certain form.

The statutes of only three states define public accommodations using a long specific list without any qualification.<sup>201</sup> There is no typical list of places included because coverage is idiosyncratic. Even so, an example of this type of listed definition is instructive. The New York Human Rights Law lists in its definition of public accommodations:

inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation, or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, bar-rooms, or any store; park or enclosure where spiritous or malt liquors are

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affirmed the decision of a state court that a fraternal organization was a public accommodation under the state law despite its own prior holding that the same establishment was a private club under Title II.

200. These categories are a variation of those used in a 1965 article surveying the state public accommodations statutes. Caldwell, *State Public Accommodations Law, Fundamental Liberties, and Enforcement Programs*, 40 WASH. L. REV. 841, 843-44 (1965).

201. ALASKA STAT. § 18.80.300(7) (1974); MD. ANN. CODE art. 49B, § 11 (Supp. 1977); N.H. REV. STAT. ANN. § 354-A:3(9) (1966).

sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries pools, laundries, and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdomes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings occupied by two or more tenants, or by the owner and one or more tenants.<sup>202</sup>

This long list was the earliest form used in state public accommodations statutes. The New York law is unusual in the length of its list. The early public accommodations laws were regarded simply as restatements of the common law; they were and still are strictly interpreted. Court decisions which interpret these statutes narrowly can be reversed only by legislative amendment.<sup>203</sup>

More recent public accommodations statutes are drafted in a different manner to avoid this problem. About one-third of the laws use a general definition of public accommodations.<sup>204</sup> The use of general language has the effect of extensive coverage: the civil rights commissions and the courts have little discretion to narrow such laws. The most broadly interpreted general definition of public accommodations is California's: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."<sup>205</sup> More typical of the general definitions of public accommodations is the New Mexico Human Rights Act,<sup>206</sup> which covers "any establishment that provides or offers its services, facilities, accommodations, or goods to the general public."<sup>207</sup> Some statutes add to this basic formula such

202. N.Y. EXEC. LAW § 292(9) (McKinney 1972). This statute does not fall within the category of statutes using a long unqualified list, because it does contain some qualifying language. It is given here as an example, because its list is particularly comprehensive.

203. M. KONVITZ, *supra* note 24, at 164.

204. CAL. CIV. CODE § 51 (West Supp. 1978); CONN. GEN. STAT. ANN. § 53-35 (West Supp. 1978); DEL. CODE tit. 6, § 4501 (1974); IND. CODE ANN. § 22-9-3(m) (Burns Supp. 1977); IOWA CODE ANN. § 601A.2(10) (West 1975); KY. REV. STAT. § 344.130 (1977); MICH. COMP. LAWS ANN. § 37.2301 (Supp. 1978-1979); MINN. STAT. ANN. § 363.01(18) (Supp. 1978); N.M. STAT. ANN. § 4-33-2(G) (1974); N.D. CENT. CODE § 12.1-14-04 (1976); OKLA. STAT. tit. 25, § 1401 (Supp. 1977); OR. REV. STAT. § 30.675(1) (1977); S.D. COMPILED LAWS ANN. § 20-13-1(12) (Supp. 1977); UTAH CODE ANN. § 13-7-2 (1973 & Supp. 1977); W. VA. CODE § 5-11-3(j) (Supp. 1978); WYO. STAT. § 6-83.1 (1975).

205. CAL. CIV. CODE § 51 (West Supp. 1978).

206. N.M. STAT. ANN. § 4-33A-2 (Supp. 1975).

207. *Id.* at § 4-33-2(G). Other statutes which use language very similar to this one include, OR. REV. STAT. § 30.675(1) (1977); VT. STAT. ANN. tit. 13, § 1451(c) (Supp. 1978).

language as "or which solicits or accepts the patronage or trade of the general public."<sup>208</sup>

The statutes which use general definitions are assumed to cover places offering food and drink, lodgings and entertainment, as well as retail establishments and state facilities.<sup>209</sup> Although the intention of legislatures which use general definitions is to broaden their public accommodations statutes, questions arise as to precisely how far they are meant to extend when enforcement is sought against "private" clubs and other such establishments. More specific statutes are less ambiguous.<sup>210</sup>

Most state legislatures have dealt with the problems of a "list" definition by stating at the end of the list that coverage "includes but is not limited to" the listed establishments<sup>211</sup> or by using other qualifying language.<sup>212</sup> A long list qualified in this manner demonstrates by example the types of places intended to be covered, without confining coverage to the examples given. Under a long qualified list, coverage is more precise than under a statute which uses a general definition and less arbitrary than under a statute with an unqualified list. The owner of an arguably public place is alerted to the possibility that his or her establishment may be covered. A person discriminated against is better able to predict whether a claim is likely to succeed. The long qualified list is a compromise between the vagueness of a general definition and the rigidity of an unqualified list. It offers both flexibility and guidance.

### C. *Discrimination: The Elements of the Offense*

Definitions of discrimination in public accommodations statutes take two forms: broad and fragmented. The former gives a general statement of purpose, specifying application to all persons, and not merely to the owner or proprietor of the covered establishment, and generally includes a broad construction clause.<sup>213</sup> The latter itemizes the particular practices the act is designed to pre-

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208. OKLA. STAT. tit. 25, § 1401(1) (1971). See DEL. CODE tit. 6, § 4501 (1974).

209. These general statutes probably cover many other places than those listed, but because the language could be interpreted not to reach those other places, they may be assumed to cover only places which have been clearly defined as open to the public.

210. Some of the statutes which use general language to define public accommodations exempt particular places. The Delaware law, for example, expressly excludes barber shops from coverage. DEL. CODE tit. 6, § 4501(2) (1974). The District of Columbia law allows political organizations to discriminate on the basis of political beliefs. D.C. CODE § 6-2203(b) (Supp. 1978).

211. ARIZ. REV. STAT. § 41-1441 (1974); COLO. REV. STAT. § 24-34-501 (1973); IDAHO CODE § 18-730 (Supp. 1977); ILL. REV. STAT. ch. 38, § 13-1 (1973); ME. REV. STAT. tit. 5, § 4553(8) (Supp. 1973); MASS. GEN. LAWS ANN. ch. 272, § 92A (West Supp. 1978-1979); MO. REV. STAT. § 314.020 (1969); MONT. REV. CODES ANN. § 64-305(14) (Supp. 1977); NEB. REV. STAT. § 20-133 (1977); NEV. REV. STAT. § 651.050 (1977); N.J. STAT. ANN. § 10:5-5(l) (West Supp. 1978-1979); PA. STAT. ANN. tit. 43, § 954(l) (Purdon Supp. 1978-1979); R.I. GEN. LAWS § 11-24-3 (1969); WASH. REV. CODE ANN. § 49.60.040 (Supp. 1977); WIS. STAT. § 9.42.04(2) (1975).

212. D.C. CODE § 6-2202(x) (Supp. 1978); N.Y. EXEC. LAW § 292(9) (McKinney 1972); OHIO REV. CODE ANN. § 4112.01(I) (Page 1973); VT. STAT. ANN. tit. 13, § 1451(c) (Supp. 1978).

213. *E.g.*, CAL. CIV. CODE § 51 (West Supp. 1978) in pertinent part provides that:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accom-

vent.<sup>214</sup>

The basic violation of a public accommodations law is denial of full and equal services at a covered establishment. Such a denial occurs when there is discriminatory or abusive treatment, service, or charges. At present, complaints of insulting or discriminatory treatment intended to discourage certain customers are as common as complaints of outright refusals of entry.<sup>215</sup> Exclusion and unequal treatment form the core of any public accommodations violation and are covered by all statutes.

Most states prohibit discriminatory advertising, *i.e.*, the circulation of any written or printed communication to the effect that patronage by any protected class will be discouraged or access refused. A few states exempt from punishment private communications sent in response to specific inquiries.<sup>216</sup> Though such a policy may protect the right of privacy, it effectively permits *sub rosa* exclusivity. By contrast, a few states find production of any discriminatory communication to be presumptive evidence of authorization by the proprietor<sup>217</sup> and, therefore, a *per se* violation.

Reprisals against persons who attempt to gain access or aid others in the exercise of their rights constitute a separate violation under many statutes.<sup>218</sup> Such provisions are potentially useful to protect employees who flout their employers' discriminatory policies and to prevent further acts of discrimination against persons who may have assisted others in gaining entrance.

The great majority of statutes prohibit third-party interference in the enjoyment of access to public accommodations. This guarantee is included in broad statutes which describe the basic violation as denial of equal access by any person. Those statutes which describe the primary violation as one by persons engaged in the operation of any place of public accommodation as a rule provide that aiding, abetting, or coercing a denial of access is a separate offense. Only Vermont and Delaware have no aiding and abetting provision; these jurisdictions prohibit discrimination only by owners, managers and agents.<sup>219</sup> California, on the other hand, prescribes separate and severe penal-

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modations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

See also IND. CODE ANN. § 22-9-1-2(a), (b), (e) (Burns Supp. 1977).

214. *E.g.*, KY. REV. STAT. §§ 344.120, 344.140, 344.280, 344.290 (1977); N.Y. EXEC. LAW §§ 296(3-b), 296(6), 296(7), 296(8) (McKinney 1972 & Supp. 1972-1977).

215. During 1975 and 1976, the Connecticut Commission on Human Rights and Opportunities processed 25 charges of unequal service in public accommodations and 27 complaints of denial of service. [1976] CONN. COMM'N ON HUMAN RIGHTS AND OPPORTUNITIES ANN. REP. 8. For additional examples of charges of unequal service see State Div. of Human Rights v. Varsity Inn of Rochester, Inc., 49 A.D.2d 698, 373 N.Y.S.2d 1018 (4th Dep't 1975); [1977] ALASKA ST. COMM'N FOR HUMAN RIGHTS ANN. REP. 28; [1975-1976] PA. HUMAN REL. COMM'N ANN. REP. 23.

216. COLO. REV. STAT. § 24-34-604 (1973); ILL. REV. STAT. ch. 38, § 13-2(b) (1973).

217. *E.g.*, N.J. STAT. ANN. § 10:1-4 (West 1976); R.I. GEN. LAWS § 11-24-2 (1969).

218. *E.g.*, N.Y. EXEC. LAW § 296(7) (McKinney 1972); NEB. REV. STAT. § 20-136 (1977). *Contra*, IND. CODE ANN. § 22-9-1-6(i) (Burns Supp. 1977). The Indiana Civil Rights Commission is authorized to prevent retaliation in lieu of a statutory bar to retaliation.

219. DEL. CODE tit. 6, § 4504(a) (1974); VT. STAT. ANN. tit. 13, § 1451(a) (Supp. 1978).

ties for the use of violence and intimidation as a means of restricting access.<sup>220</sup> States with regulatory civil rights agencies frequently categorize willful interference with or violation of a Commission order as a separate offense, often accompanied by special penalties.<sup>221</sup>

Many public accommodations statutes have undergone frequent amendments and additions since their original appearance on the statute books. As legislative awareness of and hostility toward discrimination has grown, more accommodations were added, additional groups protected, and definitions of the offense expanded. Over the years, clauses and sub-clauses have accreted around many statutes, inhibiting the creation of an orderly and comprehensive body of civil rights law. When a statute omits one or more aspects of the discriminatory offense—aiding and abetting, retaliation, or discriminatory advertising—the explanation often lies in poor drafting rather than in an intent to narrow the scope of the offense.

#### D. *Places Covered by the State Statutes*

It is useful to divide the places covered under the public accommodations statutes into categories representing the various spheres of activity. These divisions serve three functions. First, the range of coverage is more clearly delineated by functional categories than by long lists of specific places. Second, the use of categories illustrates the recent expansion of the concept of public accommodations to include certain types of places which were not covered under the earlier statutes. Third, the use of categories facilitates analysis of conceptual distinctions traditionally drawn between covered and uncovered places.

Places covered by the public accommodations statutes have been divided into four categories. The first is those affecting freedom of movement, which encompasses all places used by travellers. The second group is those places which are used for leisure time activities, which includes any places to which a person might go for entertainment, amusement, cultural or religious contact, or for any activity related to an interest or hobby. The third is transactional freedom, which includes places offering goods and services not covered above. State facilities, which includes any place owned, operated, or funded by the state government, is the last category.

##### 1. *Freedom of Movement*

The right to move freely in one's own community or within one's country is the principal basis of laws guaranteeing access to places which are privately owned. This notion was cogently described by Jacobus tenBroek:

Movement, we are told, is a law of animal life. As to man, in any event, nothing could be more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration in to the life

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220. CAL. CIV. CODE § 51.7 (West Supp. 1978).

221. See statutes cited note 480 *infra*.



of the community—than the physical capacity, the public approval, and the legal right to be abroad in the land.<sup>222</sup>

Prior to the passage of public accommodations laws, travellers were guaranteed access to transport facilities and temporary lodgings by a common law rule prohibiting "common carriers" from refusing any passengers.<sup>223</sup> This was so because access to food and shelter may be unavailable to travellers unless they are guaranteed entry to restaurants and hotels. The right of access was originally considered more fundamental for travellers than for non-travellers,<sup>224</sup> but the public accommodations statutes, with the exception of Title II, no longer give travellers greater rights of access than non-travellers.

#### a. *Transport Facilities*

Many public accommodations statutes make no mention of access to transport facilities,<sup>225</sup> perhaps because the common carrier rule has been codified in the Federal Interstate Commerce Act since 1887.<sup>226</sup> Statutes which explicitly cover transport facilities typically list in the definition of public accommodations language similar to the following: "any public conveyance operating on land or water, or in the air, [any] stations and terminals thereof."<sup>227</sup> Some public accommodations statutes mention equal access to transport facilities only in provisions protecting blind and disabled persons.<sup>228</sup> A few states have abrogated the common law rule and passed statutes allowing

222. ten Broek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966).

223. *Rex v. Ivens*, 32 E.C.L. 495, 7 C. & P. 213 (1835). See Malot, *The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation*, 46 CAN. B. REV. 612, 614-21 (1968); M. KONVITZ, *supra* note 24, at 159-60.

224. The public nature of places used by travellers is likewise fundamental to Title II. The primary constitutional basis for Title II is the commerce clause, which permits regulation of interstate activity. Congress relied on the commerce clause, however, for political rather than principled reasons. Senate Judiciary Committee Chairman James Eastland (D. Miss.) had little sympathy with any move to expand the equal protection clause. Supporters of the bill were able to obtain Judiciary Committee approval only by using the commerce clause as a foundation. See *Hearings Before the Senate Committee on Commerce on S. 1732*, 88th Cong., 1st Sess., parts 1 & 2 (1963).

225. These include Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

226. 49 U.S.C. § 3(1) (1970).

227. N.J. STAT. ANN. § 10:5-5(1) (West 1976 & Supp. 1978-1979). The following public accommodations laws also cover transport facilities: ALASKA STAT. § 18.80.300(7) (1974 & Supp. 1977); CAL. CIV. CODE § 51 (West Supp. 1978); COLO. REV. STAT. § 24-34-501 (1973 & Supp. 1976); D.C. CODE § 6-2202 (Supp. 1978); IDAHO CODE § 18-7302(e) (Supp. 1977); ILL. REV. STAT. ch. 38, § 13-1(a) (1973); KAN. STAT. § 44-1002(10) (Supp. 1977); ME. REV. STAT. tit. 5, § 4553(8) (Supp. 1973); MASS. GEN. LAWS ANN. ch. 272, § 92A (West Supp. 1978-79); MICH. COMP. LAWS ANN. § 37.2301 (Supp. 1978-79); MINN. STAT. ANN. § 363.01(18) (Supp. 1978); MONT. REV. CODES ANN. § 64-305(14) (Supp. 1977); N.H. REV. STAT. ANN. § 354-A:3(9) (1966); N.Y. EXEC. LAW § 292(9) (McKinney 1972); OHIO REV. CODE ANN. § 4112.01(I) (Page 1973); PA. STAT. ANN. tit. 43, § 954 (Purdon 1964 & Supp. 1978-1979); R.I. GEN. LAWS § 11-24-3 (1969); WASH. REV. CODE ANN. § 49.60.040 (Supp. 1977).

228. *E.g.*, UTAH CODE ANN. § 26-28-1 (1973).

operators of conveyances to discriminate in their acceptance of passengers. These state laws, however, are limited by federal law.<sup>229</sup>

*b. Restaurants*

Access to restaurants is guaranteed by all thirty-eight state public accommodations statutes, and has been the subject of much litigation.<sup>230</sup> Statutes which cover restaurants frequently do so in language similar to that used by the New York law,<sup>231</sup> or, more simply, by including "restaurant, eating house, or place where food is sold for consumption on the premises."<sup>232</sup> Eating establishments are justified in excluding patrons only on grounds of improper dress, disorderly conduct, or other criteria not mentioned in the statutes.<sup>233</sup> Bars and dining rooms of private clubs, however, are not treated as restaurants by most state courts.

*c. Lodgings*

All state statutes prohibit discrimination by such establishments as "inns, taverns, roadhouses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation, or rest."<sup>234</sup> Covered lodgings may exclude neither persons who fall in one of the classifications protected under the statutes, nor, at least in Illinois, persons who entertain guests who fall within the protected classifications.<sup>235</sup> Many statutes which prohibit sex discrimination generally allow segregation of sleeping, dressing, and bathing facilities based on sex.<sup>236</sup> A spiritual center may

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229. 49 U.S.C. § 3(1) (1970).

230. *E.g.*, *Evans v. Fong Poy*, 42 Cal. App. 2d 320, 108 P.2d 942 (1941) (bars found covered as restaurants under the public accommodations statute and prohibited from racial discrimination); *People ex rel. Clark v. McCurdie*, 75 Ill. App. 2d 217, 220 N.E.2d 318 (1966) (restaurant found in violation of public accommodations statute for refusal to serve blacks); *Ferguson v. Windsor Court Restaurant, Inc.*, 38 Mass. App. Dec. 120 (1967) (fine levied and punitive damages awarded against a restaurant which charged higher prices to black customers than to white customers); *Braun v. Swiston*, 72 Misc. 2d 661, 340 N.Y.S.2d 468 (1972) (restaurant which admitted women but not men with long hair was found to have committed sex discrimination); *McKinnie v. State*, 214 Tenn. 195, 379 S.W.2d 214 (1964) (blacks who blocked the entrance of a cafeteria after being refused service were fined fifty dollars; the court held that illegal action was not justified as an attempt to obtain constitutional rights).

231. See text accompanying note 202 *supra*.

232. N.J. STAT. ANN. § 10:5-5(1) (West Supp. 1978-1979).

233. *Feldt v. Marriott Corp.*, 322 A.2d 913 (D.C. 1974) (public accommodations statute not violated by arrest of a shoeless woman after she refused to leave a restaurant); *City of Chicago v. Corney*, 13 Ill. App. 2d 396, 142 N.E.2d 160 (1957) (racially mixed group ejected from restaurant; the disorderly behavior of certain members was found to justify their exclusion, but exclusion of non-disruptive persons was found to violate the public accommodations statute).

234. PA. STAT. ANN. tit. 43, § 954 (Purdon Supp. 1978-1979).

235. *McGill v. 830 S. Michigan Hotel*, 68 Ill. App. 2d 351, 216 N.E.2d 273 (1966).

236. COLO. REV. STAT. § 24-34-501(3) (1973 & Supp. 1976); CONN. GEN. STAT. ANN. § 53-35(a) (West Supp. 1978); KY. REV. STAT. § 344.145 (1977); MD. ANN. CODE art. 49b, § 11 (Supp. 1977); MASS. GEN. LAWS ANN. ch. 272, § 92A (West Supp. 1978-1979); MICH. COMP. LAWS ANN. § 37.2301 (Supp. 1978-1979); MINN. STAT. ANN. § 363.02(4) (Supp. 1978); MONT. REV. CODES ANN. § 64-305(14) (Supp. 1977); N.H. REV. STAT. ANN. § 354-A:8 (Supp. 1977); N.M. STAT. ANN. §

also be allowed to deny accommodations to someone on the basis of creed under a statute like that of New York, which permits religious organizations to discriminate in favor of members or in a manner designed to promote their beliefs.<sup>237</sup> Lodging may also be denied by a private club to a non-member in a state where private clubs are exempt from coverage. In most states a hotel may eject guests for boisterous behavior and may select guests by other criteria than those proscribed by the statute. Apart from these exceptions, there is no controversy over coverage of lodgings by the public accommodations statutes.

## 2. *Leisure Time Activities*

At common law there was no right of access to places of public amusement. One California judge noted that "the common law right appears to have been one of exclusion."<sup>238</sup> In contrast, all current public accommodations statutes apply to some recreational facilities. Coverage is based on the rationale that these places hold themselves out to the public as offering some form of entertainment, amusement, cultural, or religious activity and, therefore, have no right to refuse any comers.

### a. *The Passive/Participatory Distinction*

Statutory coverage of places of entertainment is less comprehensive than coverage of places affecting freedom of movement. A distinction is frequently drawn between "places of entertainment," which are covered by nearly every statute, and "places of amusement," which are frequently given carte blanche to select their clientele. A place of entertainment includes any establishment which offers a performance such as a movie, a play, a concert, or a horse race, at which the customer is a passive observer. The Missouri statute, which covers "any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment,"<sup>239</sup> is typical. This language is used in Title II.<sup>240</sup> A "place of amusement" is one where the customer participates in some activity, such as a sport, a game, or a hobby. Some laws do not distinguish between passive and participatory activity, but cover both.<sup>241</sup> These laws generally prohibit discrimination in any public place where people go to satisfy

4-33-2(G) (1974); N.Y. EXEC. LAW § 296(2)(b) (McKinney Supp. 1972-1977); W. VA. CODE § 5-11-9(g) (Supp. 1977); Wis. STAT. § 942.04(5) (1975).

237. *Cowen v. Lily Dale Assembly*, 44 A.D.2d 772, 354 N.Y.S.2d 269 (1974). See *Hobson v. York Studios*, 208 Misc. 888, 145 N.Y.S.2d 162 (1955).

238. *Flores v. Los Angeles Turf Club, Inc.*, 55 Cal. 2d 736, 742, 361 P.2d 921, 924, 13 Cal. Rptr. 201, 204 (1961).

239. MO. REV. STAT. § 314.020(4) (1969). See, e.g., NEB. REV. STAT. § 20-133(4) (1977); N.H. REV. STAT. ANN. § 354-A:3(9) (1966).

240. 42 U.S.C. § 2000a(b)(3) (1970).

241. These include Alaska, California, Colorado, Idaho, Illinois, Kansas, Maine, Massachusetts, Michigan, Montana, New Jersey, New York, Pennsylvania, Rhode Island, Washington, and the District of Columbia. See *Clover Hill Swimming Club, Inc. v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966) (swimming club covered); *Fraser v. Robin Dee Day Camp*, 44 N.J. 480, 210 A.2d 208 (1965) (day camp, although not specifically mentioned in the statute, found covered as a place of education and recreation); *State v. Rosecliff Realty Co.*, 1 N.J. Super. 94, 62 A.2d 488 (1948) (Palisades Amusement Park swimming pool found covered).

an interest or to enjoy themselves. The New Jersey statute, for example, states:

A place of public accommodation shall include, but not be limited to: any . . . summer camp, day camp, or resort camp . . . any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theater, motion picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement.<sup>242</sup>

The test for coverage used by the New Jersey courts is that "an establishment which caters to the public, and by advertising and other forms of invitation induces patronage generally cannot refuse to deal with members of the public."<sup>243</sup> One decision under the New Jersey public accommodations law prohibited the Little League from discriminating against girls.<sup>244</sup> The court held that "a ball field at which tryouts are arranged, instructions given, practices held, and games played is a place of public accommodation."<sup>245</sup>

The distinction drawn in some state statutes between passive and participatory establishments has been defended by the assertion that a stronger invitation is extended by a theater or other place in which the audience is passive than that extended by a skating rink or a pool parlor, perhaps because of more extensive advertising. The absence of any stronger conceptual basis suggests that the distinction is based primarily on policy concerns. Legislators who drafted the narrower statutes, and judges who interpreted them may have sought to avoid the social unrest that might accompany desegregation of bars and other places where the customer engages in some activity. The distinction may reflect compromises between factions in the state legislatures favoring and opposing integration, or may be merely a product of legislative conservatism. With increasing opposition to racial discrimination and more frequent application of the statutes to protect other classifications than racial minorities, non-coverage of places offering participatory entertainment is now rare.

#### *b. Controversial Recreational Facilities*

Certain recreational facilities, such as bars, private clubs, and religious organizations, are included in some statutes and expressly exempted from others. Statutes that include these places generate much administrative and court action. Therefore, each facility warrants separate treatment.

242. N.J. STAT. ANN. § 10:5-5(1) (West Supp. 1978-1979).

243. *Evans v. Ross*, 57 N.J. Super. 223, 231, 154 A.2d 441, 445, *cert. denied*, 31 N.J. 292, 157 A.2d 362 (1959).

244. *Nat'l Organization for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33, *aff'd*, 67 N.J. 320, 338 A.2d 198 (1974).

245. *Id.*

(i) *Bars*

Thirteen states and the District of Columbia specifically prohibit discrimination in public bars.<sup>246</sup> The relatively small number of statutes which mention bars may, as discussed above, reflect a concern that forced integration might generate violence. Prohibition of race and sex discrimination by bars requires the overturning of deeply rooted social traditions. Therefore, progress has been slower in this area than in other places of entertainment.<sup>247</sup> The statutes which define public accommodations in general terms may or may not include bars. The matter is often left to judicial interpretation.<sup>248</sup> Laws which define public accommodations using a long unqualified list prohibit bars from discriminating only if bars are listed.<sup>249</sup> Where "including but not limited to" is added to a list definition, the statute may cover bars even if they are not listed.<sup>250</sup> The only bars which are expressly exempted from the statutes are bars connected with private clubs. These are exempt in states which exempt private clubs from coverage.

(ii) *Private Clubs*

The public accommodations statutes of twenty-one states and the District of Columbia exempt private clubs from coverage.<sup>251</sup> Although the private club

246. ALASKA STAT. § 18.80.300(7) (1974); D.C. CODE § 6-2202(x) (Supp. 1978). ILL. REV. STAT. ch. 38, § 13-1 (1973); KAN. STAT. § 44-1002(i) (Supp. 1977); ME. REV. STAT. tit. 5, § 4553(8) (Supp. 1973); MD. ANN. CODE art. 49B, § 11 (Supp. 1977); MO. REV. STAT. § 314.020 (1969); MONT. REV. CODES ANN. § 64-305(14) (Supp. 1977); NEV. REV. STAT. § 651.050 (1977); N.J. STAT. ANN. § 10:5-5(1) (West Supp. 1978-1979); N.Y. EXEC. LAW § 292(9) (McKinney 1972); PA. STAT. ANN. tit. 43, § 954(l) (Purdon Supp. 1978-1979); R.I. GEN. LAWS § 11-24-3 (1969); WIS. STAT. § 942.04(2) (1975). The absence of explicit statutory coverage of bars does not necessarily reflect non-coverage.

247. A bar in New York which refused to serve unescorted women standing at the bar, but served them at tables, was found not to have violated the public accommodations statute. *Decrow v. Hotel Syracuse Corp.*, 59 Misc. 2d 383, 298 N.Y.S.2d 859 (1969). The court found no actionable discrimination because the proprietor did not "refuse to receive or entertain the plaintiff but simply conditioned their reception and entertainment of her by requiring that she be escorted to the bar or be seated at a table removed therefrom." *Id.* at 386, 298 N.Y.S.2d at 862-63. The *DeCrow* court's statement was dicta; the decision was based on the noncoverage of sex under the statute. *See also* *Rosenberg v. State Human Rights Appeal Bd.*, 45 A.D.2d 929, 357 N.Y.S.2d 325 (1974).

248. *See* note 204 *supra*.

249. Therefore, bars are not covered, for example, by OHIO REV. CODE ANN. § 4112.01(1) (Page 1973).

250. NEB. REV. STAT. § 20-133 (1977); WASH. REV. CODE ANN. § 49.60.040 (Supp. 1976).

251. ARIZ. REV. STAT. ANN. § 41-1441 (1974); D.C. CODE § 6-2202(x) (Supp. 1978); IDAHO CODE § 18.7302(e) (Supp. 1977); IOWA CODE ANN. § 601A.2(10) (West 1975); KAN. STAT. §§ 44-1002, 44-1018 (1973 & Supp. 1977); KY. REV. STAT. § 344.130 (1977); MD. ANN. CODE art. 49B, § 11 (Supp. 1977); MICH. COMP. LAWS ANN. § 37.2303 (Supp. 1978-1979); MO. ANN. STAT. § 314.040 (Vernon Supp. 1978); NEB. REV. STAT. § 20-138 (1977); N.J. STAT. ANN. § 10:5-5(1) (West Supp. 1978-1979); N.M. STAT. ANN. § 4-33-2(G) (1974); N.Y. EXEC. LAW § 292(9) (McKinney 1972); OKLA. STAT. tit. 25, § 1401(1) (Supp. 1977); OR. REV. STAT. § 30.675(2) (1977); PA. STAT. ANN. tit. 43, §§ 954-55 (Purdon 1964 & Supp. 1978-1979); R.I. GEN. LAWS § 11-24-3 (1969); S.D. COMPILED LAWS ANN. § 20-13-1(12) (Supp. 1977); UTAH CODE ANN. § 13-7-2 (1973 & Supp. 1977); WASH. REV. CODE ANN. § 49.60.040 (Supp. 1977); W. VA. CODE § 5-11-3(j) (Supp. 1978); WIS. STAT. § 942.04(2) (1975).

exemption is partially based on the customer's constitutional right to free association,<sup>252</sup> the Constitution does not require states to exempt private clubs from coverage. Generally, federal law establishes a minimum right of access but does not guarantee a minimum right to discriminate. Title II does not preempt state law, but instead defers to state action.<sup>253</sup> This means that the states may enforce their discrimination laws against private clubs despite the exemption of clubs from federal law.

Private club exemptions appear in state statutes either as part of the definition of public accommodations or as a separate provision of the statute.<sup>254</sup> A typical exemption states that "The provision [of this act] shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishments are made available to the customers or patrons of an establishment within the scope of [the statute]."<sup>255</sup>

The exemption of private clubs from a state statute is not dispositive of the issue of coverage. The question which clubs are "private" is subject to disparate interpretation among the states. The determination whether a place falls within a private club exemption turns on such criteria as advertising, profit orientation, openness to the public, and the general purpose of the facility. In New Jersey, for example, the private club exemption<sup>256</sup> was interpreted to permit discrimination by a fraternal organization whose "bar and grill and other facilities are available only to its members and their invited guests, and not to the public generally."<sup>257</sup> In the same state, a swimming club was held not exempted from coverage.<sup>258</sup> The court found that the club held itself out to the public because it was organized for profit, controlled by its stockholders, and solicited members.<sup>259</sup> The court rejected the argument that because the club did no advertising, referred to itself as a private club, and had a limited number of members, it was a private club.<sup>260</sup> In New York, the exemption for private clubs<sup>261</sup> was held not to shelter a fraternal organization which refused to serve,

252. This right might be invoked either by a customer or by a proprietor. *See* H. ABRAHAM, *FREEDOM AND THE COURT* 439 (3d ed. 1977), which states, "Rights of liberty and property, or privacy and voluntary association must be balanced, in close cases, against the right not to have the state enforce discrimination against the victim."

253. 42 U.S.C. § 2000a-3(c), (d) (1974) provide for notice to the state civil rights commissions of complaints brought under Title II and for opportunity for action by state commissions. If a state commission chooses to act, the federal court must abstain.

254. This variation is similar to the different drafting forms which are used to include state facilities as covered accommodations. *See* text accompanying notes 314-16 *infra*.

255. NEB. REV. STAT. § 20-138 (1977).

256. "Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private." N.J. STAT. ANN. § 10:5-5(l) (West Supp. 1978-1979).

257. *Brunson v. Rutherford Lodge No. 547*, 128 N.J. Super. 66, 79, 319 A.2d 80, 87 (1971).

258. *Clover Hill Swimming Club, Inc. v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966). A black person was found to have been denied membership based on race.

259. *Id.*

260. *Id.*

261. "Such term shall not include . . . any institution, club, or place of accommodation which is in its nature distinctly private." N.Y. EXEC. LAW § 292(9) (McKinney 1972).

and verbally abused, blacks invited to a fashion show.<sup>262</sup> In a decision not based on the public accommodations provision, another New York court refused to apply the private club exemption to the Kiwanis International and thus prohibited the organization from ordering its Great Neck chapter to exclude women.<sup>263</sup> Litigation regarding private clubs has been similarly complex in Pennsylvania. Two fraternal organizations were found not exempt as private clubs because one had opened its dining room and bar to guests of members,<sup>264</sup> and the other had opened its bantam bowling facilities to the public.<sup>265</sup>

Since no state statute expressly covers private clubs, many courts in states whose statutes contain no exemption have found that clubs are included within express provisions covering places of entertainment, restaurants, or bars. Other courts have found a private club exemption to be implied in the statute. The absence of any mention of private clubs in a statute places the proprietor in an awkward position, since the status of the establishment cannot be determined. In two cases proprietors requested declaratory judgments that their clubs were exempt from the statute.<sup>266</sup> In California, whose statute lacks a private club exemption, a gymnasium was held to be private because it had a limited number of members and was not open to the public, even though it advertised its physical education courses on television.<sup>267</sup>

### (iii) Religious Organizations

The public accommodations statutes of thirteen states and the District of Columbia allow religious organizations to discriminate on the basis of creed or religion.<sup>268</sup> Some, like the New Hampshire law, do so explicitly:

262. *Batavia Lodge No. 196 v. N.Y. State Div. of Human Rights*, 35 N.Y.2d 143, 316 N.E.2d 318, 359 N.Y.S.2d 25 (1974) (\$250 compensatory damages awarded; proof of out-of-pocket loss not required).

263. *Kiwanis Club of Great Neck, Inc. v. Kiwanis International*, 52 A.D.2d 906, 383 N.Y.S.2d 383 (1976). The ambiguous decision states that the club is not "in its nature distinctly private"; it is not, then, exempted from the public accommodations law, but neither is it found to be covered by that section. The denial of membership to women was found to violate the prohibition on employment discrimination. The club was covered as an establishment which aimed to raise "business and professional standards." *Id.* at 916, 383 N.Y.S.2d at 393.

264. *Human Relations Comm'n v. Moose Lodge No. 107*, 448 Pa. 451, 294 A.2d 594 (1972).

265. *Moose Lodge No. 145 v. Pa. Human Relations Comm'n*, 16 Pa. Commw. Ct. 433, 328 A.2d 180 (1974).

266. A tennis club was refused relief because the administrative remedies had not been exhausted. *East Chop Tennis Club v. Mass. Comm'n Against Discrimination*, 364 Mass. 444, 305 N.E.2d 507 (1973). A Playboy Club was declared to be exempt from the statute because its admissions policy was not racially discriminatory but was conditioned on payment of a fifty dollar membership fee. *Watton Playboy Clubs, Inc. v. City of Chicago*, 37 Ill. App. 2d 425, 185 N.E.2d 719 (1962).

267. *Gardner v. Vic Tanny Compton, Inc.*, 182 Cal. App. 2d 506, 6 Cal. Rptr. 490 (1960). Although it is a matter of opinion whether attending a church or a synagogue is a leisure time activity, it is considered as such because religious activity is more appropriately classified as a leisure time activity than as an exercise of freedom of movement, transactional freedom, or as a state facility.

268. D.C. CODE § 6-2203(b) (Supp. 1978); IDAHO CODE § 18.7302(e) (Supp. 1977); IOWA CODE

Nothing herein contained shall be construed to bar any religious or denominational institution, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.<sup>269</sup>

Although litigation regarding the exemption of religious organizations has been sparse, it is arguable that an exemption for religious organizations may be mandated by the Constitution. In New York, the Appellate Division held that a religious organization with hotel accommodations was justified in excluding the plaintiff on the basis of creed, because the organization had a right, guaranteed by the first amendment, to select its guests in a manner calculated to promote its religious principles.<sup>270</sup> It is not clear whether a statutory exemption of religious organizations could be applied to a sect which incorporates race or sex discrimination into its credo.<sup>271</sup> The New Mexico public accommodations law is clear on this point. Although a religious organization may select members on other grounds, it may not discriminate "on account of race, color, national origin, or ancestry."<sup>272</sup>

### 3. *Transactional Freedom*

Statutes which guarantee "transactional freedom" prohibit discrimination in access to goods and services *other* than those included within the categories of freedom of movement or leisure time activities. Of the places that fall within this category, retail stores are the most commonly covered. Other places such as cemeteries, hospitals, credit institutions, barber shops, and wholesalers are included in some statutes and excluded from others.

#### a. *The Scope of Coverage*

The extent to which state public accommodations laws guarantee transactional freedom depends largely on the way that the statutes define public accommodations.<sup>273</sup> Statutes which use broad definitions have the broadest po-

ANN. § 601A.7(2)(a) (West 1975); KAN. STAT. § 44-1018 (1973); MO. ANN. STAT. § 314.040 (Vernon Supp. 1978); NEB. REV. STAT. § 20-137 (1977); N.H. REV. STAT. ANN. § 354-A:8(IV) (Supp. 1977); N.J. STAT. ANN. § 10:5-5 (West Supp. 1978-1979); N.M. STAT. ANN. § 4-33-8(B) (Supp. 1975); N.Y. EXEC. LAW § 296(11) (McKinney 1972); OKLA. STAT. tit. 25, § 1307 (Supp. 1977); PA. STAT. ANN. tit. 43, § 955(i) (Purdon 1964); UTAH CODE ANN. § 13-7-2 (1973); WASH. REV. CODE ANN. § 49.60.040 (Supp. 1977).

269. N.H. REV. STAT. ANN. § 354-A:8(IV) (Supp. 1977). Almost identical language appears in D.C. CODE § 6-2203(b) (Supp. 1978); N.Y. EXEC. LAW § 296(11) (McKinney 1972); N.M. STAT. ANN. § 4-33-8(B) (1974 & Supp. 1975).

270. Cowen v. Lily Dale Assembly, 44 A.D.2d 772, 773, 354 N.Y.S.2d 269, 271-72 (1974).

271. This exemption might be tested in a suit by a black person to gain entry to a white church, or by an orthodox Jewish woman filing a complaint regarding the sequestration of women behind a screen in a synagogue.

272. N.M. STAT. ANN. § 4-33-8(B) (1979 & Supp. 1975).

273. See text accompanying notes 200-211 *supra*.



tential coverage. The Minnesota statute, for example, states that a "place of public accommodation" means a "business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations, are extended, offered, sold, or otherwise made available to the public."<sup>274</sup> Such a clause may cover any business. The California statute defines public accommodations so broadly that the supreme court of that state had no doubt that all transactional freedoms were guaranteed. The court stated that

[t]he legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act (Civ. Code § 51), and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of obtaining a livelihood or gain."<sup>275</sup>

The statutes which use a list to define public accommodations vary in their coverage of businesses. The New Hampshire statute makes no reference to coverage of stores or services; the only explicit guarantee of transactional freedom is access to barber shops.<sup>276</sup> Similarly, the drafters of the Kansas statute neglected to mention any businesses except barber shops, beauty parlors, and cemeteries.<sup>277</sup> New York, on the other hand, has a long and comprehensive list, which includes, among other places, "wholesale and retail stores and establishments dealing with goods and services of any kind, dispensaries, clinics, hospitals . . . laundries and all other cleaning establishments, barber shops [and] beauty parlors."<sup>278</sup>

The state statutes which add "including but not limited to" a list definition frequently cover any place offering goods or services to the public. In the Nebraska statute, the only place listed which falls within this category is gasoline stations.<sup>279</sup> That list, however, is introduced by an explanation that "places of public accommodation shall mean all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, and accommodations."<sup>280</sup> The New Jersey statute affords perhaps the broadest listed guarantee of transactional freedom; it specifically includes "any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind."<sup>281</sup> Statutes generally do not indicate precisely how far they mean to go in covering business estab-

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274. MINN. STAT. § 363.01(18) (Supp. 1978).

275. *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 468, 370 P.2d 313, 315-16, 20 Cal. Rptr. 609, 611-12 (1962).

276. N.H. REV. STAT. ANN. § 354-A:3(9) (1966).

277. KAN. STAT. § 44-1002(i) (1973).

278. N.Y. EXEC. LAW § 292(9) (McKinney 1972).

279. NEB. REV. STAT. § 20-133 (1977).

280. *Id.*

281. N.J. STAT. ANN. § 10:5-5 (West Supp. 1978-1979).

lishments. Some fail to specify which retail and service establishments are covered; others do not state whether they reach manufacturers and distributors, in addition to retailers.

A peripheral problem in this area is that regulation of some businesses may be within the exclusive jurisdiction of some other agency than the state civil rights commission, and thus be exempt from nondiscrimination requirements. In Pennsylvania, for example, a state court held that the rates charged and the services provided by utility companies are regulated solely by the Public Utility Commission. Blacks charging race discrimination in delivery of services were found not to have an actionable claim before the Human Relations Commission.<sup>282</sup>

Public accommodations statutes have not traditionally prohibited discrimination by professionals or by businesses rendering services which are delivered to the home of the customer rather than at some particular place of business. Milk delivery companies, house painters, and laundry services may select neighborhoods in which to work based on race, nationality, or any other characteristic of the residents, without fear of challenge under a state discrimination law. It is common practice for cab drivers in New York City to refuse to stop for blacks, and except for gypsy cabs, black neighborhoods receive almost no cab service.<sup>283</sup> According to established criteria defining public places as those which hold themselves out to the public, operate for profit, and use advertising, professionals and delivery services should logically be subject to the same prohibition of discrimination as retail stores. But policy in the area of public accommodations is bound by tradition. Although statutory coverage has expanded substantially in recent years, no state has yet developed the concept of access to prohibit discrimination by delivered services.

#### *b. Controversial Transactional Freedoms*

##### *(i) Barber Shops and Beauty Parlors*

In thirteen states and the District of Columbia, barber shops are covered under the public accommodations statutes.<sup>284</sup> In two states they are expressly exempted.<sup>285</sup> Coverage of barber shops and beauty parlors is particularly controversial with regard to race discrimination, because different skills are needed to cut black people's hair than to cut white people's hair. Resistance to integration of barber shops and beauty parlors also arises because cutting hair is a personal service involving physical contact.

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282. Philadelphia Elec. Co. v. Pa. Human Relations Comm'n, 5 Pa. Commw. Ct. 329, 290 A.2d 699, 700 (1972).

283. N.Y. Times, March 14, 1978, at B1, col. 1.

284. ALASKA STAT. § 18.80.300 (1974 & Supp. 1977); COLO. REV. STAT. § 24-34-501 (1973); D.C. CODE § 6-2202(x) (Supp. 1978); ILL. REV. STAT. ch. 38, § 13.1 (1973); KAN. STAT. § 44-1002 (1973); ME. REV. STAT. tit. 5, § 4553(8) (Supp. 1973); MASS. GEN. LAWS ANN. ch. 272, § 92A (West Supp. 1978-1979); MONT. REV. CODES ANN. § 64-305(14) (Supp. 1977); N.H. REV. STAT. ANN. § 354-A:3(9) (1966); N.Y. EXEC. LAW § 292(9) (McKinney 1972); OHIO REV. CODE ANN. § 4112.01 (Page 1973 & Supp. 1977); PA. STAT. ANN. tit. 43, § 954 (Purdon 1964 & Supp. 1978-1979); R.I. GEN. LAWS § 11-24-3 (1969); WIS. STAT. § 942.04(2) (1975).

285. DEL. CODE tit. 6, § 4501 (1974); OKLA. STAT. tit. 25, § 1401 (1971).

Litigation regarding desegregation of barber shops has occurred only in states whose public accommodations statutes expressly cover barber shops. Most of these cases result in the issuance of cease and desist orders prohibiting discriminatory practices.<sup>286</sup>

A recent New Jersey case held that the prohibition against sex discrimination in the public accommodations statute invalidates neither an ordinance regulating the hours of barber shops but not beauty shops, nor a statute requiring that hairdressing establishments obtain separate licenses before serving both men and women.<sup>287</sup>

(ii) *Professional Services*

Most public accommodations statutes do not specifically prohibit discrimination by private doctors, lawyers, architects, engineers, and other professionals.<sup>288</sup> Many of the statutes indicate coverage of "services" generally; this might or might not be found to apply to professional services. Some public accommodations statutes do prohibit discrimination in the delivery of certain medical services. Those which list hospitals, for example, prohibit discrimination by doctors who work in hospitals.<sup>289</sup> A unique provision in the Washington state public accommodations statute bars discrimination by doctors, regardless whether they work in hospitals or practice privately.<sup>290</sup> The Connecticut statute disallows discriminatory selection of members by professional and occupational organizations.<sup>291</sup>

Statutory ambiguity regarding coverage of professional services has been clarified in a few states by court decisions. For example, the California District Court of Appeals held that the Civil Rights Act covered professional services.<sup>292</sup> The court denied a motion to dismiss a complaint alleging race discrimination by a doctor.<sup>293</sup> This decision was a departure from the precedent set in a 1957 case in which damages were denied to a black person who was

286. *E.g.*, *Sellers v. Phillip's Barber Shop*, 46 N.J. 340, 344, 217 A.2d 121, 125 (1966); *In re Johnson*, 71 Wash.2d 245, 247, 427 P.2d 968, 970 (1967); *Gegner v. Graham*, 1 Ohio App.2d 442, 446-47, 205 N.E.2d 69, 72 (1964).

287. *State v. Schwarcz*, 123 N.J. Super. 482, 494, 303 A.2d 610, 617 (1973).

288. Prohibitions on advertising might be interpreted as evidence that professionals do not hold themselves out to the public. The prohibition of advertising, however, is based on professional propriety and is not meant to limit access to professional services.

289. These include the laws of Colorado, Idaho, Maine, Massachusetts, Montana, New Jersey, New York, Pennsylvania, Rhode Island, Washington, Wisconsin, and the District of Columbia. In Connecticut one plaintiff successfully sued a private hospital for accepting a gift of a trust which could be used to assist in the treatment only of white patients. The court found that compliance with the trust provisions would subject the hospital to criminal penalties for violation of the public accommodations law. The trust was, therefore, awarded to the residuary estate. *Connecticut Bank & T. Co. v. Johnson Memorial Hosp.*, 30 Conn. Supp. 1, 12-13, 294 A.2d 586, 593 (1972). In a New Jersey case not brought under the public accommodations law, the New Jersey Supreme Court declared private hospitals to be "quasi-public" places and to have no right to refuse service to a woman requesting a first-trimester abortion. *Doe v. Bridgeton Hosp. Ass'n, Inc.*, 71 N.J. 478, 487, 491, 366 A.2d 641, 645-47 (1976).

290. WASH. REV. CODE ANN. § 49.60.040 (Supp. 1977).

291. CONN. GEN. STAT. ANN. § 53-35 (West Supp. 1978).

292. *Washington v. Blampin*, 226 Cal. App. 2d 604, 38 Cal. Rptr. 235 (1964).

293. *Id.*

refused service by a dentist.<sup>294</sup> The court reasoned in that case that "no established public policy . . . compels a dentist to treat anyone who comes to him."<sup>295</sup>

### (iii) Cemeteries

Burial of the dead is a highly emotional issue. Consequently, cemeteries are the last bastion of protected discrimination. At one time many state laws mandated racial segregation in cemeteries.<sup>296</sup> To date, eight states have passed laws prohibiting discrimination by proprietors of cemeteries.<sup>297</sup> The statutes of Oklahoma and Washington expressly exempt cemeteries.<sup>298</sup> However, most state laws make no mention of burial grounds. The Pennsylvania statute expressly guarantees access to non-sectarian cemeteries, and exempts those affiliated with churches.<sup>299</sup> In Kansas and Washington, cemeteries are covered, but religious organizations are permitted to select members based on their religious affiliation.<sup>300</sup> The interaction of these provisions has not been interpreted by the courts.

Only a few lawsuits in recent years have challenged discriminatory practices by proprietors of cemeteries. In 1973, the Supreme Court of Pennsylvania affirmed a nondiscrimination order issued to a cemetery by the Human Rights Commission.<sup>301</sup> Under this order, the cemetery was required to keep records of all persons refused a plot and to send letters stating the reasons for rejection to the families of rejected applicants.<sup>302</sup>

### (iv) Credit Institutions

The extension of credit is a service offered to the public. Therefore, some states treat discrimination by banks and credit institutions as a denial of access

294. *Coleman v. Middlestaff*, 147 Cal. App. 2d 833, 836, 305 P.2d 1020, 1022 (1957).

295. *Id.*

296. *E.g.*, Act of April 4, 1947, ch. 821, § 2, 1947 N.C. Sess. Laws 1115-16, *quoted in CIVIL RIGHTS RECORD*, *supra* note 173, at 263, which stated:

Racial restrictions as to use of cemeteries for burial of the dead. In the event said property municipal cemeteries has been heretofore used exclusively for burial of members of the negro race, then said cemetery or burial ground so established shall remain and be established as a burial ground for the negro race. In the event said property has been heretofore used exclusively for burial of members of the white race, then said cemetery ground so established shall remain and be established as a burial ground for the white race.

297. COLO. REV. STAT. § 24-34-501 (1973); ILL. REV. STAT. ch. 38, § 13-1 (1973); KAN. STAT. § 44-1002 (1973); N.D. CENT. CODE § 23-21.1-08 (1976); OHIO REV. CODE ANN. § 4112.01(I) (Page 1973); PA. STAT. ANN. tit. 43, § 954(I) (Purdon Supp. 1978-1979); WASH. REV. CODE ANN. § 49.60.040 (Supp. 1977); WIS. STAT. § 924.04(2) (1975).

298. OKLA. STAT. tit. 25, § 1401 (1971); WASH. REV. CODE ANN. § 49.60.040 (Supp. 1977). The Washington statute exempts only cemeteries affiliated with religious institutions.

299. PA. STAT. ANN. tit. 43, § 954(I) (Purdon Supp. 1978-1979).

300. KAN. STAT. § 44-1018 (1973); WASH. REV. CODE ANN. § 49.60.040 (Supp. 1977).

301. *Pennsylvania Human Rights Comm'n v. Alto-Reste Park Cemetery Ass'n*, 453 Pa. 124, 139, 306 A.2d 881, 890 (1973).

302. *Id.* at 135, 306 A.2d at 888. An order to write a public letter of apology to the family of the person refused a burial plot was struck down as improper. *Id.* at 139, 306 A.2d at 890.

to public accommodations. Most victims of credit discrimination are women, particularly married, divorced, and black women.<sup>303</sup> Many credit institutions assume that women are oriented solely toward marriage and family and are not financially responsible.<sup>304</sup> Legislators have in the last few years recognized that this assumption makes it impossible for many responsible persons to obtain loans.

Thirty-six states and the District of Columbia have laws prohibiting discrimination in the extension of credit and loans.<sup>305</sup> Sixteen of these provisions have been enacted since 1976.<sup>306</sup> Twelve are separate credit acts which include prohibitions on discrimination.<sup>307</sup> The civil rights acts of nineteen states and the District of Columbia contain sections on credit discrimination, either in the public accommodations provision or in a separate section.<sup>308</sup> Five states specifically prohibit credit discrimination by lenders who finance the acquisition of housing,<sup>309</sup> and one state statute bars discrimination in the distribution of credit cards.<sup>310</sup>

A 1968 decision rendered by a Massachusetts court foreshadowed the rapid spread of credit discrimination laws across the country.<sup>311</sup> The court held

303. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV. 409, 410 (1974).

304. *Id.* at 409.

305. The statutes are cited below, divided into categories based on their coverage. The states without credit laws are Alabama, Arizona, Arkansas, Delaware, Idaho, Indiana, Mississippi, Nebraska, New Hampshire, New Mexico, North Dakota, Oregon, South Carolina, Utah, and Wyoming.

306. According to Gates, *supra* note 303, as of 1974, the states without credit discrimination laws were Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, and Wyoming.

307. CAL. CIV. CODE § 1812.30 (West Supp. 1978); COLO. REV. STAT. §§ 5-1-109 to 5-1-201 (1973 & Supp. 1976); CONN. GEN. STAT. ANN. §§ 36-436 to 36-439 (West Supp. 1978); LA. REV. STAT. ANN. § 9:3583 (West Supp. 1977); MD. ANN. CODE art. 83, § 128(e) (1972); MASS. GEN. LAWS ANN. ch. 151B, § 4(14) (West Supp. 1978-1979); MICH. COMP. LAWS ANN. § 750.147a (Supp. 1978-1979); R.I. GEN. LAWS § 34-37-4.1 (Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 5069-2.07 (Vernon Supp. 1978); VT. STAT. ANN. tit. 8, § 1211 (Supp. 1978); VA. CODE § 59.1-21.21 (Supp. 1975); WIS. STAT. § 138.20 (1975).

308. ALASKA STAT. § 18.80.250 (Supp. 1977); D.C. CODE § 6-2202(x) (Supp. 1978); IOWA CODE ANN. § 601A.9 (West 1975); KAN. STAT. § 44-1017 (1973); KY. REV. STAT. § 344.400 (1977); ME. REV. STAT. tit. 5, § 4596 (Supp. 1978); MINN. STAT. ANN. § 363.03(8) (Supp. 1978); MO. REV. STAT. § 314.100 (Supp. 1978); MONT. REV. CODES ANN. § 64-306(7) (Supp. 1977); NEB. REV. STAT. §§ 20-129, 20-148 (1977); NEV. REV. STAT. § 651.070 (1977); N.J. STAT. ANN. § 10:5-12 (West 1976 & Supp. 1978-1979); N.Y. EXEC. LAW § 296(a) (McKinney Supp. 1972-1977); OHIO REV. CODE ANN. § 4112.021(B) (Page Supp. 1977); OR. REV. STAT. § 30.670 (1977); PA. STAT. ANN. tit. 43, § 954(l) (Purdon Supp. 1978-1979); S.D. COMPILED LAWS ANN. § 20-13-21 (Supp. 1977); UTAH CODE ANN. § 13-7-3 (Supp. 1977); WASH. REV. CODE ANN. §§ 175, 176 (Supp. 1977); W. VA. CODE § 5-11-9(f) (Supp. 1977).

309. ALASKA STAT. § 18.80.250 (1974 & Supp. 1977); COLO. REV. STAT. § 69-75 (1973); MD. ANN. CODE art. 49B, § 23(a) (1972 & Supp. 1977).

310. ILL. ANN. STAT. ch. 121 1/2, § 385.1 (Smith-Hurd Supp. 1978).

311. *Local Finance Co. v. Mass. Comm'n Against Discrimination*, 355 Mass. 10, 242 N.E.2d 536 (1968).

that credit discrimination was prohibited by the public accommodations statutes, even though the law made no specific reference to credit at that time.<sup>312</sup> The statutes have, however, been the subject of little litigation, both because the credit laws are relatively new, and because many complaints are handled by administrative agencies rather than by courts.

#### 4. *State Facilities*

Most of the state public accommodations statutes prohibit discrimination in places owned, operated, or partly or wholly funded by the state government. Places included in this category are government buildings, public parks, public hospitals, clinics, libraries, museums, and transport facilities.<sup>313</sup> Coverage of state facilities can be indicated in one of three different sections of a public accommodations law. The most common means of covering places belonging to or funded by the state is to define a "person" who is prohibited from discriminating as including "the state, and all political subdivisions, authorities, agencies, boards, and commissions thereof."<sup>314</sup> Other statutes indicate coverage by adding to the definition of unlawful discriminatory practices a provision guaranteeing equal access to, and equal treatment in, places belonging to or funded by the state.<sup>315</sup> Yet another way of covering state facilities is to define "place of public accommodations" as including "any public facility owned, operated, or managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation, and such facility supported in whole or in part by public funds."<sup>316</sup> This last alternative is clearest because one looks first to the definition of public accommodations to see what places are covered.

State public accommodations statutes have rarely been enforced against state facilities. Most discrimination suits brought against state officials are based on 42 U.S.C. § 1983,<sup>317</sup> because there is a more substantial body of precedent under section 1983 than under the state statutes. The state law might be used to cover a facility which received sufficient funding from the state to bring it under the state statute but not enough to render the action "under color of state law" for purposes of section 1983.<sup>318</sup> State laws prohibiting discrimination in state facilities might be used to challenge unequal distribution of public transport, sewers, police protection, medical care, or street repairs when those ser-

312. *Id.* at 14-15, 242 N.E.2d at 539.

313. The term state facilities might also include publicly-assisted housing and public schools; these are not within the scope of this Project.

314. OHIO REV. CODE ANN. § 4112.01(A) (Page 1973). See D.C. CODE § 6-2202(u) (Supp. 1978); N.M. STAT. ANN. § 4-33-2(A) (Supp. 1975).

315. KAN. STAT. § 44-1002(i) (1973); MINN. STAT. ANN. § 363.03(A) (Supp. 1978).

316. MO. ANN. STAT. § 314.020(5) (Vernon Supp. 1978); NEB. REV. STAT. § 20-133(5) (1977).

317. 42 U.S.C. § 1983 (1970).

318. Some attempts at enforcement have failed. The Connecticut Civil Rights Commission, for example, tried without success to initiate hearings under the public accommodations statute regarding discriminatory police action; the court denied jurisdiction to the Commission because the Commission did not first follow procedures described for investigation and conciliation, and because the complaint in question asserted no violation of any constitutional right. *City of Waterbury v. Comm'n on Human Rights and Opportunities*, 160 Conn. 226, 278 A.2d 771 (1971).

VICES are more generously provided in white or native American, than in black or immigrant neighborhoods.

Streets and sidewalks are technically state facilities, but they are expressly covered only under certain of the statutes which protect blind and disabled persons.<sup>319</sup> Free access to the streets is implicit in the common law rule barring discrimination by common carriers<sup>320</sup> and in the statutes which cover transport facilities.<sup>321</sup> Either may be used to combat the two primary forms of discrimination which occur in the streets. One is the discriminatory enforcement of loitering and vagrancy ordinances by the police. Ever since vagrancy was outlawed by the Black Codes in 1865, these laws and their successors have been used as a means of harrasing blacks and others regarded as undesirables.<sup>322</sup> Only one state public accommodations law has been successfully used to challenge this form of harassment.<sup>323</sup> The other common form of discrimination in access to the streets affects blind and disabled person. Their access is limited unless curbs are constructed to accommodate wheelchairs and unless auditory traffic signals are installed. Both state and federal laws have been passed which require the elimination of certain architectural barriers to access,<sup>324</sup> but these laws are inadequately enforced. A few state laws provide that no higher degree of care or modification of property is required to accommodate blind or disabled persons than to provide access to others.<sup>325</sup> This means that the proprietor has no affirmative duty to provide access.

#### E. Classifications Covered by the State Statutes

The primary thrust of the first public accommodations statutes enacted after the Civil War was to guarantee freedom of movement to black people.<sup>326</sup> These statutes prohibited discrimination on the basis of race, color, national

319. *E.g.*, CAL. CIV. CODE § 54 (West Supp. 1978); COLO. REV. STAT. § 24-34-501(c) (1973); LA. REV. STAT. § 46:1952(A) (West Supp. 1978); MASS. GEN. LAWS ANN. ch. 72, § 92A (West Supp. 1978-1979); NEB. REV. STAT. § 20-127(1) (1977); S.C. CODE § 43-33-20(a) (1976); UTAH CODE ANN. § 26-28-1(1) (1974).

320. M. KONVITZ, *supra* note 24, at 160.

321. *See* text accompanying notes 225-29 *supra*.

322. CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 1, at 224-25.

323. *In re Cox*, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970). This was a habeas corpus action challenging the validity of an arrest under a loitering statute. The court found the public accommodations statute to be incorporated in the loitering statute; the latter was therefore held not to allow exclusion from a shopping mall for any arbitrary reason such as long hair, unconventional dress, or membership in a political group. Justifiable grounds for exclusion would be property damage, injury to others, and disruption of business. *Id.* at 217, 474 P.2d at 999, 90 Cal. Rptr. at 31.

324. *E.g.*, ME. REV. STAT. tit. 5, § 4593 (Supp. 1978). All of the states and the District of Columbia have statutes which require that certain new buildings be constructed to accommodate the disabled and that some pre-existing buildings be modified to provide access. Achtenberg, *Law and the Physically Disabled: An Update with Constitutional Implications*, 8 SW. U.L. REV. 847, 852-53 (1976).

325. *E.g.*, CONN. GEN. STAT. ANN. § 53-35(b) (West Supp. 1978); GA. CODE ANN. § 79-601(c)(2) (Supp. 1977).

326. *See* Indritz, *Post Civil War Ordinances Prohibiting Racial Discrimination in the District of Columbia*, 42 GEO. L.J. 179 (1954).

origin, religion, or creed alone.<sup>327</sup> Only during the past decade have state legislatures begun to recognize that access rights are denied to many other groups. Statutes have been amended to prohibit discrimination on the basis of sex, marital status, handicap, and age.<sup>328</sup> The most innovative laws include classifications such as sexual preference, pregnancy, parenthood, political affiliation, and personal appearance.<sup>329</sup> These classifications are more complex than those developed earlier, because some forms of different treatment within these groups are prohibited, while others are not. For example, it is considered reasonable to provide separate bathroom facilities for men and women.<sup>330</sup>

An examination of which classifications are covered by which statutes proves useful for several reasons. Comparison of federal and state laws highlights the relative narrowness of the federal law, and points out the need for amendment of Title II. The broad range of classifications covered by the progressive laws shows the potential for development in this area. In addition, the extension of so many laws beyond the limits of Title II demonstrates the magnitude of the social change that has occurred since 1964.

The classifications covered by the public accommodations statutes can be divided into three categories. The first consists of those classifications which are covered by Title II, which are included in almost all of the state laws.<sup>331</sup> The second category includes classifications recently added to many state laws but not covered by Title II, which are sex, age, marital status, and disability. The third category includes the more innovative and controversial classifications mentioned in only a few statutes. Those are personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, source of income, place of business or residence, pregnancy, parenthood, change in marital status, class, and status.

### 1. *Race and Color*

Race and color are prohibited bases of discrimination under all of the public accommodations statutes. The protection of the rights of black people to access to public places has been the primary subject of administrative and court action implementing the statutes.<sup>332</sup> It is now rare that a public place is penalized for wholly refusing to admit blacks. "Modern" discrimination is more subtle, because it is designed to circumvent the laws. Many proprietors of bars and restaurants recognize their obligation to admit blacks, but use a quota system to insure that their clientele will remain largely white.<sup>333</sup> Bouncers are hired to keep an eye on the number of blacks present in the establishment and

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327. The inclusion of religion may have been based on long-standing tradition rather than on the demands of a particular group.

328. See text accompanying notes 353-93 *infra*.

329. See text accompanying notes 394-416 *infra*.

330. See text accompanying notes 363-66 *infra*.

331. Creed and ancestry are not mentioned by Title II but are more or less synonymous with religion and national origin respectively.

332. See text accompanying notes 170-98 *supra*.

333. Interview with Eugene Murphy, New York State Human Rights Commission, Buffalo, New York, August 30, 1978.



to turn away black customers once the quota has been filled.<sup>334</sup> Some establishments limit the number of black customers by charging entrance fees to blacks but not to whites.<sup>335</sup>

The large volume of litigation generated under these laws prior to Title II indicates that they were actively enforced. Although the courts in many early cases found in favor of blacks alleging race discrimination.<sup>336</sup> However, it was not uncommon for a challenged practice to be found non-discriminatory<sup>337</sup> or for an offending establishment not to be deemed a place of public accommodation.<sup>338</sup> Since the passage of Title II, many states have broadened their coverage of businesses and increased the available remedies. The state courts have also become more receptive to claims of race discrimination.<sup>339</sup> Only rarely are such claims now rejected by state courts.<sup>340</sup>

The extensive development of the prohibition against race discrimination in public accommodations has served to integrate most public places, and in some substantial part, to eliminate denial of goods and services to blacks and other minorities. It has also laid the groundwork for the development of law prohibiting discrimination against other groups.

## 2. National Origin and Ancestry

Discrimination based on national origin or ancestry is prohibited by every state public accommodations statute. It is not clear, however, whether the legislatures meant for these terms to merely restate the prohibition against race discrimination, to cover minority groups such as Puerto Ricans or Mexican-Americans (who may or may not be deemed to be protected by proscription

334. *Id.*

335. *Id.*

336. *E.g.*, *Central Amusement Co. v. District of Columbia*, 121 A.2d 865 (1956); *City of Chicago v. Corney*, 13 Ill. App. 2d 396, 142 N.E.2d 160 (1957); *Crawford v. Kent*, 341 Mass. 125, 167 N.E.2d 620 (1960); *State v. Rosecliff Realty Co.*, 1 N.J. Super. 94, 62 A.2d 488 (1949).

337. *E.g.*, *McClain v. City of South Pasadena*, 155 Cal. App. 2d 423, 318 P.2d 199 (1957) (restriction of admission to swimming pool to town residents found not to be racially discriminatory).

338. *E.g.*, *Coleman v. Middlestaff*, 147 Cal. App. 2d 833, 305 P.2d 1020 (1957) (dentist held not to offer a public service and, therefore, to have no obligation to treat all patients who come to him); *Long v. Mountain View Cemetery Ass'n*, 130 Cal. App. 2d 328, 278 P.2d 945 (1955) (cemetery not covered by the public accommodations statute and, therefore, permitted to exclude blacks from mausoleum).

339. *E.g.*, *Washington v. Blampin*, 226 Cal. App. 2d 604, 38 Cal. Rptr. 235 (1964); *Clark v. McCurdie*, 75 Ill. App. 2d 318 (1966); *McGill v. 830 S. Michigan Hotel*, 68 Ill. App. 2d 351, 216 N.E.2d 273 (1966); *Local Finance Co. v. Mass. Comm'n Against Discrimination*, 355 Mass. 10, 242 N.E.2d 536 (1968); *Ferguson v. Windsor Court Restaurant*, 38 Mass. App. Dec. 120 (1967); *Clover Hill Swimming Club, Inc. v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966); *Sellers v. Phillip's Barber Shop*, 46 N.J. 340, 217 A.2d 121 (1966); *Fraser v. Robin Dee Day Camp*, 44 N.J. 480, 210 A.2d 208 (1965); *Batavia Lodge No. 196 v. N.Y. State Div. of Human Rights*, 35 N.Y.2d 143, 316 N.E.2d 318, 359 N.Y.S.2d 25 (1974); *Pennsylvania Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n*, 453 Pa. 124, 306 A.2d 881 (1973); *Human Relations Comm'n v. Loyal Order of Moose, Lodge No. 107*, 448 Pa. 451, 294 A.2d 594 (1972).

340. *E.g.*, *In re James*, 247 Ind. 339, 215 N.E.2d 863 (1966) (no evidence to support allegation that blacks had been excluded from a jury; public defender found justified in refusing to represent petitioner on a writ of coram nobis); *Philadelphia Elec. Co. v. Pa. Human Relations Comm'n*, 5 Pa. Commw. Ct. 329, 290 A.2d 699 (1972).

of race discrimination), or to prohibit discrimination against white immigrants. There has been no litigation under these sections of the laws. Whatever complaints have been filed on these grounds have been handled administratively.

### 3. *Creed and Religion*

All of the statutes prohibiting discrimination in public accommodations include in their list of covered classifications either religion,<sup>341</sup> or creed,<sup>342</sup> or both.<sup>343</sup> Courts have interpreted creed to refer strictly to religious beliefs,<sup>344</sup> so the terms are used interchangeably. Two statutes explicitly prohibit discrimination based on political affiliation,<sup>345</sup> but attempts to expand the interpretation of creed to cover political beliefs have failed.<sup>346</sup> In one case, a gas station owner successfully defended a charge that he had violated the public accommodations law by refusing to service a car bearing a peace symbol.<sup>347</sup> In another, a landlord was found within his rights in refusing to rent a storefront to pacifists.<sup>348</sup> The Colorado Court of Appeals suggested that "creed" did not even protect freedom of religion, reversing a commission finding that a school hair length regulation was discriminatory as applied to an American Indian.<sup>349</sup> Even though the public accommodations statute included creed,<sup>350</sup> the court declared that the commission had exceeded its authority.<sup>351</sup> The prohibition of discrimination based on creed or religion is further limited in thirteen states and the

341. ALASKA STAT. § 18.80.230 (Supp. 1977); CAL. CIV. CODE § 51 (West Supp. 1978); D.C. CODE § 6-2241(a) (Supp. 1978); ILL. REV. STAT. ch. 38, § 13-2(a) (1973); IND. CODE § 22-9-1-2(a) (1976); KAN. STAT. § 44-1001 (Supp. 1977); KY. REV. STAT. § 344.120 (1977); ME. REV. STAT. tit. 5, § 4592 (Supp. 1978); MICH. COMP. LAWS ANN. § 37.2302 (Supp. 1978-1979); NEV. REV. STAT. § 651.070 (1977); N.M. STAT. ANN. § 4-33-7 (Supp. 1975); N.D. CENT. CODE § 12.1-14-04 (1976); OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1977); OKLA. STAT. tit. 25, § 1402 (1971); OR. REV. STAT. § 30.670 (1977); R.I. GEN. LAWS § 11-24-2 (1969); UTAH CODE ANN. § 13-7-3 (Supp. 1977); W. VA. CODE § 5-11-9(f)(1) (Supp. 1977); WYO. STAT. § 6-83.1 (1975).

342. ARIZ. REV. STAT. § 41-1442 (1974); COLO. REV. STAT. § 24-34-501(2) (1973); CONN. GEN. STAT. ANN. § 53-35 (West Supp. 1978); DEL. CODE tit. 6, § 4503 (1974); IDAHO CODE § 18-7301 (Supp. 1977); MD. ANN. CODE art. 49B, § 11 (Supp. 1977); N.H. REV. STAT. ANN. § 354A:8-IV (Supp. 1977); N.J. STAT. ANN. § 10:5-12(f) (West Supp. 1978-1979); N.Y. EXEC. LAW § 296(2)(a) (McKinney Supp. 1972-1977); VT. STAT. ANN. tit. 13, § 1451(a) (Supp. 1978); WASH. REV. CODE ANN. § 49.60.030(1) (Supp. 1977); WIS. STAT. § 942.04(a) (1975).

343. IOWA CODE ANN. § 601A.7(1)(a) (West 1975); MASS. GEN. LAWS ANN. ch. 272, §§ 92A, 98 (West Supp. 1978-1979); MINN. STAT. ANN. § 363.03 (Supp. 1978); MO. REV. STAT. § 314.030 (Supp. 1978); MONT. REV. CODES ANN. § 64-306(3)(a) (Supp. 1977); NEB. REV. STAT. § 20-134 (1977); PA. STAT. ANN. tit. 43, § 955(i) (Purdon Supp. 1978-1979); S.D. COMPILED LAWS ANN. § 20-13-23 (Supp. 1977).

344. *Streeter v. Bogan*, 113 N.J. Super. 486, 490, 274 A.2d 312, 315 (Ch. Div. 1971); *Schuchter v. Div. on Civ. Rights*, 117 N.J. Super. 405, 407-08, 285 A.2d 42, 43 (App. Div. 1971).

345. D.C. CODE § 6-2241(a) (Supp. 1978); MONT. REV. CODES ANN. § 64-318 (Supp. 1977).

346. 113 N.J. Super. at 490, 274 A.2d at 315. Although not liable under the public accommodations statute, the gas station owner was found obliged to serve all customers under the common carrier rule. *Id.* at 491, 274 A.2d at 315.

347. *Id.* at 490, 274 A.2d at 315.

348. 117 N.J. Super. at 408, 285 A.2d at 43.

349. School Dist. No. 11-J v. Howell, 33 Colo. App. 57, 517 P.2d 422, 424 (1973).

350. COLO. REV. STAT. § 24-34-501(2) (1973).

351. 517 P.2d at 424.

District of Columbia, which allow religious organizations to discriminate in any manner designed to promote their religious principles.<sup>352</sup>

#### 4. Sex

During the last decade, women have begun to challenge their exclusion from bars, restaurants, hotels, men's clubs, and athletic facilities. Exclusion of women is variously defended on grounds of custom, safety, and morality. Proprietors of some restaurants and bars claim that their atmosphere would be destroyed by the admission of women. Others claim that unless women are excluded, prostitutes will solicit in their establishments. Owners of hotels which admit only women justify their policy on grounds that it protects the safety of their guests.<sup>353</sup>

With the resurgence of the women's movement, attention to the issue of sex discrimination has increased. Twenty-six of the thirty-nine state public accommodations laws have been amended to prohibit discrimination based on sex.<sup>354</sup> Exceptions include Arizona, Illinois, Kentucky, Maryland, Missouri, Nevada, Oklahoma, Pennsylvania, Rhode Island, Vermont, Washington, and Wyoming, as well as those states which have no public accommodations statutes.<sup>355</sup> The rapid advance of coverage of sex discrimination is in part a response by state legislators to countless complaints from women excluded from establishments which hold themselves as open to the public.<sup>356</sup> Congress, by contrast, has been unresponsive to such pressure.<sup>357</sup>

The state courts have read the prohibition of sex discrimination in the public accommodations statutes quite broadly. A New York court issued an injunction ordering a restaurant to admit long-haired men and held that the admission of women, but not men, with long hair was a discriminatory act within the meaning of the statute.<sup>358</sup> In another case, the New York Court of Appeals found that a newspaper which maintained separate "help wanted" ads for men and women was aiding and abetting sex discrimination.<sup>359</sup> In 1974 a New Jer-

352. See text accompanying notes 267-71 *supra*.

353. B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 1037 (1975).

354. *E.g.*, CAL. CIV. CODE § 51 (West Supp. 1978) (amended to include sex in 1974); MASS. GEN. LAWS ANN. ch. 272, § 92A (West Supp. 1978-1979) (in 1971); MINN. STAT. ANN. § 363.03 (Supp. 1978) (in 1969); N.J. STAT. ANN. § 10:5-4 (West 1976) (in 1970).

355. Limited protection against sex discrimination is provided by a few statutes, *e.g.*, MD. ANN. CODE art. 49B, § 11 (Supp. 1977) (licensed establishments and state facilities only).

356. Harkins, *Sex and the City Council*, NEW YORK MAGAZINE, April 27, 1970, at 10-11. Carol Greitzer, the sponsor of the amendment to the New York public accommodations statute, for example, received eighty letters from lawyers protesting the sexual segregation of many Wall Street restaurants. Similarly, an Assistant Attorney General in New York in charge of the state's Civil Rights Bureau stated in 1970, before the amendment was passed, "We've had dozens of calls from women complaining about the renting problem and the restaurant problem." *Id.*

357. The apathy of Congress toward sex discrimination is very different from the approach taken toward school desegregation, where the federal government initiated action which was not well received by the states, and used coercive measures to enforce the law.

358. *Braun v. Swiston*, 72 Misc. 2d 661, 662, 340 N.Y.S.2d 468, 469 (1972).

359. *Nat'l Organization for Women v. State Division of Human Rights*, 34 N.Y.2d 416, 421, 314 N.E.2d 867, 870, 358 N.Y.S.2d 124, 128 (1974). The issue was not declared to be moot, even

sey court declared that the refusal of the Little League to admit girls constituted sex discrimination.<sup>360</sup> This landmark decision may lead to the opening of other traditionally male activities to women. In a few cases women who were refused goods and services have brought suit in states whose public accommodations statutes do not prohibit sex discrimination. In 1969, before sex was included in the New York public accommodations law, a woman denied service in a bar was found not to be protected by either the state law or by 42 U.S.C. § 2000(a).<sup>361</sup> A year later, a similar claim against a bar brought in federal court under section 1983 succeeded.<sup>362</sup>

Eleven of the twenty-six states whose civil rights laws cover sex discrimination qualify the prohibition against gender discrimination by an exemption which allows certain reasonable forms of discrimination.<sup>363</sup> Some of these exemptions specify particular places in which discrimination is acceptable. The New Mexico statute, for example, provides that "nothing contained in the Human Rights Act shall: . . . apply to public rest rooms, public showers, public dressing facilities, or sleeping quarters in public institutions, where the preference or limitation is based on sex."<sup>364</sup> Some statutes allow an establishment wishing to be exempted to apply to the civil rights commission for individual consideration.<sup>365</sup> The District of Columbia law exempts any action which is discriminatory in effect if it is "not intentionally devised or operated to contravene the prohibitions of this chapter and can be justified by business necessity."<sup>366</sup> Certain forms of sex discrimination would be allowed by this exemption.

### 5. *Handicap*

Prohibition of discrimination against handicapped persons is a long-neglected and rapidly developing area of law. Because the disabled have been largely excluded from society, recognition of this form of discrimination is particularly important. Until recently, most laws dealing with handicapped persons required segregation rather than access. A good example of these "ugly laws" was a Chicago city ordinance, repealed in 1974,<sup>367</sup> which stated that:

No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed

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though the newspaper had dropped the classification by the time the case was appealed, because the problem was found capable of repetition. *Id.* at 419, 314 N.E.2d at 869, 358 N.Y.S.2d at 126.

360. *Nat'l Organization for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 534 (App. Div. 1974).

361. *DeCrow v. Hotel Syracuse Corp.*, 59 Misc. 2d 383, 386, 298 N.Y.S.2d 859, 861-62 (1969).

362. *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 606 (S.D.N.Y. 1970).

363. Colorado, Connecticut, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New Mexico, New York, West Virginia, and Wisconsin.

364. N.M. STAT. ANN. § 4-33-8(D) (Supp. 1975); *see, e.g.*, KY. REV. STAT. § 344.145 (1977); N.J. STAT. ANN. § 10:5-12(f) (West Supp. 1978-1979).

365. D.C. CODE § 6-2203(a) (Supp. 1978).

366. The exemption in this statute is very narrow, allowing discrimination only in places where people customarily undress. B. BABCOCK, *supra* note 353, at 1070.

367. Achtenberg, *supra* note 324, at 851 n.9.

in or on the public ways or other public places in this city, shall therein or thereon expose himself on public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.<sup>368</sup>

Similar laws are still in effect in Columbus, Ohio, Omaha, Nebraska, and elsewhere.<sup>369</sup> Disabled persons, who number in the millions,<sup>370</sup> are subject to more extreme denials of access than any other disadvantaged group. Handicapped persons are frequently refused admission to a panoply of establishments because of their disabilities. More serious than such overt discrimination is covert discrimination based on the widespread attitude that the rights of handicapped persons are simply not important enough to warrant serious attention. Most buses, streets, and sidewalks are constructed without any thought to the needs of disabled persons.<sup>371</sup> Persons whose mobility is impaired are further hindered from free movement by the absence of ramps, elevators, wide doors in rest rooms, and Braille numbers on offices. By necessity they are often confined to institutions or sequestered in private homes.<sup>372</sup>

During the 1960's many disabled persons, perhaps motivated by the success of the civil rights movement,<sup>373</sup> "came out of the closet" and asserted their right to participate in public life.<sup>374</sup> They have since become one of the

368. *Id.*

369. *Id.*

370. Only limited statistics are available on the number of handicapped persons in the United States. According to the *New York Times*, the disabled population totals 30 million. *N.Y. Times*, June 18, 1978, § A, at 16, col. 1. The U.S. Department of Labor issued a fact sheet which listed statistics on employable handicapped persons titled "Who Are the Handicapped":

HANDICAP	NO. OF PEOPLE
Paralysis (muscular-skeletal)	5,400,000
Mentally Retarded	3,500,000
Mentally Restored	250,000
Partial Hearing Loss	2,000,000
Total Deafness	250,000
Epileptic	2,000,000
Kidney Failure	450,000
Amputee	200,000

Achtenberg, *supra* note 324 at 851 n.11.

371. One example of the lack of consciousness of the needs of disabled persons in the recent enactment of numerous laws allowing motorists to turn right on a red light. Blind persons are trained to cross streets when they hear the traffic begin to move in the direction they are going. Right turn on red eliminates any time period when a blind person can safely cross the street. The *Washington Star*, July 11, 1978, § A, at 7, col. 1.

372. The exclusion of the handicapped from normal life is evidenced by the fact that 22 percent of handicapped children receive an eighth grade education or less. Furthermore, the proportion of handicapped persons who earn less than subsistence wages is twice that of the general population. *N.Y. Times*, June 18, 1978, § A, at 16, col. 1.

373. Many disabled persons strongly identify with black civil rights advocates. Mrs. Leslie Milk, executive director of Mainstream, Inc., a group which advocates the rights of the disabled, said that "to be beautiful in America is to be blond, blue-eyed, and structurally straight. The blacks couldn't find themselves in *Glamour* and neither could the disabled." *Id.* at col. 2.

374. One writer notes that "[i]n the 1960's there was a political and legal revolution because a significant minority of the population had to sit at the back of the bus. Today, it is realized that a significant minority cannot even get on the bus." Achtenberg, *supra* note 324, at 850.

most prominent and aggressive activist groups in the country.<sup>375</sup> Legislators, however, have demonstrated only superficial concern about the access problems of the handicapped. The federal government and all of the states have enacted architectural barriers statutes which require that certain buildings be constructed to provide access to disabled persons and that some existing buildings be similarly modified.<sup>376</sup> Many states have amended their civil rights laws to prohibit discrimination against disabled persons.<sup>377</sup> These statutes appear to be very significant, but the annotated codes contain little evidence that they are enforced. In some instances, this means that enforcement occurs through administrative rather than judicial action. In others, the state commissions are not interested in enforcing the rights of disabled persons.<sup>378</sup> Shortly after the Architectural Barriers Law was passed in California, a state official in Los Angeles decided that the term "facilities" did not include sidewalks around state office buildings. Therefore, the statute did not require construction of ramps to accommodate wheel chairs. This interpretation denies many persons access to government services.<sup>379</sup> Added to governmental apathy is a general reluctance among the proprietors affected to comply with the law. Some plead ignorance of the law; others claim that compliance would be unreasonably expensive.<sup>380</sup>

Beginning in 1972 many lawsuits were filed by disabled persons who had been denied access to various public places in violation of law. The first decisions involved access to courthouses.<sup>381</sup> In one of these, an Ohio court issued a consent decree ordering modification of a courthouse to give a city councilman access to his own office, located in a building which had no elevators.<sup>382</sup> The State of California, on behalf of an official in the State Rehabilitation Department who was confined to a wheelchair, filed a lawsuit against a restaurant for violation of the Architectural Barriers Law.<sup>383</sup> The primary violation alleged was that the restroom was so small that the plaintiff was unable to close the door before urinating. The court ordered renovation of the restaurant to comply

375. During the first third of 1978, HEW received 377 complaints of discrimination against disabled persons brought under section 504 of the Rehabilitation Act of 1973. This number far exceeded the total of race and sex discrimination complaints brought during that period. N.Y. Times, June 18, 1978, § A, at 16, col. 1.

376. E.g., ME. REV. STAT. tit. 5, § 4593 (Supp. 1978); TENN. CODE ANN. § 53-2547 (Supp. 1977). See Achtenberg, *supra* note 324, at 852, 853.

377. E.g., CONN. GEN. STAT. ANN. § 53-34 (West Supp. 1978); D.C. CODE § 6-1502 (1973); IOWA CODE ANN. § 601A (West 1975); ME. REV. STAT. tit. 5, § 4591 (Supp. 1977); MD. ANN. CODE art. 49B, § 11 (Supp. 1977); MINN. STAT. ANN. § 363.03 (3) (Supp. 1978); NEV. REV. STAT. § 651.070 (1977); N.H. REV. STAT. ANN. § 354A-1 (Supp. 1977); N.J. STAT. ANN. § 10:5-4.1 (West 1976); N.M. STAT. ANN. § 4-33-7 (Supp. 1975); N.Y. EXEC. LAW § 296-2(a) (McKinney Supp. 1972-1977); OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1977); WIS. STAT. § 942.04(a) (1975).

378. Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1506-07 (1973); Achtenberg, *supra* note 324, at 855.

379. Achtenberg, *supra* note 324, at 855.

380. *Id.* at 856.

381. *Id.* at 859.

382. *Friedman v. County of Cuyahoga*, No. 895961 (Cuyahoga, Ohio, 1972), cited in Achtenberg, *supra* note 324, at 859.

383. *People v. Smuggler's Inn, Associated Hosts, Inc.*, No. 251428 (Sacramento County Super. Ct., March 1, 1975), cited in Achtenberg, *supra* note 324, at 857.

with statutory standards.<sup>384</sup> A case is now pending against San Francisco State University regarding construction of a student union which is only partly accessible to handicapped students. Since the lawsuit was filed in 1975, there has been no work done on the partially completed building, and a loan which the university obtained from HUD has been cancelled.<sup>385</sup>

There have been few cases involving disabled persons which deal with traditional denials of access. One example of this type of case was a suit brought in California by a young man confined to a wheelchair who was refused admission to a theater.<sup>386</sup> The court held that the act in question constituted invidious discrimination under the California civil rights law and awarded damages to the plaintiff despite the absence of specific coverage of disabled persons.<sup>387</sup>

Most current litigation relating to the access rights of the disabled involves the architectural barriers laws. One problem area is mass transit. Providing access to public transport facilities for disabled persons is difficult because of the extensive structural changes which must be made in buses and subway systems. Although radical steps have been taken in a few places, the buses and subways in most cities remain unchanged. A Washington state judge recently held that disabled persons have no right of access to mass transit facilities under either the state anti-discrimination law or the Constitution.<sup>388</sup> Public transport is particularly important to the handicapped because of the expense of specially designed, private cars and vans. Without easy access to transport, the obstacles to employment, education, and recreational activities may be insurmountable.<sup>389</sup> The difficulties faced by a mobility-impaired person in enforcing his or her own rights suggest a particular need for attention to this issue on the part of state commissions.

## 6. Marital Status

Only nine states and the District of Columbia prohibit discrimination on the basis of marital status in their public accommodations provisions.<sup>390</sup> Others

384. See note 382 *supra*.

385. *Disabled Student Union v. Bd. of Trustees*, Civil No. 692-231 (S.F. Cal. Super. Ct., July 1, 1975), cited in Achtenberg, *supra* note 324, at 863.

386. *Marsh v. Edwards Theater*, Circuit No. C55,376 (L.A. County Super. Ct., June 16, 1975), cited in Achtenberg, *supra* note 324, at 863.

387. Achtenberg, *supra* note 324, at 863. The Unruh Civil Rights Act was first held to prohibit discrimination against classifications other than those specifically mentioned in the Act in *In re Cox*, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).

388. *Martin v. Seattle King County Metropolitan Transit Comm'n*, No. 795,806 (King County, Wash. Super. Ct., filed April 25, 1975). See *Bohlke v. Golden Gate Bridge, Highway and Transp. Dist.*, Memorandum and Minute Order No. 73362 (Marin County, Cal. Super. Ct., May 9, 1975). Both cases are cited in Achtenberg, *supra* note 324, at 867.

389. Achtenberg, *supra* note 324, at 866.

390. ALASKA STAT. § 18.80.230 (Supp. 1977); CONN. GEN. STAT. ANN. § 53-35 (West Supp. 1978); DEL. CODE tit. 6, § 4503 (1974); D.C. CODE § 6-2241(a) (Supp. 1978); MD. ANN. CODE art. 49B, § 11 (Supp. 1977); MICH. COMP. LAWS ANN. § 32.302 (Supp. 1978-1979); N.H. REV. STAT. ANN. § 354-A:8(IV) (Supp. 1977); N.J. STAT. ANN. § 10:5-12(f) (West Supp. 1978-1979); N.Y. EXEC. LAW § 296(2)(a) (McKinney Supp. 1972-1977); OR. REV. STAT. § 30.670 (1977).

include marital status in their credit discrimination laws.<sup>391</sup> The primary reason for prohibiting discrimination based on marital status is to stop banks, credit institutions, and insurance companies from dealing with single and married persons on different terms. The inclusion of marital status is, however, relatively recent, and there have been few complaints filed and little or no court action on this subject.

### 7. Age

Age discrimination is very common in employment, but is rare in places of public accommodations. The civil rights statutes of seven states prohibit age discrimination,<sup>392</sup> but it is unlikely that the legislatures intended this classification to be invoked under the public accommodations sections of the laws. Prohibition of age discrimination may, however, be invoked by persons denied credit. This application would be possible only under those civil rights laws which cover both age discrimination and credit institutions, and under those credit laws which cover age discrimination.<sup>393</sup>

### 8. Sexual Orientation

Refusal of service to homosexuals in bars, restaurants, hotels, cabarets, and discotheques is common practice. Perhaps in retaliation, some gay bars discourage the patronage of heterosexuals. Until recently, many municipal ordinances required certain establishments to deny access to gay people.<sup>394</sup> A regulation of the New York City Department of Consumer Affairs, which was repealed in 1971, forbade the congregation of gay people in discotheques and cabarets.<sup>395</sup> Other laws not specifically directed against homosexuals are enforced in a discriminatory manner.<sup>396</sup>

Although during the past decade demands for gay rights have become more strident,<sup>397</sup> and although homosexuality has become increasingly acceptable, neither Congress nor any state legislature has passed a statute prohibiting discrimination against homosexuals. Only the District of Columbia includes sexual preference as a prohibited classification in its public accommodations law.<sup>398</sup> A bill is presently pending in the House of Representatives which would amend the Civil Rights Act of 1964 to prohibit discrimination based on "affectional or

391. *E.g.*, ME. REV. STAT. tit. 5, § 4596 (Supp. 1978); MINN. STAT. ANN. § 363.03 (Supp. 1977); MONT. REV. CODES ANN. § 64-306 (Supp. 1977); OHIO REV. CODE ANN. § 4112.021(B) (Page Supp. 1977).

392. CONN. GEN. STAT. ANN. § 53-35 (West Supp. 1978); DEL. CODE ANN. tit. 6, § 4503 (1974); D.C. CODE § 6-2241(a) (Supp. 1978); MICH. COMP. LAWS ANN. § 37.2302 (West Supp. 1978-1979); MONT. REV. CODES ANN. § 64-306(2)(a) (Supp. 1977); N.H. REV. STAT. ANN. § 354-A:8(IV) (Supp. 1977); W. VA. CODE § 5-11-9(f)(1) (Supp. 1977).

393. *E.g.*, ME. REV. STAT. tit. 5, § 4596 (Supp. 1978).

394. E. BOGGAN, M. HAFT, C. LISTER, & J. RUPP, *THE RIGHTS OF GAY PEOPLE 95-96 (1975)* [hereinafter cited as *RIGHTS OF GAY PEOPLE*].

395. *Id.*

396. 1 SEX. L. RPTR. 36 (1975).

397. In the summer of 1978 there was a gay rights rally in San Francisco attended by over 250,000 people, the largest ever held.

398. D.C. CODE § 6-2241(a) (Supp. 1978).



sexual preference."<sup>399</sup> Similar amendments have been proposed in Massachusetts and Oregon.<sup>400</sup> Another was recently defeated in Maine.<sup>401</sup>

Despite the noncoverage of sexual orientation in the state discrimination laws, a person discriminated against on that basis might initiate a lawsuit based on the theory that the public accommodations laws impliedly protect homosexuals. It may be argued either that sex preference is covered by prohibition of sex discrimination, or that the public accommodations laws prohibit all arbitrary discrimination.<sup>402</sup>

During the civil rights movement of the 1960's laws protecting the rights of blacks were enacted first in city councils and later by state legislatures.<sup>403</sup> The gay rights movement may be at an earlier stage in the same developmental course. As of August, 1978, thirty-four cities and counties had gay rights ordinances.<sup>404</sup> The coverage of these laws varies greatly. The most comprehensive include those of the District of Columbia, Minneapolis, Minnesota, Tucson, Arizona, San Francisco, California, and Howard County, Maryland.<sup>405</sup> The progress of the gay rights movement is slowed by another movement, which opposes access to public places, jobs, and housing for homosexuals. The anti-gay groups view the issue as one of morality rather than civil rights.<sup>406</sup> Their efforts have led to the repeal by referendum of five gay rights ordinances.<sup>407</sup>

Discrimination against homosexuals is often very subtle. Therefore, enforcement of existing civil rights ordinances which proscribe discrimination based on sexual preference proves difficult. There have been relatively few lawsuits based on these ordinances. This is because less formal enforcement mechanisms have been found effective. In the District of Columbia, for example, it is now generally recognized that discrimination against homosexuals is illegal.<sup>408</sup> The law operates as a deterrent, and those cases which do arise are resolved by conciliation.<sup>409</sup> Gay people who complain of discrimination to the Human Rights Commission are first advised to take a copy of the law to the offending proprietor, and to explain their intention to have it enforced.<sup>410</sup> In nearly every case this tactic has been effective.<sup>411</sup>

After the Washington, D.C. ordinance was passed, members of the gay community organized two dance-ins at establishments which would not permit

399. H. R. 2998 is discussed in 3 *SEX. L. RPTR.* 32 (1977).

400. 3 *SEX. L. RPTR.* 33 (1977).

401. *Id.*

402. 2 *SEX. L. RPTR.* 4-5 (1976); *RIGHTS OF GAY PEOPLE*, *supra* note 394, at 97.

403. *See* text accompanying note 167 *supra*.

404. Interview with a member of the Gay Activist Alliance of the District of Columbia, August 17, 1978.

405. Interview with Commissioner Frank Kameny, District of Columbia Commission on Human Rights, August 17, 1978 [hereinafter cited as Kameny Interview].

406. *N.Y. Times*, April 27, 1978, § A, at 20, col. 2.

407. These include Boulder, Colorado, Dade County, Florida, St. Paul, Minnesota, Wichita, Kansas, and Eugene, Oregon. Kameny Interview, *supra* note 405.

408. Kameny Interview, *supra* note 405.

409. *Id.*

410. *Id.*

411. *Id.*

gay people to dance together. In one case an investigator from the Human Rights Commission was present to monitor any discriminatory action. In the other case the management called the police, but the dispute was resolved without court action.<sup>412</sup> A complaint was filed against a restaurant in the District of Columbia which permitted simple displays of affection between heterosexual couples but not between homosexual couples.<sup>413</sup> The case never went to court, but was resolved through conciliation.

A city ordinance is not an automatic guarantee that gay people will no longer face discrimination. In Bloomington, Indiana, for example, the ordinance was interpreted by the state's Human Rights Commission not to require that a discotheque allow persons of the same sex to dance together.<sup>414</sup> The same commission claimed not to have jurisdiction to hear a complaint that a landlord barred two people of the same sex from sharing an apartment.<sup>415</sup> The reasoning in both cases was that no discrimination based on sexual orientation had been alleged.<sup>416</sup>

### 9. Other Innovative Coverage

Exclusion based on personal appearance is a common practice in restaurants and places of entertainment which impose dress requirements. Before the Washington, D.C. statute was amended to include personal appearance, a woman filed suit challenging the right of a restaurant to eject her because she was not wearing shoes. The Court of Appeals of the District of Columbia found that she had no statutory right of access and found the establishment of dress codes by restaurants to be permissible.<sup>417</sup> It is not clear whether a different result would have been dictated by the new law.

Discrimination based on family responsibilities is prohibited under the statutes of Alaska and Washington, D.C. The former uses broader language, barring denial of access based on "changes in marital status, pregnancy, or parenthood."<sup>418</sup> Thus it protects both divorced and married persons. These provisions could be used to challenge denial of a loan to a person with alimony obligations, or to challenge exclusion of parents accompanied by their children from restaurants, hotels, or places of entertainment.

Discrimination based on "matriculation" was included in the District of Columbia public accommodations statute to prohibit landlords from excluding students based on their student status.<sup>419</sup> The provision was enacted in response to a relatively short-lived problem of the late 1960's and early 1970's.<sup>420</sup>

412. *Id.*

413. *Id.*

414. 3 SEX. L. RPT. 21 (1977).

415. *Id.*

416. *Id.*

417. *Feldt v. Marriott Corp.*, 322 A.2d 913 (D.C. 1974). See *Reigler v. Holiday Skating Rink*, 393 Mich. 607, 227 N.W.2d 759 (1975) (denial of access due to hair length not violative of state law).

418. ALASKA STAT. § 18.80.200 (1974 & Supp. 1977). See *Hotel Employees Local 879 v. Thomas*, 551 P.2d 942 (1976).

419. Kameny Interview, *supra* note 405.

420. *Id.*

The Montana public accommodations law prohibits state officials from considering "political ideas" in considering applicants for state funding.<sup>421</sup> This section also bars the state from giving financial assistance to any organization which engages in discriminatory practices.<sup>422</sup>

The Massachusetts public accommodations statute prohibits discrimination on the basis of "class."<sup>423</sup> The potential implications of this provision are profound, but it is difficult to determine what the drafters intended by the inclusion of the classification.

In the District of Columbia the public accommodations provision prohibiting discrimination based on place of residence or business<sup>424</sup> could be used to challenge denial of a loan or an insurance policy, or refusal of service by businesses which deliver goods or services to homes or offices. This provision might also be invoked in actions challenging equal distribution of sewer, transport, or other state services to particular neighborhoods. In general, the District of Columbia public accommodations law offers broader protection than does any other. It exempts only those acts prohibited by the statute which may be justified by business necessity.<sup>425</sup>

#### *F. Remedies and Enforcement Under the State Statutes*

Thirty-eight states and the District of Columbia now have public accommodations statutes, compared with thirty-one states and the District of Columbia at the time of the passage of Title II.<sup>426</sup> Each statute creates some enforcement mechanism which provides for administrative, civil, and/or criminal penalties. States with comprehensive civil rights acts usually have human or civil rights commissions which handle complaints in the areas of housing, employment, and education, as well as in the area of public accommodations. Thirty-two states and the District of Columbia currently have agencies to rule upon public accommodations complaints and enforce remedial orders. This is more than double the number that had such agencies in 1964.<sup>427</sup> Other states rely primarily on judicial remedies to enforce their public accommodations statutes. These states may still have advisory agencies which distribute information on the public's rights and obligations under the civil rights laws and informally resolve disputes.

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421. MONT. REV. CODES ANN. § 64.324 (Supp. 1977).

422. *Id.*

423. MASS. GEN. LAWS ANN. ch. 272, § 92A (West Supp. 1978-1979).

424. D. C. CODE § 6-2241(a) (Supp. 1978).

425. *Id.*

426. For a summary of state anti-discrimination laws prior to 1965, see Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 WASH. L. REV. 841 (1965). This figure does not include those states which guarantee equal access solely to the handicapped.

427. Sixteen states had agencies empowered to enforce public accommodations statutes in 1964. *Id.* at 868 & Appendix.

## 1. Administrative Agencies

### a. Advisory Agencies

Some states without public accommodations laws have created agencies with advisory and educational functions whose goals may be as amorphous as promoting "understanding, respect and good will among all citizens."<sup>428</sup> These agencies, lacking statutory foundation and absent staffs with specific, albeit informal, duties, cannot hope to function effectively.

Some states leave enforcement of their public accommodation statutes in the hands of the state attorney general or the aggrieved party, but may also have advisory agencies which serve other functions. Both California and Illinois have agencies lacking regulatory powers. However, the agencies in these two states exemplify very different approaches to the role of the advisory agency. The California statute authorizes the creation by ordinance of human rights commissions in any city or county.<sup>429</sup> California has substituted more casual, local control for centralized authority, thus permitting a greater degree of experimentation, flexibility, and diversity than is possible under a more unified and bureaucratized commission. This goal has been achieved by the San Francisco Human Rights Commission (SFHRC). While the SFHRC has no enforcement powers, it has actively lobbied for more comprehensive city ordinances and has established an active mediation program. Its Social Programs Committee has become increasingly involved in a number of accommodations-related projects, such as advocating multilingual phone service and the implementation of a program of ramp construction for the city's handicapped.<sup>430</sup> Furthermore, the San Francisco ordinance has expanded its coverage to prohibit discrimination on the basis of sexual orientation, a more progressive stance than that of most state statutes.<sup>431</sup> Most of the duties undertaken by the SFHRC—organizing public meetings, negotiating with local employers, advising tenants' associations—are directed toward publicizing and effectuating the individual rights of San Francisco residents.

The Illinois Commission on Human Relations, on the other hand, focuses on providing community services rather than on protecting individual freedoms, by assisting communities in planning day care centers, youth job programs, citizens' crime prevention committees, family workshops, and public housing projects.<sup>432</sup> The state commission also supervises grass-roots agencies which are similarly oriented toward providing social services.<sup>433</sup> In dealing with individual complaints, the commission acts only as an intake and conciliation center. If

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428. N.C. GEN. STAT. § 143B-391(3) (Supp. 1977). The Tennessee Commission for Human Development and the Florida Commission on Human Relations, although without enforcement powers, do receive and conciliate complaints on a systematic basis. See TENN. CODE ANN. § 4-22-1 (1971); [1975-1976] FLORIDA COMM'N ON HUMAN REL. ANN. REP.

429. CAL. CIV. CODE § 50262 (West Supp. 1978).

430. [1977] HUMAN RIGHTS COMM'N OF SAN FRANCISCO ANN. REP. 39-42.

431. San Francisco, Calif., AD. CODE § 12A.2 (amended 1974).

432. [1975-1976] ILL. COMM'N ON HUMAN REL. BIENNIAL REP. 8-24.

433. *Id.* at 26.

conciliation fails, the complainant is referred to the state attorney general.<sup>434</sup>

All agencies, advisory and regulatory, have certain educational and advisory responsibilities: to inform the public of its rights and the business community of its duties; to establish councils to study the problem of discrimination and formulate affirmative action plans; to develop policies and procedures; and to advise the legislature.<sup>435</sup> Agencies also serve as information centers, publicizing the remedies available under the law and responding to specific inquiries. Most commissions publish pamphlets for wide distribution and maintain public information switchboards. States with substantial funding may also maintain a public relations branch which exploits the educational potential of the media. New York, for example, produces a bimonthly television show and sponsors a Spanish-language radio program.<sup>436</sup> Kansas, New Mexico, and New Hampshire require the posting of notices which identify the premises as ones covered by the state civil rights laws and which briefly describe the scope of protection.<sup>437</sup> These blanket posting requirements permit agencies to advertise rights and remedies in a manner more in keeping with their smaller budgets. If an agency is to competently perform its anti-discrimination functions, it must develop some program of public education, designed to heighten citizens' awareness of their rights and encourage enforcement activity by the public.

#### *b. Regulatory Agencies*

One of the most sweeping changes in the public accommodations area since 1964 is the increased number of agencies which have been granted regulatory and quasi-judicial authority in addition to their educational and advisory responsibilities. Regulatory civil rights commissions adhere to a classic procedural pattern based on each state's administrative procedure act: complaint, investigation, persuasion and conciliation, hearing, and judicial review. Variations in this procedural pattern are slight.

##### *(i) The Complaint*

Administrative proceedings are set in motion by the filing of a complaint, usually by an aggrieved party. In all states, commissions are also authorized to file complaints and usually do so at the discretion of an investigator.<sup>438</sup> The commissions' complaint-initiation prerogative is infrequently utilized, in part due to the tremendous backlogs of individual complaints,<sup>439</sup> but it is a poten-

434. *Id.* at 7-8.

435. *E.g.*, N.Y. EXEC. LAW §§ 294, 295 (McKinney 1972 & Supp. 1972-1977).

436. [1975] N.Y. STATE DIV. OF HUMAN RIGHTS ANN. REP. 39-40.

437. KAN. STAT. § 44-1012 (1973); N.H. REV. STAT. ANN. § 354-A:11 (Supp. 1977); N.M. STAT. ANN. § 4-33-13 (1974). The District of Columbia also has a blanket posting requirement, D.C. CODE § 6-2261 (Supp. 1978), and the Connecticut commission may require the posting of notices, CONN. GEN. STAT. § 53-35(b) (1958).

438. However, Maryland requires the approval of a majority of the commissioners before the Commission will initiate proceedings. MD. ANN. CODE art. 49B, § 12(b) (1972).

439. Most agencies report a considerably higher number of docketed complaints than closed complaints each year. Often as many as one-third of filed complaints remain open and unresolved a year later. *See* [1975-1976] MINN. DEP'T OF HUMAN RIGHTS BIENNIAL REP. 4; [1975-1976] MO.

tially powerful weapon in fighting discrimination. Individual complaints do not necessarily reflect the nature and extent of discrimination within a jurisdiction. Victims of discrimination are often either reluctant to complain or unaware of available recourse. This is especially true in public accommodations cases, since an offense may be isolated and the complaint process relatively complex. Additionally, many practices, such as subtly selective admissions policies and discriminatory advertising are not obvious to the immediate victim. The agency, not the individual aggrieved party, has the data and resources to detect patterns of discrimination. While an individual may think he or she has been refused entrance because the establishment is already filled, an agency could more readily determine whether the denial is valid or part of a discriminatory scheme. Charges of public accommodations discrimination are often more susceptible of group protection and proof than other civil rights violations. Complicated questions of job requirements, limited resources or positions, scarce housing stock, and academic qualifications, which may require individual resolution, are not at issue in public accommodations cases. As alternatives to agency initiation, agencies might accept complaints on behalf of a class or from organizations filing on behalf of their members. Only a few state statutes now authorize these practices,<sup>440</sup> which might achieve the same broad-range effects as agency initiation but at lower cost to the agency.

Before the available procedures are invoked, a complaint must be made in writing and verified. Filing deadlines for verified complaints vary from ten days to one year after the alleged discriminatory act occurred.<sup>441</sup> Short filing periods deny unsuspecting complainants access to agency protection, and verification requirements may deter parties from following through with complaints. Informal complaint procedures can resolve many grievances which otherwise would never be placed on an agency's docket and can warn proprietors of their obligations to the public. In Michigan, for example, a phone call may trigger an investigation or a preliminary conciliation attempt, potentially rectifying the problem without invoking official procedure.<sup>442</sup>

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COMM'N ON HUMAN RIGHTS ANN. REP. 13; [1976] WASH. STATE HUMAN RIGHTS COMM'N ANN. REP. 31. On the other hand, some states are making a concerted and successful effort to diminish their case backlog. See [1976] KAN. COMM'N ON CIV. RIGHTS REP. OF PROGRESS 8-15; [1975-1976] MICH. CIV. RIGHTS COMM'N ANN. REP. 23. These latter figures may reflect more perfunctory dismissals or stricter probable cause requirements rather than more efficient complaint processing methods.

440. Rhode Island will accept complaints from interested organizations. R.I. GEN. LAWS § 11-24-4 (1969) and New Jersey has accepted complaints from the National Organization for Women. See *Nat'l Organization for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33, *aff'd*, 67 N.J. 320, 338 A.2d 198 (1974). Minnesota and Pennsylvania take jurisdiction over class actions. See *Richardson v. School Bd. of I.S.D. No. 271*, 297 Minn. 91, 210 N.W.2d 911 (1973); *Pa. Human Rel. Comm'n v. Freeport Area School Dist.*, 467 Pa. 522, 359 A.2d 724 (1976).

441. Nebraska has the strictest time limitation on complaint filing, one of 10 days. NEB. REV. STAT. § 20-141(6) (1977). The New York statute of limitations is one year. N.Y. EXEC. LAW § 297.5 (McKinney Supp. 1972-1977).

442. [1975-1976] MICH. CIV. RIGHTS COMM'N ANN. REP. 34-5.

(ii) *Investigation*

The scope of an agency investigation is limited more by the investigator's available time and resources than by any statutory limitation.<sup>443</sup> After filing a complaint, an investigating officer may interview the parties or other persons who might be connected with the case, take depositions, order interrogatories, and subpoena documents. An agency's regulations may not authorize orders for depositions and subpoenas of persons not parties to the action, but an adverse inference may be made against parties failing to voluntarily comply with a request.<sup>444</sup> The interview may constitute a respondent's first notification that a complaint has been filed against him or her. Although most agencies require that a copy of the complaint be served on the respondent as soon as it is filed, some do not provide for notice prior to the hearing stage.<sup>445</sup> In the absence of a hearing, the respondent may never discover that a complaint has been filed against him or her.

Certain commissions do not hesitate to investigate complaints that extend beyond their jurisdiction. New Hampshire regularly investigates and conciliates credit complaints, despite the absence of a state equal credit statute.<sup>446</sup> Other agencies screen complaints before any investigation begins.<sup>447</sup> Agencies which receive relatively large numbers of complaints may be forced to refine their complaint processing methods to separate the more meritorious claims from complaints that are obviously beyond their enforcement powers.

(iii) *Conciliation and Persuasion*

Conciliation, an attempt by an investigator to negotiate with the respondent for an adjustment of a grievance, is the next phase. Its importance is evidenced by the number of complaints settled in this way. Pennsylvania, Michigan, and Ohio annually resolve 50% of their public accommodations complaints in this manner; Missouri and Alaska settle 40%, Minnesota over 33%,

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443. The scope of an agency investigation is never delineated and references to the process are vague. *See e.g.*, N.Y. EXEC. LAW § 297.2 (McKinney Supp. 1972-1977). However, the confidentiality provisions surrounding the conciliation stage will place limits on the evidence admissible at the hearing stage. *See* text accompanying notes 453-56 *infra*.

444. W. Va. Ad. Reg. 4.02(e) (1975).

445. *E.g.*, District of Columbia, Minnesota, and New York require that notice be given to the respondent upon the filing of a complaint. D.C. CODE § 6-2289 (Supp. 1978); MINN. STAT. § 363.06(1) (Supp. 1977); N.Y. EXEC. LAW § 297.2 (McKinney 1972). The Massachusetts statute does not mention notice until the hearing stage. MASS. GEN. LAWS ANN. ch. 151B, § 5 (West Supp. 1978-1979).

446. *See* Letter to the authors from Berel Firestone, Executive Director, New Hampshire Commission for Human Rights, October 5, 1977. The practice, however, has not always been upheld by the courts, especially when there is a conflict of agency jurisdiction. *See* Bd. of Higher Educ. of City of New York v. Carter, 26 Misc. 2d 989, 213 N.Y.S.2d 132 (1961), *modified*, 16 A.D.2d 443, 228 N.Y.S.2d 704 (1962), *modified*, 14 N.Y.2d 138, 250 N.Y.S.2d 33 (1964).

447. New York and New Jersey screen complaints before investigation or before the complaint is formally filed. *See* [1975] N.Y. STATE DIV. OF HUMAN RIGHTS ANN. REP. 47 (28 public accommodations complaints were dismissed for lack of jurisdiction); [1976] N.J. DIV. ON CIV. RIGHTS ANN. REP. 1. Minnesota makes no distinction between the screening and investigation stages. *See* [1975-1976] MINN. DEP'T OF HUMAN RIGHTS BIENNIAL REP. 9.

and Connecticut and Indiana about 25%.<sup>448</sup>

Conciliation is usually characterized as a discrete stage,<sup>449</sup> which does not begin until after an investigation and a "probable cause" determination have been made.<sup>450</sup> Nonetheless, conciliation attempts commonly begin during investigation. Settlements are frequently arrived at before a determination of probable cause can be made, often in situations where probable cause could not be found.<sup>451</sup> Resolution is usually formalized in a signed agreement, which often provides for a follow-up investigation to assure compliance.<sup>452</sup> Such an agreement is enforceable as a commission order. Any breach of the agreement could subject the violator to criminal penalties,<sup>453</sup> despite the fact that a similar finding might not have been reached by a hearing examiner.

The merging of conciliation and investigation becomes relevant later in the process, after negotiations have failed and the evidence gathered during negotiations is introduced at the hearing. A general rule is that all information obtained during conciliation is confidential and may not be submitted as evidence at a hearing.<sup>454</sup> Breaches of confidence sometimes carry criminal penalties more severe than those imposed for committing a discriminatory act.<sup>455</sup> This guarantee of privacy probably makes respondents more willing to negotiate and creates an atmosphere conducive to settlement. Faced with the threat of adverse publicity, respondents prefer to proceed with a hearing to preserve a chance of vindication. The State of Washington, however, dropped its confidentiality provision in 1957. Nonetheless, the Washington State Human Rights

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448. These figures represent the conciliation and adjustment rate after the complaints which were screened out, dismissed for lack of jurisdiction, or withdrawn by the complainant have been eliminated. See Letter to the authors from Sharyn Roberts, Alaska Human Rights Commission, November 8, 1977; [1976] CONN. COMM'S ON HUMAN RIGHTS AND OPPORTUNITIES ANN. REP. 8 [1976-1977] IND. CIV. RIGHTS COMM'N ANN. REP. 12; [1975-1976] MICH. CIV. RIGHTS COMM'N ANN. REP. 24; [1976] MINN. DEP'T OF HUMAN RIGHTS BIENNIAL REP. 9; [1975-1976] MO. COMM'N ON HUMAN RIGHTS ANN. REP. 17; [1975-1976] OHIO CIV. RIGHTS COMM'N ANN. REP. 18; [1975-1976] PA. HUMAN REL. COMM'N ANN. REP. 20.

449. *E.g.*, PA. STAT. ANN. tit. 43, § 959 (Purdon Supp. 1978-1979).

450. The New York agency makes a probable cause determination before conciliation begins. All complaints where probable cause is found are officially resolved, either through negotiation or a public hearing. Of the 57 public accommodations complaints for which probable cause was found, 23 were conciliated and 34 ordered for hearings. [1975] N.Y. DIV. OF HUMAN RIGHTS ANN. REP. 47.

451. A number of agencies have a "predetermination settlement" stage during the investigation whereby the parties may come to an informal agreement before a determination as to probable cause is made. See [1976-1977] COLO. CIV. RIGHTS COMM'N ANN. REP. 5; [1976-1977] IND. CIV. RIGHTS COMM'N ANN. REP. 9. Complaints listed as "satisfactorily adjusted" may also include some cases resolved before a cause determination was made." See [1975-1976] MINN. DEP'T OF HUMAN RIGHTS BIENNIAL REP. 3. See also note 446 *supra*.

452. *E.g.*, N.Y. EXEC. LAW § 297(3)(a) (McKinney 1972).

453. The conciliation agreement will usually take the form of a commission order which is judicially enforceable. See, *e.g.* KY. REV. STAT. § 344.200(4)(5) (1973); N.Y. EXEC. LAW § 297.3(a)(b) (McKinney 1972); W. Va. Ad. Reg. 4.03 (1975). Eight states impose criminal penalties for the violation of a commission order. See note 480 *infra*.

454. All states but Washington prohibit disclosure of what transpires during conciliation. See, *e.g.*, N.Y. EXEC. LAW § 297(3)(a) (McKinney 1972).

455. MD. ANN. CODE art. 49B, § 16 (Supp. 1977).



Commission continues to report a comparatively high rate of complaint adjustment.<sup>456</sup> The confidentiality policy seriously limits the evidence admissible at the hearing stage. It, in effect, assures that all information volunteered by the respondent is protected from disclosure and that only information obtained directly by the efforts of investigators is admissible.

Conciliation is a swifter, simpler approach to resolving differences than a hearing. But a hearing is often more attractive to the typically under-staffed and overworked agency. Conciliation avoids the problems associated with litigation, and is particularly appropriate to public accommodations controversies.

The greatest danger of conciliation is that the complainant may find his or her rights bargained away during negotiations. In public accommodations cases, on the other hand, both parties may be as eager for a quick resolution as is the agency. Respondents typically cooperate to avoid adverse publicity and the harm to business that the exposure accompanying a hearing may cause. Opening the facility to the complainant may be less disruptive to the respondent's operations than testifying at a hearing. Providing access to an accommodation is also an easier concession to make than those requested in other types of civil rights proceedings, such as the promise of a job, a promotion along with an award of back pay, or of an apartment in a building with no vacancies. Furthermore, the remedy sought by the complainant is an order for compliance with the statute. This amounts to access to the establishment plus minor, if any, monetary damages. Since the conciliation agreement often takes the form of an order, this remedy leaves the complainant well protected. Even when a conciliation agreement does not carry the force of an order, noncompliance triggers renewed investigations and public hearings.

#### (iv) *Hearing*

As agencies begin to require stricter and more elaborate procedural safeguards, the hearing loses its informal character and becomes indistinguishable from a trial. The right to counsel, the right to present evidence and cross-examine witnesses, notice requirements, testimony under oath, submission of briefs, and transcriptions of the proceedings have been incorporated into the agency proceedings of all states. The parties may amend complaints and answers, present oral arguments, raise objections to the introduction of evidence, and request continuances. Generally, the hearing is public. All agencies have the authority to subpoena documents and witnesses, but many require that the requesting party bear the costs of service, transportation, and the production of documents.<sup>457</sup> Usually the strict rules of evidence do not apply, and the hearing examiner may take account of all reliable, probative, and substantial evidence, statistical or otherwise, which tends to prove the existence of a discriminatory pattern or act.<sup>458</sup> Only the Kansas statute requires that the hearing

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456. 1957 WASH. LAWS ch. 37, § 17; [1976] WASH. HUMAN RIGHTS COMM'N ANN. REP. 31.

457. *E.g.*, Neb. Equal Opportunity Comm'n Rules and Regs. 5-(2). *Contra*, N.J. Div. on Civ. Rights Rules of Practice and Procedure 13:4-9.2(b) (1975).

458. Ohio Civ. Rights Comm'n Rules and Regs. CR 13.04(b) (1971).

panel be bound by the strict rules of evidence,<sup>459</sup> although a few states have incorporated this requirement into their rules and regulations.<sup>460</sup> Some states provide for intra-agency appeals or reconsideration. New York maintains a separate appellate board within the agency.<sup>461</sup> But the more typical pattern is to permit the agency to review its determination before the final order has been announced, whenever new evidence or the "interests of justice" so require.<sup>462</sup>

The hearing is an unpopular mode of resolution generally, and for public accommodations complaints in particular. The costs in time, resources, and inconvenience and the risk of failure simply outweigh the rewards of public vindication or monetary compensation. Although hearings are less bound up in burdensome procedure than are trials, certain standards of proof, rules of evidence, and discovery provisions must be observed. Establishing actual discrimination is difficult, especially for the lone complainant facing a corporate respondent represented by counsel. A complaint which might have been favorably settled by conciliation may be dismissed at a hearing. The agency also suffers when the complainant is defeated at the very visible hearing stage. Not only does a hearing represent a considerable commitment of time and resources but a victory for the respondent may undermine an agency's credibility and public image. Perhaps as a consequence of stricter procedures and the pressure of agency workloads, a very small proportion of complaints reach the hearing stage and few hearings involve public accommodations issues. In New York in 1975, an unusually high percentage of public accommodations complaints filed, 34 out of 189, ended in hearings.<sup>463</sup> Many states have held no public accommodations hearings in recent years.<sup>464</sup> Even states in which relatively high numbers of complaints are registered hold very few hearings.<sup>465</sup>

459. KAN. STAT. § 44-1005 (1973).

460. Mich. Dep't of Civ. Rights and Procedures 8 (1975); Neb. Equal Opportunity Comm'n Rules and Regs. 3-4(4)(b); W. Va. Ad. Reg. 7.19 (1975).

461. N.Y. EXEC. LAW § 297-a (McKinney Supp. 1972-1977).

462. See KAN. STAT. § 44-1010 (1973); WASH. REV. CODE ANN. § 49.60.255 (1962); Ind. Civ. Rights Comm'n Rules and Regs. 11.2; Ohio Civ. Rights Comm'n Rules and Regs. CR-21 (1971); W. Va. Ad. Reg. 7.25 (1975).

463. [1975] N.Y. ST. DIV. OF HUMAN RIGHTS ANN. REP. 47.

464. Alaska, Connecticut, Iowa, Kansas, Missouri, Ohio, and Washington have held few or no hearings in the last two or three years. Letter to the authors from Sharyn Roberts, Alaska Human Rights Commission, November 8, 1977; [1976] CONN. COMM'N ON HUMAN RIGHTS AND OPPORTUNITIES ANN. REP. 9-11; [1976] IOWA CIV. RIGHTS COMM'N ANN. REP. 11-13; [1976] KAN. CIV. RIGHTS COMM'N REP. ON PROGRESS 19-20; Letter to the authors from May N. Holmes, Maryland Commission on Human Relations, January 30, 1978; [1975-1976] MO. COMM'N ON HUMAN RIGHTS ANN. REP. 17; [1975-1976] OHIO CIV. RIGHTS COMM'N ANN. REP. 3; Letter to the authors from Morton Tytler, Attorney for the Washington State Commission on Human Rights, October 31, 1977.

465. Pennsylvania held two public accommodations hearings in the 1975-1976 fiscal year, [1975-1976] PA. HUMAN REL. COMM'N ANN. REP. 13; Minnesota held two in the past two years, [1975-1976] MINN. DEPT OF HUMAN RIGHTS BIENNIAL REP. 9; New Jersey held six hearings in the fiscal year 1977, Letter to the authors from Michael Prime, New Jersey Division on Civil Rights, Department of Law and Public Safety, October 3, 1977; West Virginia held two, [1975-1976] W. VA. HUMAN RIGHTS COMM'N ANN. REP. 7-11. Other states do not break down their complaint statistics to indicate which issues were resolved through hearings, but since few hearings are held it is unlikely that many, if any, concern public accommodations. See [1976] S.D. DIV. OF HUMAN

The Expedited Resolution Process (ERP), pioneered by the State of Washington<sup>466</sup> and recently adopted by the Colorado Civil Rights Commission,<sup>467</sup> offers a possible solution to the congestion and bureaucratic morass confronting aggrieved parties and agencies. ERP represents a compromise between conciliation and a formalized hearing. Shortly after a complaint is filed the parties and their witnesses are invited to a round table discussion to present their views. The discussion is moderated by a senior investigating officer who encourages the parties to settle early, before they become too firmly entrenched in their respective positions.<sup>468</sup> ERP provides the parties with a forum, but one without the trappings and complications of a hearing. Even when the conference is not successful, it is an effective means of gathering evidence, often acting as a substitute for a more time-consuming field investigation. In individual cases which involve relatively uncomplicated fact patterns, ERP may telescope investigation, conciliation, and hearing into one stage, thus enabling an investigator to handle twice as many cases as he or she did under the traditional system.<sup>469</sup>

(v) *Agency Remedies*

The standard agency remedy is an order to cease and desist the discriminatory practice and to admit the complainant to the accommodation in question. The order generally requires either that the respondent report back to the agency on his manner of compliance, or that the agency itself monitor the respondent to prevent continued or new violations.<sup>470</sup> States without blanket posting requirements often order accommodations found to be in violation of the law to post a notice stating that the establishment is required to comply with the state civil rights laws.<sup>471</sup> Often agencies have the express power to award compensatory damages.<sup>472</sup> Montana and Kentucky allow damages for

RIGHTS ANN. REP. 1 (11 hearings); [1976-1977] IND. CIV. RIGHTS COMM'N ANN. REP. 16 (31 hearings); [1975-1976] N.M. HUMAN RIGHTS COMM'N ANN. REP. 9 (17 hearings).

466. [1976] WASH. HUMAN RIGHTS COMM'N ANN. REP. 28.

467. [1976-1977] COLO. CIV. RIGHTS COMM'N ANN. REP. 11.

468. [1976] WASH. HUMAN RIGHTS COMM'N ANN. REP. 28.

469. *Id.*

470. All agencies require either that the respondent report back on compliance or that the agency perform a follow-up check on compliance. N.Y. EXEC. LAW § 297.4(c)(v) (McKinney 1972 & Supp. 1972-1977) requires a report on compliance from the respondent. KY. REV. STAT. § 344.200(5) (1977) provides that the Commission will investigate compliance after a conciliation agreement has been issued.

471. *E.g.*, IND. CODE § 22-9-1-6(k)(l) (1976); S.D. COMPILED LAWS ANN. § 20-13-42 (Supp. 1977).

472. CONN. GEN. STAT. ANN. § 53-36 (West Supp. 1978); D.C. CODE § 6-2293(a)(4) (Supp. 1978); IND. CODE § 22-9-1-6(k)(l) (1976); KAN. STAT. 44-1042 (Supp. 1977); KY. REV. STAT. § 344.230(3)(h) (1977); MICH. COMP. LAWS ANN. § 37.2605(2)(i) (Supp. 1977); MINN. STAT. § 363.071(2) (Supp. 1977); MONT. REV. CODES ANN. § 64-309(b) (Supp. 1977); N.M. STAT. ANN. § 4-33-10(E) (Supp. 1977); N.Y. EXEC. LAW § 297.4(c)(iii) (McKinney 1972 & Supp. 1972-1977). The West Virginia agency has been judicially granted authority to award compensatory damages. *State Human Rts. Comm. v. Pauley*, 212 S.E.2d 77 (1975). The Maryland court took an opposite position in *Gutwein v. Easton Publishing Co.*, 272 Md. 563, 325 A.2d 740 (1974). Most statutes authorize

humiliation and embarrassment.<sup>473</sup> The commissions in the District of Columbia, Connecticut, Kentucky, and Michigan award attorney's fees to successful complainants on a discretionary basis.<sup>474</sup> Only the Minnesota statute authorizes the commission to award punitive damages.<sup>475</sup> Monetary awards are rarely granted for public accommodations cases which do not reach the hearing stage, but conciliation settlements can, and sometimes do, include such compensation.<sup>476</sup>

In addition to orders and damage awards, agencies in seven states and the District of Columbia require violators to appear before the appropriate state licensing board to defend their rights to be licensed.<sup>477</sup> Such a remedy is particularly suited to violations of public accommodations statutes committed by hotels and restaurants which depend upon state liquor licenses to attract patrons. A revocation threatens more severe monetary loss than any award of damages. Referrals to licensing boards may be permitted even when the accommodation falls outside the statute. A state may revoke the liquor license of a private club on the theory that although the state cannot prevent the club from persisting in practices, it may use its licensing authority to discourage such behavior.<sup>478</sup>

#### (vi) *Judicial Review and Enforcement*

All agencies provide some form of judicial review to promote enforcement of agency orders. The Oklahoma statute specifies that an administrative order is not law until it has been enforced in a judicial proceeding.<sup>479</sup> Ten jurisdictions make non-compliance with an order a *per se* discriminatory act.<sup>480</sup> Violations are treated as willful obstructions of the commission's function and thus subject the offender to criminal or civil liability. The majority of state statutes follow a more moderate course. They give legal force to a commission order when an enforcement proceeding is not brought within a specified time,

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the agency, along with the power to issue cease and desist orders, to take "such affirmative action as . . . will effectuate the purpose of [the] act." *E.g.*, N.J. STAT. ANN. § 10:5-17 (West 1976). Such clauses may permit the agency to award damages but they have been the subject of little judicial interpretation.

473. KY. REV. STAT. § 344.230(3)(h) (1977); MONT. REV. CODES ANN. § 64-309(b) (Supp. 1977).

474. CONN. GEN. STAT. ANN. § 53-36 (West Supp. 1978); D.C. CODE § 6-2293(a)(5) (Supp. 1978); KY. REV. STAT. § 344.230(3) (1977); MICH. COMP. LAWS ANN. § 37.2605(2)(j) (Supp. 1977).

475. MINN. STAT. § 363.071(2) (Supp. 1977).

476. [1976] CONN. COMM'N ON HUMAN RIGHTS AND OPPORTUNITIES ANN. REP. 9.

477. D.C. CODE § 6-2297 (Supp. 1978); IND. CODE § 22-9-1-6(k)(l) (1976); MD. ANN. CODE art. 49B, § 11C (Supp. 1977); MICH. COMP. LAWS ANN. § 37.2605(3) (Supp. 1977); MINN. STAT. § 363.071(4) (Supp. 1977); N.Y. EXEC. LAW § 297(4) (McKinney 1972); PA. STAT. ANN. tit. 43, § 959 (Purdon Supp. 1978-1979).

478. B.P.O.E. Lodge No. 2043 of Brunswick v. Ingraham, Me., 297 A.2d 607, *stay granted*, 410 U.S. 903, *appeal dismissed*, 411 U.S. 924 (1972).

479. OKLA. STAT. tit. 25, § 1505(e) (1971).

480. ALASKA STAT. § 18.80.270 (1974); D.C. CODE § 6-2274 (Supp. 1978); KAN. STAT. § 44-1013 (1973); KY. REV. STAT. § 344.290 (1977); MO. ANN. STAT. § 314.080 (Vernon Supp. 1978); NEB. REV. STAT. § 20-143 (1977); N.H. REV. STAT. ANN. § 354-A:12 (1966); N.J. STAT. ANN. § 10:5-26 (West 1976); WASH. REV. CODE ANN. § 49.60.310 (1962); W. VA. CODE § 5-11-14 (1971).

but impose no penalty on the respondent who awaits a proceeding to enforce compliance.<sup>481</sup>

Judicial review of an agency finding may assume one of two procedural postures: a trial *de novo* or, more commonly, limited review. The New Mexico statute, for example, instructs the trial court, on appeal from an agency determination, to relitigate all issues, consider new objections, and permit either party to request a jury.<sup>482</sup> Other statutes require the court to accept the commission's finding of fact and to refuse consideration of objections not raised during the hearing. The agency decision will not be overturned unless the court finds that the agency acted beyond the scope of its authority or in an arbitrary or capricious manner.<sup>483</sup> In states where the administrative remedy is exclusive, requiring a trial *de novo* may be a more just policy because it compensates for whatever investigatory or evidentiary abuses occurred at the hearing and eliminates possible bias on the part of the commissioners on the hearing panel.

In twelve states the administrative remedy is exclusive and exhaustion of administrative procedures is required before judicial review becomes available.<sup>484</sup> Minnesota and Maine have partial exhaustion doctrines, which permit an aggrieved party to bring a civil suit only after the complaint has been dismissed by the commission.<sup>485</sup> Despite the lack of explicit language, all statutes requiring exhaustion may be subject to a similar interpretation. If the agency considers the dismissal of a complaint to be a final order, such a dismissal would be reviewable by the court.<sup>486</sup>

Six states require election of remedies; filing a complaint with the state agency bars the initiation of a civil or criminal suit and vice versa.<sup>487</sup> The statute of the District of Columbia bars court action only after the commission has made a final determination.<sup>488</sup> The agency's dismissal of a complaint may constitute its final determination. Hence, complainants should be wary of filing

481. *E.g.*, New York makes violation of a commission order a separate offense but specifies no additional penalties in the event of a violation. N.Y. EXEC. LAW § 296.8 (McKinney 1972).

482. N.M. STAT. ANN. § 4-33-12 (1974). Delaware, Kansas, and Michigan also authorize *de novo* appeals. *People's Comm. Hosp. Auth. v. Wayne Circuit Ct.*, 36 Mich. App. 537, 193 N.W.2d 900 (1971); DEL. CODE tit. 6, § 4513 (1974); KAN. STAT. § 44-1011 (1973).

483. NEB. REV. STAT. § 20-142(3)(b) (1977). Other statutes authorize a somewhat less narrow standard of review but require that the agency's findings of fact be conclusive if supported by sufficient evidence in the record. *See* N.Y. EXEC. LAW § 298 (McKinney 1972); OHIO REV. CODE ANN. § 4112.06(E) (Page 1973).

484. Iowa, Kansas, Maryland, Missouri, Nebraska, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Dakota, and the State of Washington make no provisions for civil and criminal penalties. Delaware permits a criminal suit only upon the approval of the commissioners, DEL. CODE. tit. 6, § 4514 (1974).

485. ME. REV. STAT. ANN. tit. 5, § 4622 (Supp. 1973); MINN. STAT. § 363.14(1) (Supp. 1977).

486. The Nebraska statute allows review of "any agency order or decision," which would include a dismissal. NEB. REV. STAT. § 20-142(1) (1977).

487. COLO. REV. STAT. § 24-34-701 (1973); KY. REV. STAT. § 344.270 (1977); N.Y. EXEC. LAW § 297.9 (McKinney 1972); N.J. STAT. ANN. § 10:5-27 (West 1976); PA. STAT. ANN. tit. 43, § 962(b) (Purdon Supp. 1978-1979); W. VA. CODE § 5-11-13 (Supp. 1977).

488. D.C. CODE § 6-2296(a) (Supp. 1978).

a complaint with the agency lest they lose the right to initiate a civil suit.

Neither exhaustion nor election is required in Arizona, Montana, Oregon, Idaho, Michigan, Massachusetts, Nevada, Ohio, Connecticut, Alaska, and Vermont.<sup>489</sup> Thus, civil actions may be brought before or after administrative proceedings. Because courts are often authorized to award greater damages than are agencies, a successful complainant might institute a civil suit to gain a remedy in excess of the commission's award. Whether a party may use the commission ruling as evidence in a state court proceeding is an unresolved question. There is no question, however, that attempts to subpoena information gathered during an investigation are barred by the confidentiality provisions found in most civil rights statutes.<sup>490</sup>

*c. Access and Jurisdiction*

After more than a decade of expanding administrative jurisdiction, that has widened the scope of protected classes, of covered accommodations, and of agency enforcement powers, there are currently signs of slowdown and even retrenchment. Less administrative energy is devoted to enforcement of public accommodations statutes than to other civil rights legislation. Hawaii and Virginia have fair housing and employment laws but no public accommodations statutes.<sup>491</sup> A few states have agencies which handle only employment discrimination complaints and enforce their public accommodations statutes exclusively through judicial remedies.<sup>492</sup> Others provide agency enforcement of public accommodations complaints but have more elaborate procedures and remedies for housing and employment complaints.<sup>493</sup>

Such differences do not necessarily indicate a lack of concern for discrimination in public accommodations. Certain procedures and remedies, such as temporary restraining orders and broad discovery, have little relevance to accommodations issues. Furthermore, agency involvement in housing and employment is understandably greater. Public accommodations complaints account for fewer than 5% of total complaints filed, while housing complaints account for 5% to 15%, and employment complaints for 75% to 90%.<sup>494</sup> Even

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489. The Arizona, Connecticut, Idaho, Indiana, Oregon, and Vermont statutes offer multiple remedies and make no mention of an exhaustion or election requirement. Other state statutes expressly allow dual suits. MASS. GEN. LAWS ANN. ch. 151B, § 5 (West 1971); MICH. COMP. LAWS ANN. § 37.2705 (1970); MONT. REV. CODES ANN. § 64-329 (Supp. 1977); NEV. REV. STAT. § 651.120 (1975); OHIO REV. CODE ANN. § 4112.06(B) (Page 1973).

490. In addition to the confidentiality provisions surrounding the conciliation process, see text accompanying notes 453-56 *supra*. Statutes usually prohibit public disclosure of all information concerning the processing and resolution of a complaint. See, e.g., IOWA CODE ANN. § 601A.14.4 (West 1975); N.Y. EXEC. LAW § 297.8 (McKinney 1972).

491. HAWAII REV. STAT. §§ 378-7 to 378-10 (Supp. 1977); VA. CODE §§ 36-86 to 36-88 (Supp. 1975).

492. See CAL. LAB. CODE §§ 1414 to 1426 (West 1971); ILL. ANN. STAT. ch. 48, §§ 852 to 855 (Smith-Hurd Supp. 1978).

493. Compare NEV. REV. STAT. §§ 118.010 to 118.120 with §§ 651.050 to 651.120 (1977). See CONN. GEN. STAT. ANN. § 53-36a (West Supp. 1978).

494. See [1977] ALASKA COMM'N FOR HUMAN RIGHTS ANN. REP. 47; [1976-1977] COLO. CIV. RIGHTS COMM'N ANN. REP. 4; [1976-1977] IND. CIV. RIGHTS COMM'N ANN. REP. 12; [1975-1976]

when public accommodations complaints are handled within the same agency and by the same process as are housing and employment complaints, the agency's jurisdiction in accommodations disputes is often narrower in terms of classes protected and scope of enforcement. Most agencies are expressly authorized to award monetary damages in the form of back pay for employment violations. However, the authority to award damages for public accommodations violations is frequently ambiguous, and has rarely been clarified by the courts.<sup>495</sup> Certain groups, such as the aged and women, are usually protected by state employment statutes, but may not be protected by public accommodations laws.<sup>496</sup> In some states, the access rights of the handicapped are protected by a separate statutory provision. Although criminal or civil remedies are available to protect the handicapped, the agencies are not authorized to accept and process such complaints.<sup>497</sup> No such distinction is made in the area of employment.

Nor have agencies been granted all the jurisdiction they could constitutionally command. Only the New York Division of Human Rights is authorized to take jurisdiction over complaints against out-of-state corporations doing business within the state.<sup>498</sup> Such expanded jurisdiction could have considerable impact on public accommodations enforcement by, for example, prohibiting discriminatory advertising by foreign resorts and discriminatory practices by businesses owned by outside investors.

Two recent decisions, one in Kansas and the other in Michigan, portend further narrowing of agency powers in the area of public accommodations. In *Kansas Commission on Civil Rights v. Howard*,<sup>499</sup> the Kansas Supreme Court held the state commission's coverage of prisons, jails, and schools under the public accommodations law invalid. The decision decreased the agency's public accommodations complaint load by 75%.<sup>500</sup> The Michigan Human Rights Commission narrowed its own jurisdiction and stopped accepting sex-based accommodations complaints in 1975, when it interpreted the Michigan sex discrimination statute as a penal law. Consequently, sixty-six complaints were closed by the agency, and the complainants were advised to seek state or local

IOWA CIV. RIGHTS COMM'N ANN. REP. 7; [1976] KAN. COMM'N ON CIV. RIGHTS REP. ON PROGRESS 8; [1975-1976] MICH. CIV. RIGHTS COMM'N ANN. REP. 24; [1975-1976] MINN. DEP'T OF HUMAN RIGHTS BIENNIAL REP. 9; [1975] N.Y. STATE DIV. OF HUMAN RIGHTS ANN. REP. 43; [1975-1976] OHIO. CIV. RIGHTS COMM'N ANN. REP. 3; [1975-1976] PA. HUMAN REL. COMM'N ANN. REP. 20; [1976] WASH. STATE HUMAN RIGHTS COMM'N ANN. REP. 31; [1976-1977] W. VA. HUMAN RIGHTS COMM'N ANN. REP. 23-24.

495. See note 472 *supra*.

496. In Arizona, sex discrimination is prohibited in employment but not in public accommodations. Compare ARIZ. REV. STAT. § 41-1463 (Supp. 1977-1978) with *id.* § 41-1442 (1974); compare VT. STAT. ANN. tit. 13, § 1451 (1974) with *id.* tit. 21, § 495 (Supp. 1978).

497. In Arizona, Nebraska, New Hampshire, and Rhode Island, denials of access to the handicapped result in criminal penalties. The state agencies have no jurisdiction over these complaints. See ARIZ. REV. STAT. § 24-411 (1971); NEB. REV. STAT. §§ 20-127, 20-129 (1977); N.H. REV. STAT. ANN. § 167:42-a (1975); R.I. GEN. LAWS § 40-9.1-3 (1969).

498. N.Y. EXEC. LAW § 298-a (McKinney Supp. 1972-1977).

499. 218 Kan. 248, 544 P.2d 791 (1975).

500. [1976] KAN. COMM'N ON CIV. RIGHTS REP. ON PROGRESS 11.

criminal prosecution.<sup>501</sup> Although at present infrequent, such occurrences may signal further limitations on the victim's access to civil rights agencies, which provide a simple, inexpensive remedy.

## 2. *Judicial Remedies*

Public accommodations statutes are largely enforced by state civil rights agencies. Few cases reach the courts, even in those states lacking agencies. Although rarely used, civil and criminal remedies are widely available. Twenty-one states and the District of Columbia offer judicial, as well as administrative, relief for public accommodations violations, and twelve states offer administrative, civil, and criminal remedies.<sup>502</sup>

Civil remedies are available in twenty-three states and the District of Columbia. In California and Utah civil relief is the exclusive remedy.<sup>503</sup> In addition to injunctive relief, successful plaintiffs usually will be awarded compensatory damages and, less often, attorney's fees.<sup>504</sup> Punitive or exemplary damages are authorized by statute in Idaho, Nevada, and Oregon.<sup>505</sup> Many states set minimum and maximum damage limitations. These accommodate situations where out-of-pocket costs are nonexistent or difficult to establish, and preclude excessive jury awards.

Criminal penalties—fines and/or imprisonment—are the sole mode of enforcement in North Dakota and Wyoming,<sup>506</sup> although eighteen states authorize

501. [1975-1976] MICH. CIV. RIGHTS COMM'N ANN. REP. 18-19.

502. The following states offer administrative, criminal, and civil enforcement: COLO. REV. STAT. §§ 24-34-502, 24-34-703 (1973 & Supp. 1976); CONN. GEN. STAT. ANN. §§ 53-35, 53-36 (West Supp. 1978) (A civil suit was authorized by *Ross v. Schade*, 7 Conn. Supp. 443 (1939)); IDAHO CODE §§ 18-7303, 67-5906, 67-5911 (Supp. 1977); IND. CODE §§ 22-9-1-6(k)(l), 35-46-2-1 (Supp. 1977); MASS. GEN. LAWS ANN. ch. 272, §§ 92A, 98 and ch. 151B, § 5 (West Supp. 1978-1979); ME. REV. STAT. tit. 5, §§ 4612, 4613(2)(B)(7) (1973 and Supp. 1977); MICH. COMP. LAWS ANN. §§ 27.2605, 750.147 (West Supp. 1978-1979); MINN. STAT. §§ 363.14, 363.071(2), 609.03 (Supp. 1977); MONT. REV. CODES ANN. §§ 64-309, 64-329 (Supp. 1978); NEV. REV. STAT. §§ 651.080, 651.090, 651.110 (1977); N.J. STAT. ANN. §§ 10:1-6, 10:1-7, 10:5-17 (West 1976 & Supp. 1978-1979); N.Y. EXEC. LAW §§ 297.4(c), 297.9, 299 (McKinney 1972 & Supp. 1972-1977).

The following states authorize administrative and civil remedies: ALASKA STAT. §§ 18.80.130, 22.10.020 (Supp. 1977); ARIZ. REV. STAT. §§ 41-1471, 41-1472 (1974); D.C. CODE §§ 6-2294, 6-2296(a) (Supp. 1978); KY. REV. STAT. §§ 344.230, 344.450 (1977); OR. REV. STAT. §§ 30.680, 659.060 (1977); PA. STAT. ANN. tit. 43, §§ 959, 962 (Purdon Supp. 1978-1979); W. VA. CODE §§ 5-11-10, 5-11-13 (Supp. 1977).

The following states offer criminal and administrative remedies: DEL. CODE tit. 6, §§ 4506(f), 4515 (1974); OHIO REV. CODE ANN. §§ 4112.05(G), 4112.99 (Page Supp. 1977); VT. STAT. ANN. tit. 13, §§ 1453, 1464 (1974).

503. CAL. CIV. CODE § 52(a) (West Supp. 1978); UTAH CODE ANN. § 13-7-4(c) (1953 & Supp. 1977).

504. A Nebraska statute authorizes an award of attorney's fees on appeal from an agency ruling. NEB. REV. STAT. § 20-142(6) (1977).

505. IDAHO CODE § 67-5911 (Supp. 1977); NEV. REV. STAT. § 651.090(c) (1977); OR. REV. STAT. § 30.680 (1977). California, Maine, and Michigan have treble damages provisions. CAL. CIV. CODE § 52(a) (West Supp. 1978); ME. REV. STAT. ANN. tit. 5, § 4613.2.B(6) (Supp. 1977); MICH. COMP. LAWS ANN. § 750.147 (West Supp. 1978-1979).

506. N.D. CENT. CODE § 12.1-14-04 (1976); WYO. STAT. § 6-83.2 (Supp. 1975). Wisconsin and



criminal penalties in addition, or as an alternative, to civil or administrative enforcement. Fines vary from \$100 to \$1000 and sentences range from thirty days to one year. In Utah and Illinois, the state attorney general may enjoin a violation as a public nuisance, in lieu of fines or imprisonment.<sup>507</sup> Eight states impose criminal penalties for willful violations of agency orders.<sup>508</sup> However, as the dearth of case law demonstrates, states are hesitant to bring criminal suits. This reluctance is exemplified by the Delaware statute which requires the approval of a majority of the Human Rights Commissioners before criminal proceedings may be instituted.<sup>509</sup>

Absent agency enforcement, civil and criminal remedies afford inadequate protection of the right of access. The expense of a civil suit discourages most victims from litigating. Criminal remedies have even less utility, for then enforcement is taken entirely out of the hands of the individual. Furthermore, in criminal prosecutions the procedural safeguards are more stringent, the problems of proof more difficult, and courts are more reluctant to impose criminal penalties, especially prison terms than to impose civil remedies. Courts may also construe the pertinent statutes strictly, as is traditional in criminal law. Criminal and civil penalties are not without merit, of course, but their primary value is for cases involving particularly egregious offenses. A criminal prosecution has significant symbolic value: it serves as evidence that the state will, if pressed, support its public accommodations legislation with its most potent weapon.

#### IV CONCLUSION

Title II represented the first federal attempt to deal with the problems of equal access since the post-Civil War era. At the time of its passage it was a sweeping piece of legislation, regulating private and social behavior to a greater extent than any prior federal law. Title II, however, covers a relatively narrow range of accommodations, prohibits only discrimination based on race, color, religion, and national origin, and offers severely limited remedies. The impact of Title II has been dissipated by other federal legislation, particularly the reinterpretation of the Civil Rights Act of 1866. More accommodations are covered and more classes protected under the 1866 Act, and claims of damages are available to supplement Title II's injunctive relief. The recent passage of the Attorneys' Fees Act, which permits courts to award attorneys' fees in claims brought under the Civil Rights Act of 1866 and other reconstruction statutes, has equalized the prior differences which existed between those laws and Title II.<sup>510</sup>

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Illinois permit civil and criminal actions, ILL. REV. STAT. ch. 38, §§ 13-3(a), (b) (1973); WIS. STAT. §§ 942.04(1,6) (1975). See note 502 *supra* for other criminal statutes.

507. ILL. REV. STAT. ch. 38, § 13-3(c) (1973); UTAH CODE ANN. § 13-7-4 (Supp. 1977).

508. See text accompanying note 480 *supra*.

509. DEL. CODE tit. 6, § 4515 (1974).

510. See text accompanying notes 97-98 *supra*.

Certain procedural advantages do remain which might recommend a Title II suit over others. The abstention doctrine, frequently invoked by the federal courts to refuse jurisdiction while a state action is pending,<sup>511</sup> or to permit the suspension of a federal suit if a state action is filed in the interim,<sup>512</sup> affects suits brought under sections 1981, 1982, and 1983. Title II, however, contains independent and explicit procedural requirements which limit the delays which can occur in state proceedings and to waive the requirement that the Attorney General proceed in state court.<sup>513</sup> Furthermore, Title II permits removal to federal court of state criminal proceedings involving Title II defenses. Title II's coverage is also clear. While it may be difficult to establish the applicability of the Civil Rights Act of 1866 to the accommodation in question, this is not necessary if suit is brought under Title II. Although other federal laws are more expansive in their language than Title II, such laws are susceptible of divergent interpretations because of this expansiveness.

The greatest advantage of Title II now may be its mere existence, the fact that it was passed. The Civil Rights Act of 1964 was enacted before the change in judicial consciousness that led to the revitalization of the more conservative 1866 Act in *Jones v. Alfred Mayer, Inc.*<sup>514</sup> The 1964 Act, and Title II in particular, may have acted as a catalyst to revive interest in civil rights issues and inspire a search for even broader coverage once its own constitutionality had been established. Although the current interpretations of sections 1981 and 1982 exceed the boundaries of Title II, the very breadth of the Reconstruction statutes implies that they could be contracted as they have been expanded. Such a retreat has occurred to some extent with the state action doctrine.<sup>515</sup> Title II provides a floor for other public accommodations legislation, a solid, if minimal, level of protection.

Nonetheless, federal law cannot reach certain private acts of discrimination as easily as state law can. State legislatures are not hindered by the constraints of federalism, constitutional or political, imposed on Title II. No interstate commerce barrier impinges on state regulation. The state may prohibit discrimination in all establishments until a constitutionally-based privacy interest surfaces. Federal law offers protection largely to victims of racial and ethnic discrimination, the groups which are afforded the strongest constitutional protection. State legislatures, with their unity of geographic interest, may agree to protect groups which have historically been victims of discrimination within the state borders or may succumb to the political pressures applied by local activists. State laws can be tailored to meet local needs and demands. For these reasons, state legislation is better suited to the task of enforcing antidiscrimination policies.

Most states have transcended the protections afforded by federal law by prohibiting discrimination in virtually all business establishments and protecting

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511. *Younger v. Harris*, 410 U.S. 37 (1971); *Huffman v. Pursue*, 420 U.S. 69 (1975).

512. *Hicks v. Miranda*, 422 U.S. 332 (1975).

513. See text accompanying notes 74-78 *supra*.

514. See text accompanying notes 84-88 *supra*.

515. See text accompanying notes 109-20 *supra*.

not only the groups mentioned in Title II but also women, the aged, and the disabled. A few states have expanded the concept of protected classes and have barred discrimination on grounds of marital status, personal appearance, and sexual preference. These states may now serve as a model for the expansion of federal coverage, although federal legislation once served that function for the states. The District of Columbia statute offers an excellent example of innovative civil rights legislation.<sup>516</sup>

Furthermore, the scope of state remedies and the effectiveness of state enforcement frequently go beyond the limited civil remedy provisions of federal law. Now that public accommodations issues are out of the spotlight, the cases have moved out of the courts. The responsibility for shoring up and maintaining the advances made in guaranteeing access to public accommodations has devolved upon state civil rights agencies. The observation that informal methods of resolution are the most appropriate for public accommodations grievances is supported by the large number of enforcement agencies which have been established, and the few public accommodations cases which reach either state or federal courtrooms. Ideally, an agency can provide more expedient and less expensive procedures for protecting the right of equal access. The fact that the number of accommodations complaints is fewer than other types of discrimination complaints,<sup>517</sup> and that many charges are withdrawn by complainants before resolution, may indicate that agency procedures have not fulfilled their promise of efficiency. Complaint backlogs cause delays of several months, and the increasingly formalized requirements of the administrative hearing discourage many victims of discrimination from pursuing their claims. A greater reliance on informal means of resolution—conciliation, negotiation and the Expedited Resolution Process<sup>518</sup>—and on class actions and group complaints might make an agency more responsive to the needs of victims of discrimination.

Once a state has passed a comprehensive public accommodations act, the presence of an active and efficient agency is the best single indicator of a state's commitment to its public accommodations legislation. Although accommodations complaints make up a small percentage of the total complaints filed, and agency attention is focused largely on employment and housing complaints, new areas of concern, such as credit discrimination and affirmative protection for the handicapped, are receiving attention by legislatures and agencies. The active agency also successfully settles and conciliates complaints prior to the hearing stage. It also explores and pushes the boundaries of its public accommodations laws to bring more establishments under its coverage, and investigates and challenges subtle exclusionary patterns and practices. The availability of a broad range of remedies—civil, criminal, and administrative—is a further sign that a state's interest in enforcing its public accommodation laws is genuine. By offering the maximum number of options to its citizens and back-

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516. See Appendix D *infra*.

517. See text accompanying notes 491-94 *supra*.

518. See text accompanying notes 466-69 *supra*.

ing up those choices with meaningful remedies, a state at least creates a climate which encourages victims of discrimination to exercise their rights of equal access.

The right of equal access is widely accepted and guaranteed in theory. It now remains to implement that theory in practice and eradicate swiftly and surely all remnants of this form of discrimination.

LISA GABRIELLE LERMAN\*  
ANNETTE K. SANDERSON

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\* Sections IIIA-E were written by Lisa Lerman. Sections II and IIIF were written by Annette Sanderson.

APPENDIX A

PLACES COVERED UNDER THE PUBLIC ACCOMMODATIONS AND CREDIT LAWS

	type of def. of PA's	restaurants	lodgings	places of entertainment	transport facilities	retail stores	wholesalers & distributors	state facilities	credit institutions	bars	cemeteries	beauty parlors & barber shops	garages & gas stations	swimming pools	hospitals	bathhouses & restrooms	private clubs	religious organizations	reasonable sep. of sex
Title II	L	X	X	X															e
Alabama	N																		
Alaska	L	X	X	X	X	X		X	Xc	X		X		X		X			
Arizona	Q	X	X	X		X													e
Arkansas	N																		
California	G	X	X	X	X	X		X	c										
Colorado	Q	X	X	X	X	X	X	X	c		X	X		X	X	X			c
Connecticut	G	X	X	X		X		X	c										c
Delaware	G	X	X	X		X		X				e							
District of Columbia	Q	X	X	X	X	X	X	X	X	X		X		X	X	X		e	e
Florida	N								c										
Georgia	N								c										
Hawaii	N								c										
Idaho	Q	X	X	X	X	X		X							X	X		e	e
Illinois	Q	X	X	X	X	X		X	c	X	X	X		X		X			
Indiana	G	X	X	X		X		X											
Iowa	G	X	X	X		X		X	c									e	e
Kansas	Q	X	X	X	X			X	c	X	X	X		X				e	e
Kentucky		X	X	X		X		X	X									e	e
Louisiana	N								c										
Maine	Q	X	X	X	X	X			c	X		X	X	X	X	X			
Maryland	L	X	X	X				X	c	X								e	e

Key to Appendixes A and B

- X: included in the public accommodations law
- c: included in the credit statute, the credit provision of the civil rights law, or the housing credit law
- e: exempted from the public accommodations law

L: long specific list      *Types of Definitions of Public Accommodations*  
 G: general language

*N.B.:* A general definition is assumed to cover restaurants, lodgings, places of entertainment, transport facilities, retail stores, and state facilities. The absence of an "X" does not mean that the place listed is not covered, but only that it is not specifically listed.

Q: long qualified list  
 N: no public accommodations law

## APPENDIX A (continued)

## PLACES COVERED UNDER THE PUBLIC ACCOMMODATIONS AND CREDIT LAWS

	type of def. of PA's	restaurants	lodgings	places of entertainment	transport facilities	retail stores	wholesalers & distributors	state facilities	credit institutions	bars	cemeteries	beauty parlors & barber shops	garages & gas stations	swimming pools	hospitals	bathhouses & restrooms	private clubs	religious organizations	reasonable sep. of sex	
Massachusetts	Q	X	X	X	X	X	X	X	c			X	X	X	X	X				c
Michigan	G	X	X	X	X	X		X	c									c		c
Minnesota	G	X	X	X	X	X		X	Xc											c
Mississippi	N																			
Missouri	Q	X	X	X				X	c			X						c		c
Montana	Q	X	X	X	X	X		X	c	X		X		X	X	X				c
Nebraska	Q	X	X	X				X				X						c		c
Nevada	Q	X	X	X					c	X		X						c		
New Hampshire	L	X	X	X	X			X				X				X				c
New Jersey	Q	X	X	X	X	X	X		c	X		X	X	X	X	X		c	c	c
New Mexico	G	X	X	X		X		X	X									c	c	c
New York	Q	X	X	X	X	X	X	X	c	X		X	X	X	X	X		e	c	c
North Carolina	N								c											
North Dakota	G	X	X	X		X		X			X									
Ohio	Q	X	X	X	X	X		X	c		X	X								
Oklahoma	G	X	X	X		X		X				c						c		c
Oregon	G	X	X	X		X		X												c
Pennsylvania	Q	X	X	X	X	X		X	c	X	X	X		X	X	X		e		c
Rhode Island	Q	X	X	X	X	X		X	c	X		X	X	X	X	X				c
South Carolina	N																			
South Dakota	G	X	X	X		X		X	Xc											c
Tennessee	N								c											
Texas	N								c											
Utah	G	X	X	X		X		X										e		c
Vermont	Q	X	X	X		X		X	c											
Virginia	N								c											
West Virginia	G	X	X	X		X		X	c									e		c
Washington	Q	X	X	X	X	X		X	c		X	X		X	X	X		e		c
Wisconsin	Q	X	X	X		X			c	X	X	X		X				e		c
Wyoming	G	X	X	X		X		X												

APPENDIX B  
CLASSIFICATIONS COVERED UNDER THE STATE PUBLIC ACCOMMODATIONS  
AND CREDIT LAWS

	race	color	national origin	ancestry	religion	creed	sex	marital status	physical handicap	mental handicap	age	sexual orientation	political affiliation
Title II	X	X	X		X								
Alabama													
Alaska	Xc	Xc	Xc		Xc		Xc	Xc					
Arizona	X	X	X	X		X							
Arkansas													
California	X	X	X	X	X		X	c					
Colorado	Xc	Xc	Xc	Xc	c	Xc	Xc	c					
Connecticut	Xc	Xc	Xc	Xc	c	Xc	Xc	Xc	Xc		Xc		
Delaware	X	X	X			X	X	X			X		
District of Columbia	X	X	X		X		X	X	X		X	X	
Florida							c	c					
Georgia	c		c		c		c	c					
Hawaii								c					
Idaho	X	X	X			X	X						
Illinois	Xc	Xc	Xc	Xc	X	Xc	c	c	X	X			
Indiana	X	X	X	X	X		X		X	X			
Iowa	Xc	Xc	X		Xc	Xc	Xc	c	Xc	X	c	c	
Kansas	Xc	Xc	Xc	Xc	Xc		Xc		X				
Kentucky	Xc	Xc	Xc		Xc		c				c		
Louisiana	c	c	c		c		c	c					
Maine	Xc	Xc	Xc	X	X		Xc	c	X	X	c		
Maryland	Xc	Xc	Xc		c	Xc	c	Xc	Xc	Xc			

*Key to Appendixes A and B*

- X: included in the public accommodations law  
 c: included in the credit statute, the credit provision of the civil rights law, or the housing credit law  
 e: exempted from the public accommodations law

*Types of Definitions of Public Accommodations*

- L: long specific list  
 G: general language

*N.B.:* A general definition is assumed to cover restaurants, lodgings, places of entertainment, transport facilities, retail stores, and state facilities. The absence of an "X" does not mean that the place listed is not covered, but only that it is not specifically listed.

- Q: long qualified list  
 N: no public accommodations law

APPENDIX B (continued)  
 CLASSIFICATIONS COVERED UNDER THE STATE PUBLIC ACCOMMODATIONS  
 AND CREDIT LAWS

	race	color	national origin	ancestry	religion	creed	sex	marital status	physical handicap	mental handicap	age	sexual orientation	political affiliation
Massachusetts	X	X	X		X	X	Xc	c	X		c		
Michigan	Xc	Xc	Xc		Xc		Xc	Xc	c	c	X		
Minnesota	Xc	Xc	Xc		Xc	Xc	Xc	c	Xc	Xc			
Mississippi													
Missouri	Xc	Xc	Xc	X	Xc	X							
Montana	Xc	Xc	Xc		Xc	Xc	Xc	c	Xc	Xc	Xc		
Nebraska	X	X	X	X	X	X	X						
Nevada	X	X	X		X		c	c	X				
New Hampshire	X	X	X			X	X	X	X	X	X		
New Jersey	Xc	Xc	Xc	Xc		Xc	Xc	Xc	X				
New Mexico	Xc	Xc	Xc	Xc	Xc		Xc	c	Xc	X			
New York	Xc	Xc	Xc			X	Xc	Xc	Xc	Xc			
North Carolina							c						
North Dakota	X	X	X		X		X						
Ohio	Xc	Xc	Xc	Xc	Xc		Xc	c	Xc	Xc	c		
Oklahoma	X	X	X		X		c	c					
Oregon	X	X	X		X		X	X					
Pennsylvania	X	X	X	X	X	X			X				
Rhode Island	X	X	X	X	X		c	c	X				
South Carolina													
South Dakota	Xc	Xc	Xc	Xc	Xc	Xc	Xc						
Tennessee							c	c					
Texas							c						
Utah	X	X	X	X	X		X						
Vermont	X	X	X			X	c	c					
Virginia							c	c					
West Virginia	Xc	Xc	Xc	Xc	Xc		Xc		Xc		X		
Washington	Xc	Xc	X			Xc	c	c					
Wisconsin	X	X	X	X		X	Xc	c	Xc				
Wyoming	X	X	X		X								



APPENDIX C  
REMEDIES AVAILABLE UNDER STATE PUBLIC ACCOMMODATIONS LAWS

State and Agency	Agency Remedy	Civil Remedy	Criminal Remedy	Other Provisions
Alaska	Order	Civil action for compensatory and punitive damages		Failure to comply with administrative order triggers criminal prosecution
Human Rights Commission				
Arizona	Order	Civil action for damages		
Division of Civil Rights				
California	Local agencies authorized by statute	Treble actual damages, attorneys' fees		
Colorado	Order	Damages not less than \$50, not more than \$500	Fine not less than \$10, not more than \$300, and/or up to 1 year imprisonment	Election of remedies
Civil Rights Commission				
Connecticut	Order, compensatory damages, attorneys' fees	Civil action for compensatory damages, attorneys' fees	Fine not less than \$25, not more than \$100, and/or 30 days imprisonment	
Delaware	Order		Fine not more than \$500 and/or 90 days imprisonment	Commission must certify that any criminal prosecution is in the public interest
Human Relations Commission				

District of Columbia	Order, compensatory damages, attorneys' fees, referral to licensing agency	Civil action for damages including but not limited to agency remedies	Election of remedies. Commission will institute a civil, then a criminal action for failure to comply with administrative order
Office of Human Rights			
Idaho	Order	Civil action for damages	Misdemeanor \$1000 punitive damages for willful violation of administrative order
Commission on Human Rights			
Indiana	Order, compensatory damages, referral to licensing agency	Damages not less than \$25, not more than \$100	Fine not less than \$25, not more than \$100, and/or up to 30 days imprisonment Civil action bar to criminal proceeding and vice versa
Civil Rights Commission			
Illinois	No enforcement powers	Damages not less than \$100, not more than \$1000; accommodation may be enjoined as a public nuisance	Class B misdemeanor
Commission on Human Relations			
Iowa	Order		Administrative remedy is exclusive
Civil Rights Commission			
Kansas	Order, compensatory damages		\$500 and/or up to one year for willful violation of Commission order Administrative remedy is exclusive
Commission on Civil Rights			

APPENDIX C (continued)  
REMEDIES AVAILABLE UNDER STATE PUBLIC ACCOMMODATIONS LAWS

State and Agency	Agency Remedy	Civil Remedy	Criminal Remedy	Other Provisions
Kentucky	Order, compensatory damages, damages for humiliation and embarrassment, attorneys' fees	Actual damages, attorneys' fees	\$100 and/or 30 days for willful violation of Commission order or for breach of confidentiality	Election of remedies
Commission on Human Rights				
Maine	Commission empowered to bring civil action on finding of probable cause	Treble damages for price discrimination; damages not more than \$100 for first offense, \$250 for second offense, \$1000 for third offense		Partial exhaustion of administrative remedies
Human Relations Commission				
Maryland	Order, referral to licensing agency			Administrative remedy is exclusive
Human Relations Commission				
Massachusetts	Order	Damages not more than \$100, not more than \$500	Fine not more than \$300 and/or up to 1 year imprisonment	
Commission Against Discrimination				
Michigan	Order, compensatory damages, attorneys' fees, referral to licensing agency	Treble damages sustained	Fine not less than \$100 and/or 15 days imprisonment	
Civil Rights Commission				

Minnesota	Order, compensatory damages, punitive damages not more than \$25 and not more than \$500, referral to licensing agency	Relief limited to administrative remedies plus attorneys' fees	Misdemeanor, fine not more than \$300 and/or up to 90 days imprisonment	Partial exhaustion of administrative remedies
Department of Human Rights				
Missouri	Order		Interference with Commission a misdemeanor	Administrative remedy is exclusive
Commission on Human Rights				
Montana	Order, compensatory damages, damages for humiliation and embarrassment	Civil action for damages	Misdemeanor, fine not more than \$500 and/or up to 60 days imprisonment	
Commission for Human Rights				
New Hampshire	Order		Interference with Commission a misdemeanor	Administrative remedy is exclusive
Commission for Human Rights				
New Jersey	Order	Forfeiture to state of sum not less than \$100, not more than \$500 out of which attorneys' fees may be recovered by plaintiff	Misdemeanor, fine not more than \$500 and/or up to 90 days imprisonment. Interference with Commission leads to fine not more than \$500 and/or up to 1 year imprisonment	Election of remedies
Division of Civil Rights				
New Mexico	Order, damages not to exceed \$1000			Administrative remedy is exclusive
Human Rights Commission				

APPENDIX C (continued)  
REMEDIES AVAILABLE UNDER STATE PUBLIC ACCOMMODATIONS LAWS

State and Agency	Agency Remedy	Civil Remedy	Criminal Remedy	Other Provisions
New York Division of Human Rights	Order, compensatory damages, referral to licensing agency	Civil action for damages	Misdemeanor; fine not more than \$500 and/or up to 1 year imprisonment	Election of remedies
Nebraska Equal Opportunity Commission	Order		Willful violation of administrative order leads to fine of not more than \$100 and/or 30 days imprisonment	Administrative remedy is exclusive
Nevada Equal Rights Commission	Order	Damages, punitive damages to \$250, attorneys' fees	Misdemeanor	
North Dakota Ohio	Order		Class B misdemeanor	
Civil Rights Commission Oklahoma	Order		Misdemeanor	Administrative remedy is exclusive
Human Rights Commission				

Oregon	Order	Compensatory and punitive damages; attorneys' fees	Civil action also available for violation of Commission order
Civil Rights Division			
Pennsylvania	Order, referral to licensing agency	Civil action for equitable relief	Election of remedies
Human Relations Commission			
Rhode Island	Order		Administrative remedy is exclusive
Commission Against Discrimination			
South Dakota	Order		Administrative remedy is exclusive
Division of Human Rights			
Utah	No enforcement powers	Civil action for damages and expenses incurred	
Anti-Discrimination Commission			
Vermont	Order	Fine not more than \$500 and/or up to 30 days imprisonment	
Commission on Human Rights			
Washington	Order	Willful interference with Commission order is a misdemeanor	Administrative remedy is exclusive
Human Rights Commission			

APPENDIX C (continued)  
REMEDIES AVAILABLE UNDER STATE PUBLIC ACCOMMODATIONS LAWS

State and Agency	Agency Remedy	Civil Remedy	Criminal Remedy	Other Provisions
West Virginia	Order, compensatory damages	Civil action permitted	Willful interference with Commission order is a misdemeanor; fine not less than \$100, not more than \$500 and/or up to 30 days imprisonment	Election of remedies
Human Rights Commission				
Wisconsin		Damages not less than \$100	Fine not more than \$200 and/or up to 6 months imprisonment	
Wyoming			Misdemeanor; fine not more than \$100 and/or up to 90 days imprisonment	

APPENDIX D

SUBCHAPTER I.—GENERAL PROVISIONS

§ 6-2201. Purpose.

It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia, to discrimination for any reason other than that of individual merit, including, but not limited to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence or business.

§ 6-2202. Definitions.

The following words and terms when used in this chapter have the following meanings:

(a) "Administrative Procedure Act" means the "District of Columbia Administrative Procedure Act," (D.C. Code, sec. 1-1501 et seq.);

(b) "Age" means eighteen (18) years of age or older except that, in a case of employment, age shall be defined as eighteen (18) to sixty-five (65) years of age, unless otherwise prohibited by law;

....

(l) "Family Responsibilities" means the state of being, or the potential to become, a contributor to the support of a person or persons in a dependent relationship, irrespective of their number;

(m) "Hearing Tribunal" means members of the Commission, or one or more hearing examiners, appointed by the Commission to conduct a hearing;

....

(p) "make public" means disclosure to the public or to the news media of any personal or business data obtained during the course of an investigation of a complaint filed under the provisions of this chapter, but not to include the publication of EEO-1, EEO-2, or EEO-3 reports as required by the Equal Employment Opportunities Commission, or any other data in the course of any administrative or judicial proceeding under this chapter; or any judicial proceeding under Title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.] involving such information; nor shall it include access to such data by staff or the Office of Human Rights, members of the Commission on Human Rights, or parties to a proceeding, nor shall it include publication of aggregated data from individual reports;

(q) "Marital status" means the state of being married, single, divorced, separated, or widowed and the usual conditions associated therewith, including pregnancy or parenthood;

(r) "Matriculation" means the condition of being enrolled in a college, or university; or in a business, nursing, professional, secretarial, technical or vocational school; or in an adult education program;

....

(t) "Owner" means one of the following:

(1) any person, or any one of a number of persons in whom is vested all or any part of the legal or equitable ownership, dominion, or title to any real property;



(2) the committee, conservator, or any other legal guardian of a person who for any reason is non sui juris, in whom is vested the legal or equitable ownership, dominion or title to any real property; or

(3) a trustee, elected or appointed or required by law to execute a trust, other than a trustee under a deed of trust to secure the payment of money; or one who, as agent of, or fiduciary, or officer appointed by the court for the estate of the person defined in paragraph (1) of this definition shall have charge, care or control of any real property.

The term "owner" shall also include the lessee, the sublessee, assignee, managing agent, or other person having the right of ownership or possession of, or the right to sell, rent or lease, any real property;

(u) "Person" means any individual, firm, partnership, mutual company, joint stock company, corporation, association, organization, unincorporated organization, labor union, government agency, incorporated society, statutory or common law trust, estate, executor, administrator, receiver, trustee, conservator, liquidator, trustee in bankruptcy, committee, assignee, officer, employee, principal or agent, legal or personal representative, real estate broker or salesman or any agent or representative of any of the foregoing;

(v) "Personal appearance" means the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees, for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual;

(w) "Physical handicap" means a bodily or mental disablement which may be the result of injury, illness or congenital condition for which reasonable accommodation can be made;

(x) "Place of public accommodation" means all places included in the meaning of such terms as inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest; restaurants or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores, and establishments dealing with goods or services of any kind, including, but not limited to the credit facilities thereof; banks, savings and loan associations, establishments of mortgage bankers and brokers, all other financial institutions, and credit information bureaus; insurance companies and establishments of insurance policy brokers; dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiards and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures, occupied by two (2) or more tenants, or by the owner and one (1) or more tenants. Such term shall not include any institution, club, or place of accommodation which is in its nature distinctly private except, that any such

institution, club or place of accommodation shall be subject to the provisions of section 6-2277;

(y) "Political affiliation" means the state of belonging to or endorsing any political party;

....

(cc) "Sexual orientation" means male or female homosexuality, heterosexuality and bisexuality, by preference or practice;

(dd) "Source of income" means the point, the cause, or the form of the origination, or transmittal, of gains of property accruing to a person in a stated period of time; including, but not limited to, money and property secured from any occupation, profession or activity, from any contract, agreement or settlement, from federal payments, court-ordered payments, from payments received as gifts, bequests, annuities, life insurance policies and compensation for illness or injury, except in a case where conflict of interest may exist;

....

(ff) "Unlawful discriminatory practice" means those discriminatory practices which are so specified in subchapter II of this chapter.

#### § 6-2203. Exceptions.

(a) Any practice which has a discriminatory effect and which would otherwise be prohibited by this chapter shall not be deemed unlawful if it can be established that such practice is not intentionally devised or operated to contravene the prohibitions of this chapter and can be justified by business necessity. Under this chapter, a "business necessity" exception is applicable only in each individual case where, it can be proved by a respondent that, without such exception, such business cannot be conducted; a "business necessity" exception cannot be justified by the factors of increased cost to business, business efficiency, the comparative characteristics of one group as opposed to another, the stereotyped characterization of one group as opposed to another, and the preferences of co-workers, employers, customers or any other person.

(b) Nothing contained in the provisions of this chapter shall be construed to bar any religious or political organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious or political organization, from limiting employment, or sales, or rental of housing accommodations, or admission to or giving preference to persons of the same religion or political persuasion as is calculated by such organization to promote the religious or political principles for which it is established or maintained.

(c) Nothing in this chapter shall be construed to supersede any federal rule, regulation or act.

#### § 6-2204. Severability.

If any provision, or part thereof of this chapter or application thereof to any person or circumstances is held invalid, the remainder of the chapter and the application of the provision, or part thereof, to other persons not similarly situated or to other circumstances is not to be affected thereby.

## SUBCHAPTER II.—PROHIBITED ACTS OF DISCRIMINATION

### PART A.—RIGHTS OF INDIVIDUALS

#### § 6-2211. Equal opportunities.

Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to

participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.

....

#### PART D.—PUBLIC ACCOMMODATIONS

##### § 6-2241. Prohibitions.

(a) *General.* It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business, of any individual:

(1) to deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations;

(2) to print, circulate, post, or mail, or otherwise cause, directly or indirectly, to be published a statement, advertisement, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation will be unlawfully refused, withheld from or denied an individual; or that an individual's patronage of, or presence at, a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable.

(b) *Subterfuge.* It is further unlawful to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business, of any individual.

....

#### PART F.—GENERAL REQUIREMENTS

##### § 6-2261. Posting of notice.

Every person subject to this chapter shall post and keep posted in a conspicuous location where business or activity is customarily conducted or negotiated, a notice whose language and form has been prepared by the Office, setting forth excerpts from or summaries of, the pertinent provisions of this chapter and information pertinent to the filing of a complaint.

##### § 6-2262. Records and reports.

(a) Every person subject to this chapter shall preserve any regularly kept business records for a period of six (6) months from the date of the making of the record, or from the date of the action which is the subject of the record, whichever is longer; such records shall include, but not be limited to, application forms submitted by applicants, sales and rental records, credit and reference reports, personnel records, any any other records pertaining to the status of an individual's enjoyment of the rights and privileges protected or granted under this chapter.

(b) Where a charge of discrimination has been filed against a person under this chapter, the respondent shall preserve all records which may be relevant to the charge or action, until a final disposition of the charge in accordance with subsection (c) of this section.

(c) All persons subject to this chapter shall furnish to the Office, at the time and in the manner prescribed by the Office, such reports relating to information under their control as the Office may require. The identities of persons and properties contained in reports submitted to the Office under the provisions of this section shall not be made public.

§ 6-2263. Affirmative action plans.

It shall not be an unlawful discriminatory practice for any person to carry out an affirmative action plan that has been approved by the Office. An affirmative action plan is any plan devised to effectuate remedial or corrective action in response to past discriminatory practices prohibited under this chapter and may also include those plans devised to provide preferential treatment for a class or classes of persons, which preferential treatment by class would otherwise be prohibited by this chapter and which plan is not devised to contravene the intent of this chapter.

PART G.—OTHER PROHIBITED PRACTICES

§ 6-2271. Coercion or retaliation.

(a) It shall be an unlawful discriminatory practice to coerce, threaten, retaliate against, or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected under this chapter.

(b) It shall be an unlawful discriminatory practice for any person to require, request, or suggest that a person retaliate against, interfere with, intimidate or discriminate against a person, because that person has opposed any practice made unlawful by this chapter, or because that person has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing authorized under this chapter.

(c) It shall be an unlawful discriminatory practice for any person to cause or coerce, or attempt to cause or coerce, directly or indirectly, any person to prevent any person from complying with the provisions of this chapter.

§ 6-2272. Aiding or abetting.

It shall be an unlawful discriminatory practice for any person to aid, abet, invite, compel or coerce the doing of any of the acts forbidden under the provisions of this chapter or to attempt to do so.

§ 6-2273. Conciliation agreements.

It shall be an unlawful discriminatory practice for a party to a conciliation agreement, made under the provisions of this chapter, to violate the terms of such agreement.

§ 6-2274. Resisting the Office or Commission.

(a) Any person who shall willfully resist, prevent, impede or interfere with the Office or the Commission, or any of their representatives, in the performance of any duty under the provisions of this chapter; or shall willfully violate an order of the Commission, shall upon conviction, be punished by imprisonment for not more than ten (10) days, or by a fine of not more than three hundred dollars (\$300), or by both, except, that filing a petition for review of an order, pursuant to the provisions of this chapter, shall not be deemed to constitute such willful conduct, nor shall compliance with any procedure regarding a subpoena in accord with section 1-237, be deemed to constitute such willful conduct.

(b) It shall be an unlawful discriminatory practice for a person subject to this chapter to fail to post notices, maintain records, file reports, as required by Part F of this subchapter, or to supply documents and information requested by the Office in connection with a matter under investigation.

§ 6-2275. Falsifying documents and testimony.

It shall be unlawful to willfully falsify documents, records or reports, which are required or subpoenaed pursuant to this chapter, or willfully to falsify testimony, or to intimidate any witness or complainant; such violations shall be punishable by imprisonment for not more than ten (10) days, or by a fine of not more than three hundred dollars (\$300), or by both.

§ 6-2276. Arrest records.

It shall be an unlawful practice, punishable by a fine of not more than three hundred dollars (\$300) or imprisonment for not more than ten (10) days, or both, for any person to require the production of any arrest record or any copy, extract, or statement thereof, at the monetary expense of any individual to whom such record may relate. Such "arrest records" shall contain only listings of convictions and forfeitures of collateral that have occurred within ten (10) years of the time at which such record is requested.

§ 6-2277. District of Columbia licenses.

All permits, licenses, franchises, benefits, exemptions or advantages issued by or on behalf of the Government of the District of Columbia, shall specifically require and be conditioned upon full compliance with the provisions of this chapter; and shall further specify that the failure or refusal to comply with any provision of this chapter shall be a proper basis for revocation of such permit, license, franchise, benefit, exemption or advantage.

§ 6-2278. Effects clause.

Any practice which has the effect or consequence of violating any of the provisions of this chapter shall be deemed to be an unlawful discriminatory practice.

### SUBCHAPTER III.—PROCEDURES

§ 6-2281. Authority of the Director and Commission.

(a) The activities of the Office and the Commission, under the provisions of this chapter, shall be considered investigations or examinations of municipal matters, within the meaning of section 1-237; and the Commission, the individual members thereof, and the Director, shall possess the powers vested in the Council of the District of Columbia.

(b) The Office is hereby empowered to undertake its own investigations and public hearings on any racial, religious, and ethnic group tensions, prejudice, intolerance, bigotry and disorder; and on any form of, or reason for, discrimination, in accordance with sections 6-2201 and 6-2211, against any person, group of persons, organization, or corporations, whether practiced by private persons, associations, corporations, city officials or city agencies; for the purpose of making appropriate recommendations for action, including legislation, against such discrimination.

(c) The Office and the Commission may make, issue, adopt, promulgate, amend and rescind such rules and procedures as they deem necessary to effectuate and which are not in conflict with, the provisions of this chapter. Such rules and procedures and

amendments thereto, shall be adopted and promulgated in accordance with procedures promulgated pursuant to the D.C. Administrative Procedure Act.

(d) In taking any action authorized or required by the provisions of this chapter, the Commission may act through panels or a division of not less than three (3) of its members, a majority of whom shall constitute a quorum.

(e) The Mayor shall recommend to the Council, any additional regulations.

(f) Investigations relating to the enforcement of provisions of this chapter shall be given priority over all other duties and activities of the Office.

(g) The Mayor shall report annually to the Council as to the progress with regard to the enforcement of this chapter, and any other activity related to the field of human rights deemed valuable to the Council in the pursuit of its responsibilities.

§ 6-2282. Complaints filed with other District agencies.

Nothing in the provisions of this chapter is deemed to relieve any agency or authority of the government of the District of its obligation to take immediate and independent action regarding a matter filed with it, in accord with its jurisdiction, that also may be the subject of a complaint filed with the Office.

§ 6-2283. Complaints against District agencies.

Notwithstanding any other provision of this chapter, the Mayor shall establish rules of procedure for the investigation, conciliation and hearing of complaints filed against District government agencies, officials and employees alleging violations of this chapter. The final determination in such matters shall be made by the Mayor or his designee.

§ 6-2284. Filing of complaints

(a) Any person or organization, whether or not an aggrieved party, may file with the Office a complaint of a violation of the provisions of this chapter, including a complaint of general discrimination, unrelated to a specific person or instance. The complaint shall state the name and address of the person alleged to have committed the violation, hereinafter called the respondent, and shall set forth the substance thereof, and such other information as may be required by the Office. The Director, sua sponte, may investigate individual instances and patterns of conduct prohibited by the provisions of this chapter and may initiate complaints in connection therewith. Any complaint under this chapter shall be filed with the Office within one (1) year of the occurrence of the unlawful discriminatory practice, or the discovery thereof, except as may be modified in accordance with section 6-2283.

(b) Complaints filed with the Office under the provisions of this chapter may be voluntarily withdrawn at the request of the complainant at any time prior to the completion of the Office's investigation and findings as specified in section 6-2285, except that the circumstances accompanying said withdrawal may be fully investigated by the Office.

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§ 6-2285. Investigation.

(a) After the filing of any complaint, the Office shall serve, within fifteen (15) days of said filing, a copy thereof upon the respondent, and upon all persons it deems to be necessary parties; and shall make prompt investigation in connection therewith.

(b) Within one hundred and twenty (120) days, after service of the complaint upon all parties thereto, the Office shall determine whether, in accord with its own rules, it has jurisdiction; and if so, whether there is probable cause to believe that the respondent has engaged or is engaging in an unlawful discriminatory practice.

(c) If the Office finds, with respect to any respondent, that it lacks jurisdiction or that probable cause does not exist the Director forthwith shall issue and cause to be served on the appropriate parties, an order dismissing the allegations of the complaint.

§ 6-2286. Conciliation.

(a) If, in the judgment of the Office, the circumstances so warrant, it may, at any time after the filing of the complaint, endeavor to eliminate such unlawful discriminatory practice by conference, conciliation or persuasion.

(b) The terms of a conciliation agreement may require a respondent to refrain, in the future, from committing specified discriminatory practices, and to take such affirmative action as, in the judgment of the Office, will effectuate the purposes of this chapter; and may include consent, by the respondent, to the entry in court of a consent decree, embodying the terms of the conciliation agreement.

(c) Upon agreement of all parties to a complaint and upon notice to all parties thereto, a conciliation agreement shall be deemed an order of the Commission, and shall be enforceable as such. Except for the terms of the conciliation agreement, employees of the Office shall not make public, without the written consent of the respondent, information concerning conciliation efforts.

§ 6-2287. Injunctive relief.

If, at any time after a complaint has been filed, the Office believes that appropriate civil action to preserve the status quo or to prevent irreparable harm appears advisable, the Office shall certify the matter to the Corporation Counsel, who shall bring in the name of the District of Columbia, any action necessary to preserve such status quo or to prevent such harm, including the seeking of temporary restraining orders and preliminary injunctions. The appropriate parties shall be notified of such certification and the complainant may initiate independently, or in cooperation with the Corporation Counsel, appropriate civil action to seek a temporary restraining order or preliminary injunction.

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§ 2289. Service of notice.

In all cases where the Office is required to effect service, it shall be accomplished by registered or certified mail, return receipt requested or by personal service and shall otherwise be in accordance with rules of the Office regarding service and notice.

§ 6-2290. Notice of hearing.

In case of failure of conciliation efforts, or in advance of conciliation efforts, as determined by the Office, and after a finding of probable cause, the Office shall cause to be issued and served in the name of the Commission, a written notice, together with a copy of the complaint, as the same may have been amended, requiring the respondent to answer the charges of such complaint at a public hearing before one (1) or more members of the Commission or before a hearing examiner, such hearing to be scheduled not less than ten (10) days or not more than thirty (30) days after such service and at a place to be specified in such notice. Notice shall be served by registered or certified mail, return receipt requested, or by personal service.

§ 6-2291. Hearing tribunal.

(a) After a complaint has been noticed for hearing, a hearing tribunal consisting of three (3) members of the Commission, sitting as the Commission, shall be appointed to make a determination upon such complaint. At the discretion of the Commission, one

(1) or more hearing examiners may be delegated to hear and report back to the Commission, on any case or question before the Commission.

(b) A hearing examiner may be an employee of the District Government or may be selected from a list of qualified hearing examiners prepared by the Commission. Commission members may serve as hearing examiners. Hearing examiners shall be paid on a per diem basis, while actually sitting and hearing a case: *Provided*, That funds are available for such purpose.

§ 6-2292. Conduct of hearing.

(a) The hearing shall be conducted in accordance with procedures promulgated pursuant to the Administrative Procedure Act.

(b) The case in support of the complaint shall be presented by an agent or attorney of the Office.

(c) Any Commissioner or hearing examiner, who has participated in the investigation, conciliation or processing of a complaint, or has participated in any decision related to the merits of a complaint, may not sit with a hearing tribunal appointed to make a determination upon such complaint.

(d) Efforts at conciliation by the Office or the parties, shall not be received in evidence.

(e) If the respondent fails to answer the complaint, the hearing tribunal, or the hearing examiner designated to conduct the hearing, may enter the default; and the hearing shall proceed on the basis of the evidence in support of the complaint. Such default may be set aside only for good cause shown, and upon equitable terms and conditions.

§ 6-2293. Decision and order.

(a) If, at the conclusion of the hearing, the Commission determines that a respondent has engaged in an unlawful discriminatory practice or has otherwise violated the provisions of this chapter, the Commission shall issue, and cause to be served upon such respondent, a decision and order, accompanied by findings of fact and conclusions of law, requiring such respondent to cease and desist from such unlawful discriminatory practice, and to take such affirmative action, including but not limited to:

(1) the hiring, reinstatement or upgrading of employees, with or without back pay;

(2) the restoration to the membership in any respondent labor organization, admission to or participation in a program, apprenticeship training program, on-the-job training program or other occupational training or retraining program;

(3) the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons;

(4) the payment of compensatory damages to the person aggrieved by such practice;

(5) the payment of reasonable attorney fees; and

(6) the payment of hearing costs, as, in the judgment of the Commission, will effectuate the purposes of this chapter, and including a requirement for a report as to the manner of compliance with such decision and order. With regard to compensatory damages and attorney's fees, the Commission shall develop guidelines which shall be submitted to the Council for review prior to implementation.

(b) If, upon all the evidence, the Commission finds that a respondent has not engaged in any unlawful discriminatory practice, the Commission shall issue and cause to be served on the complainant, an order dismissing the complaint as to such respondent.



(c) Whenever a case has been heard by one (1) or more hearing examiners who do not<sup>1</sup> [sic] have the power to render a final order or decision, the Commissioners, assigned to decide the case, shall serve upon the parties a proposed order or decision, including findings of fact and conclusions of law, with a notice providing that each party adversely affected may file exceptions and present arguments to the Commissioners, on a date not less than ten (10) days from the date of service of the proposed order or decision.

(d) Findings of fact and conclusions of law shall be supported by, and in accordance, with reliable, probative, and substantial evidence.

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§ 6-2294. Review.

Any person suffering a legal wrong, or adversely affected or aggrieved by, an order or decision of the Commission in a matter, pursuant to the provisions of this chapter is entitled to a judicial review thereof, in accordance with section 1-1510, upon filing, in the District of Columbia Court of Appeals a written petition for such review.

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§ 6-2295. General enforcement provision.

(a) The decision and order of the Commission shall be served on the respondent, with notice that, if the Commission determines that the respondent has not, after thirty (30) calendar days following service of its order, corrected the unlawful discriminatory practice and complied with the order, the Commission will certify the matter to the Corporation Counsel, and to such other agencies as may be appropriate for enforcement.

(b) The Corporation Counsel shall institute in the name of the District, civil proceedings including the seeking of such restraining orders and temporary or permanent injunctions, as are necessary to obtain complete compliance with the Commission's orders. In the event that successful civil proceedings do not result in securing such compliance, the Corporation Counsel shall institute criminal action.

(c) No enforcement action shall be instituted pending review as provided in section 6-2294.

(d) Nothing in this section shall to<sup>1</sup> [sic] deprive any person of rights in the criminal justice process.

§ 6-2296. Enforcement by a private person.

(a) Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of competent jurisdiction for damages and such other remedies as may be appropriate, unless such person has filed a complaint hereunder: *Provided*, That where the Office has dismissed such complaint on the grounds of administrative convenience, or where the complainant has withdrawn a complaint, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who maintains in a court of competent jurisdiction, any action based upon an act which would be an unlawful discriminatory practice under this chapter may file the same complaint with the Office.

(b) The court may grant such relief as it deems appropriate, including but not limited to, such relief as is provided in section 6-2293(a).

§ 6-2297. District licenses.

(a) Whenever it appears that the holder of a permit, license, franchise, benefit, or advantage, issued by any agency or authority of the government of the District is a person against whom the Office has made a finding of probable cause pursuant to section 6-2285, the Office, notwithstanding any other action it may take or may have taken under the authority of the provision of this chapter, may refer to the proper agency or authority the facts and identities of all persons involved in the complaint, for such action as such agency or authority, in its judgment, considers appropriate, based upon the facts thus disclosed to it.

(b) The Commission, upon a determination of a violation of any of the provisions of this chapter by a holder of, or applicant for any permit, license, franchise, benefit, exemption or advantage issued by or on behalf of the government of the District of Columbia, and upon failure of the respondent to correct the unlawful discriminatory practice and comply with its order, in accordance with section 6-2295(a), shall refer this determination to the appropriate agency or authority. Such determination shall constitute prima facie evidence that the respondent, with respect to the particular business in which the violation was found is not operating in the public interest. Such agency or authority shall, upon notification, issue to said holder or applicant an order to show cause why such privileges related to that business should not be revoked, suspended, denied or otherwise restricted.

