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Separate but Equal-An Analysis of State Civil Rights Law Enforcement and its Interaction with Federal Law

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SEPARATE BUT EQUAL—AN ANALYSIS OF STATE CIVIL RIGHTS LAW ENFORCEMENT AND ITS INTERACTION WITH FEDERAL LAW

*Philip J. Tierney**

I. Introduction

The eroded "separate but equal" doctrine of *Plessy v. Ferguson*[1] may find new life in a different civil rights context. A federal district court recently announced that state or local civil rights agencies operate under a constitutional mandate to provide victims of discrimination the rights and remedies equivalent to those provided them under federal civil rights law.[2]

During the past year, several other federal decisions have directed attention to state or local civil rights agencies and raise questions as to their interaction with federal law. In *Lopez v. State Foundry and Machine, Inc.*,[3] a federal court held that an aggrieved party could seek vindication of his rights under the 1964 Civil Rights Act, including financial remuneration, even though the action had previously been before a state agency and he had signed a settlement with the employer. Also, the Sixth Circuit Court in *Cooper v. Philip Morris, Inc.*[4] disregarded the decision of the Kentucky Civil Rights Commission and permitted civil rights plaintiffs to recover monetary relief which had been previously denied them by the State Commission. In *Tillman v. Wheaton-Haven Recreation Association, Inc.*[5] the plaintiffs had obtained relief from a local civil rights agency but no monetary damages.[6] Instead of pursuing their state relief, they chose the federal scheme which ultimately provided them with relief not provided by the local agency.

The purpose of this article is to explore the role of state civil rights agencies within the context of federalism, analyze their effectiveness, and suggest the course of their future activities. For purposes of illustrating the state administrative process, the author has chosen the procedures of Maryland Commission on Human Relations (Md. COHR) whose structure and history are similar to that of most state civil rights agencies.[7]

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1 163 U.S. 537 (1896).

2 Gilliam v. City of Omaha, 331 F. Supp. 4 (D. Neb. 1971), *rev'd on other grounds*, 459 F.2d 63 (8th Cir. 1972).

3 336 F. Supp. 34 (E.D. Wisc. 1972).

4 464 F.2d 9 (6th Cir. 1972).

5 410 U.S. 431 (1973).

6 1 RACE REL. L. SURVEY 231 (1970).

7 MD. ANN. CODE, Art. 49B, § 1 et seq. (1972 Repl. Vol., 1972 Supp.). For a comparative study of state agencies see Bonfield, *An Institutional Analysis of the Agencies Administering Fair Employment Practices Laws*, 42 N.Y.U.L. REV. 823, 1035 (1967); Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 VAND. L. REV. 965 (1965).

II. History

State civil rights enforcement agencies preceded the modern federal civil rights laws; the first state agencies were established in New York and Wisconsin in 1945.[8] Although many of the early state agencies were concentrated in the midwest and northeast industrial states,[9] these agencies gradually expanded into all areas except the South. By 1965 23 states had established such agencies.[10] The typical pattern of development involved the establishment of an advisory commission with little power followed by the enactment of substantive laws, first in public accommodations, then in employment, and finally in housing. There are approximately 40 states and 400 municipalities which have civil rights agencies which are similar in purpose but which vary considerably in degree of coverage and in sanctions imposed upon those who discriminate.[11]

A. *The Maryland Experience*

In Maryland, the foundation was laid for the present structure of the Md. COHR in 1927 with the establishment of the Interracial Commission, an advisory agency designed to consider the welfare of "colored people residing in the State."[12] The Interracial Commission was given neither a substantive law to administer, nor any enforcement powers. Since 1927 this Commission has experienced several name changes: Commission for Colored Problems,[13] Commission on Interracial Problems and Relations,[14] and finally, the State of Maryland Commission on Human Relations.[15]

In 1963, the Commission took on the responsibility of adminstering the first substantive civil rights law in the state, a prohibition against discrimination in places of public accommodations.[16] Two years later, in 1965, the Commission was given added authority to administer a prohibition against employment discrimination.[17] These two provisions are patterned after their federal counterparts contained in Title II (public accommodations) and Title VII (employment) of the Civil Rights Act of 1964.[18] At that time, however, the Commission was provided neither adequate staff to administer these laws nor provided with clear sanctions to enforce them.[19] Consequently, despite the law, state civil rights enforcement was nonexistent.

8 N.Y. EXECUTIVE LAW §§ 290-301 (McKinney 1972); WISC. STAT. ANN. §§ 111.31-.36 (1957).

9 Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process,* 74 YALE L.J. 1171, 1239-42 (1965).

10 *Id.*

11 U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, HISTORICAL OVERVIEW — EQUAL OPPORTUNITY ON HISTORY (1972); Note, *Municipal Fair Employment Practices Ordinances and Commissions: A Legal Survey and Model Ordinance,* 45 NOTRE DAME LAWYER 258 (1970); *Equal Employment Opportunities,* CCH EMPLOYMENT PRACTICES ¶ 20,080 (1973).

12 Chap. 559, Laws of Maryland (1927).

13 Chap. 431, Laws of Maryland (1943).

14 Chap. 548, Laws of Maryland (1951).

15 Chap. 83, Laws of Maryland (1958).

16 Chap. 227, Laws of Maryland (1963).

17 Chap. 717, Laws of Maryland (1965).

18 42 U.S.C. §§ 2000a et seq. and §§ 2000e et seq. (1970).

19 MARYLAND COMM'N ON INTERRACIAL PROBLEMS AND RELATIONS, ANNUAL REPORT 8 (1965).

During the period between 1969 and 1971 the Md. COHR underwent a dramatic change. The staff was increased from eight to fifty positions,[20] the law was amended to provide for administrative sanctions against those in violation of law,[21] and a strong fair housing law was enacted[22]—one which is identical in all substantive respects to the Federal Civil Rights Act of 1968.[23] Also, during that period, the Commission experienced a dramatic increase in the number of charges of discrimination filed. While in the years 1963 through 1968 only 454 cases had been filed from throughout the state,[24] 426 were filed for in 1969 alone; since that time the case load has approximately doubled in each succeeding year.[25]

B. *Past Effectiveness of State Laws*

Prior to the enactment of the Federal Civil Rights Act of 1964, the United States Supreme Court in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*[26] thwarted a constitutional challenge to the action of a state agency in regulating employment discrimination by an interstate carrier. This decision accorded considerable weight to the action of state civil rights agencies and could have operated as a catalyst for vigorous law enforcement by state commissions. Nevertheless, the state agencies during that period were notorious for their passivity and ineffectiveness.

> The history [of state civil rights agencies] is one of timidity in investigations, vacillation in decisionmaking, and soft settlements which failed to aid the victim of discrimination and did not remedy the broader social problems.[27]

Many reasons have been assigned for this failure: limited coverage of existing laws, inadequate budget and staff, lack of political support, and untrained commissioners and staff.[28] The major reasons, however, were twofold. First, state agencies predicated a finding of discrimination upon proof of a defendant's subjective intent to discriminate.[29] Second, state agency inquiry focused on the effect of a discriminatory practice as it related to an individual complainant and not the institutional causes of the discrimination.[30]

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20 MARYLAND COMM'N ON HUMAN RELATIONS, ANNUAL REPORT 6 (1970).
21 Chap. 83, Laws of Maryland (1968).
22 Chap. 324, Laws of Maryland (1971). A prior fair housing act, Chap. 385, Laws of Maryland (1967), had been passed by the Maryland legislature in 1967 but was petitioned to referendum and defeated at the general election in November, 1968. After Governor Spiro T. Agnew left office to assume the Vice-Presidency, he was succeeded to the governorship by the Speaker of the House of Delegates, Marvin Mandel, who then promoted the new fair housing law which eventually was enacted without incident.
23 42 U.S.C. §§ 3601 et seq. (1970).
24 MARYLAND COMM'N ON INTERRACIAL PROBLEMS AND RELATIONS, ANNUAL REPORT 10 (1968).
25 MARYLAND COMM'N ON HUMAN RELATIONS, ANNUAL REPORT 14 (1973).
26 372 U.S. 714 (1963).
27 A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 6 (1971).
28 *Id.* at 6-27; Witherspoon, *supra* note 9, at 1180-87; Minsky, *FEPC in Illinois: Four Stormy Years*, 41 NOTRE DAME LAWYER 152 (1965); Hill, *Twenty Years of State Fair Employment Practices Commission: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22 (1964).
29 Sutin, *supra* note 7, at 994.
30 A. BLUMROSEN, *supra* note 27, at 12.

Several early state decisions illustrate this dilemma. In *Draper v. Clark Dairy, Inc.*,[31] a Connecticut court reviewed a finding of employment discrimination made by a local commission. A black male had applied for a job at a dairy which had an all white work force but was rejected. Despite the applicant's qualifications to perform the job and the existence of a job vacancy at the time of his application, the defendant argued that no intent to discriminate had been proven. In struggling with the question of intent, the court fashioned a liberal inference to be drawn from the facts to support a finding of intent to discriminate and thus upheld the Commission's finding. However, the court held the Commission's order was improper since it sought to enjoin future discriminatory hiring practices. In effect, the court limited the inquiry of the civil rights agency to the individual complainant and prevented any class relief. Later in *International Brotherhood of Electrical Workers Local 35 v. Commission on Civil Rights*[32] another Connecticut court allowed liberal inferences to support a finding of intent to discriminate and left undisturbed the Commission's order finding employment discrimination on the basis of race. Nevertheless, in *Motorola, Inc. v. Illinois Fair Employment Practices Commission*,[33] where the question of intent was again present, the court applied a stricter standard which limited the inferences the Commission would be permitted to draw. The Commission's order was reversed because of the failure to prove intent to discriminate on the part of Motorola.

Proof of intent to discriminate posed a serious problem to state agencies since the requisite was almost impossible to prove absent an outright admission. Some state courts, however, did allow circumstantial evidence to meet the intent requisite. The New York Court of Appeals stated the basis for this principle in *Holland v. Edwards*:

> One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which "subtleties of conduct . . . play no small part . . . ."[34]

Federal courts also struggled with intent as a requisite necessary to prove discrimination, and as late as 1969 a federal district court included proof of a defendant's intent as a necessary element of proof in a housing discrimination case.[35] The requisite of intent did not fully disappear until the Supreme Court announced its landmark decision in *Griggs v. Duke Power Co.*[36] The *Griggs* decision removed this heavy, if not impossible, burden of proof which, no doubt, extended the time necessary to investigate a complaint, and encouraged agencies to settle or dismiss cases without an evidentiary hearing.

State civil rights agencies also limited the scope of their inquiry to include

31 17 Conn. Supp. 93, 1 CCH EMPLOYMENT PRACTICES DECISIONS ¶ 9620 (Super. Ct. 1950).
32 140 Conn. 537, 102 A.2d 366 (1953).
33 34 Ill. 2d 266, 215 N.E.2d 286 (1966).
34 307 N.Y. 38, 40; 119 N.E.2d 581, 584 (1954) (citations omitted).
35 Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969).
36 401 U.S. 424 (1971).

only the individual and not systematic discriminatory practices. This practice elicited severe criticism of the agencies' effectiveness.[37] The unchanged minority housing and unemployment patterns in those jurisdictions with civil rights laws were cited as illustrations of the inadequacy of the individual approach.[38] After appraising the ineffectiveness of state and local civil rights agencies, the Kerner Commission in 1968 recommended that these agencies broaden the scope of their inquiry and apply the enforcement effort not only for the benefit of an individual who filed a complaint, but also against broad patterns of discrimination.[39]

C. *Developing Federal-State Interaction*

With the stimuli of the Supreme Court decision in *Jones v. Alfred H. Mayer Co.*[40] giving new life to long-dormant federal civil rights laws and the enactment and enforcement of the Civil Rights Acts of 1964 and 1968,[41] state agencies have begun to develop new patterns of enforcement. After 1968, the increasing civil rights activity on the federal level also had the effect of promoting the enactment of more civil rights laws in most states outside the South and expanding the coverage in those states already possessing civil rights laws. Today most state commissions operate as law enforcement agencies with a mandate and coverage similar and often identical to that of the Equal Employment Opportunity Commission (EEOC) and the United States Department of Housing and Urban Development (HUD). The changing enforcement patterns of state agencies resulted from the pressure of federal action and training and dissemination of federal standards by such organizations as EEOC's Office of State and Community Affairs and the International Organization of Official Human Rights Agencies.[42]

Both Title II (public accommodations) and Title VII (employment) of the Civil Rights Act of 1964 and Title VIII (housing) of the Civil Rights Act of 1968 provide an opportunity for the state or local agency to deal with discrimination charges first.[43] With the passage of these acts, Congress clearly intended to promote the concept of federalism by insuring close working relationships between the federal and the state agencies as the most effective means of eliminating discrimination. Congress with the enactment of these laws has made it clear that the federal civil rights scheme is to be implemented by local civil rights agencies.[44]

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37 *See generally,* A. BLUMROSEN, *supra* note 27; Hill, *supra* note 28; Sutin, *supra* note 7.
38 A. BLUMROSEN, *supra* note 27, at 7.
39 U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 78-79 (1968).
40 392 U.S. 409 (1968).
41 U.S.C. §§ 2000a et seq. and §§ 3601 et seq. (1970).
42 Many new enforcement practices have been developed by Professor Alfred Blumrosen, Rutgers Law School, and have been adopted by various state agencies.
43 The coverage of a protected class usually includes race, color, creed, ancestry, age, sex, and national origin. The coverage of subject matter includes public accommodations, employment, and housing in both the public and private sectors with various exemptions carved out of the statutory scheme. With the enactment of the Equal Employment Opportunity Act of 1972, 86 Stat. 103 (1972), Title VII jurisdiction has been extended to prohibit employment discrimination by state and local governments. State agencies have been encouraged to similarly amend state civil rights laws and in fact have been given a deadline to do so in order to maintain their federal relationship. *See* 38 Fed. Reg. 16672 (1973).
44 Title II, Civil Rights Act of 1964, § 207(b), 42 U.S.C. § 2000a-6 (1970); Title VII,

This opportunity is effectuated through a deferral process whereby complaints of discrimination first filed with the federal government are sent to the state agency if the agency has been certified by the federal government as providing rights and remedies substantially equivalent to federal laws.[45] The EEOC deferral process received approval by the Supreme Court in *Love v. Pullman Co.*[46] Federal law provides that the federal government may proceed with the discrimination charge after a specified period of time, but the practice of many federal regional offices is to allow the state agency to complete its action on the charge. The results of such state action are given substantial weight by the federal agencies.

III. Administrative Structure of State Agencies

Unlike the federal civil rights scheme which provides for direct court action to determine the merits of a charge of discrimination, most state commissions operate under an administrative structure which authorizes the agency to issue orders to "cease and desist" from the discriminatory practices identified and to take "such affirmative action" as may be appropriate to effectuate the purposes of the law. Such administrative orders are usually either directly enforceable in state courts or are reviewable by the state court on direct appeal. It should be noted that the proponents of the Civil Rights Act of 1964 unsuccessfully sought to have this "cease and desist" authority vested in the EEOC,[47] and the failure to include this authority brought predictions of ineffectiveness.[48] Nevertheless, the federal scheme has produced a remarkable number of favorable civil rights decisions and has effectively rebutted the critics of the federal structure.[49]

The Md. COHR, like most state civil rights agencies, has two distinct and separate functions. One function is quasi-judicial, and is performed by commissioners appointed by the governor.[50] The commissioners in this role adjudicate specific cases and issue appropriate orders of relief. With increasing case loads many states have substituted hearing examiners for the commissioners.[51] The second function is administrative and involves the agency's professional staff which processes the specific charges of discrimination through all administrative phases prior to the quasi-judicial determination by the commission. Commis-

Civil Rights Act of 1964, § 708, 42 U.S.C. § 2000(e)-7 (1970); Title VIII, Civil Rights Act of 1968, 810(c), 42 U.S.C. § 3610(c) (1970).

45 EEOC and HUD Deferral Procedures are set forth in 29 C.F.R. § 1601.12 (1972) and 24 C.F.R. § 105.18 (1972), respectively. The Md. COHR and other states have been so certified: 37 Fed. Reg. 16540 (1972); 37 Fed. Reg. 9214 (1972).

46 404 U.S. 522 (1972).

47 *See* A. BLUMROSEN, *supra* note 27, at 6.

48 M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205, 208 (1966).

49 For a discussion of the administrative creativity employed by EEOC, see A. BLUMROSEN, *supra* note 27 at 51-101. Also, for a discussion of the powers of EEOC see Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59, 94-100 (1972).

50 The structure and procedures of the Md. COHR are contained in Sections 1 and 14, respectively, of the MD. CODE ANN., Art. 49B (1972 Repl. Vol., 1972 Supp.). *See* Bonfield, *supra* note 7 and Sutin, *supra* note 7.

51 The following states have hearing examiner systems: Colorado, Connecticut, Hawaii, Illinois, Iowa, Kentucky, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Rhode Island, South Dakota, Utah, Washington and Wisconsin.

sioners, because of their quasi-judicial functions and political roles, should not become involved in earlier administrative phases conducted by the professional staff; but the history of commissioner involvement in these phases has been a continuing problem undermining the effectiveness of some state agencies.

The administrative process involves five stages: the filing of a charge, investigation, determination of probable cause, conciliation and hearing.[52] Most of the challenges to civil rights agencies initially centered on procedural challenges to one or more of these stages. Federal court decisions concerning some of the challenges to these stages have resulted in decisions of substance evolving from the questions of procedures. A narrow view of these various stages could effectively stultify the implementation of the civil rights laws. Successful defense of procedural challenges is critical to the efficacy of a state agency.

A. *The Complaint*

The filing of a complaint is the initial stage under the civil rights law and triggers the subsequent law enforcement process. Usually a complaint can be filed by either an aggrieved party or members of the agency itself.[53] The complaint and its scope have been one of the most litigated areas in the civil rights field primarily on the federal level. This litigation, however, has produced generally favorable results.[54] The complainant is no longer viewed as a mere individual seeking to make himself whole; rather he is considered a private attorney general vindicating not only his rights, but the rights of all those persons similarly situated.[55] The very term "discrimination" has been defined to mean unlawful conduct directed at a class.[56]

It is the policy of both federal and state agencies that a complainant is not to be charged with having full knowledge of civil rights law. The complainant may believe that discrimination has occurred but may be unable to perceive or understand all the sources, effects, patterns or practices of a respondent's system upon his own personal case of discrimination. A charge of discrimination merely triggers the agency's investigatory and conciliatory procedures. Civil rights laws contemplate the filing of charges by persons who are untutored in the technicalities of the law and who may not be able to fully articulate their grievances. It is now established that the charge of discrimination is not considered a formal

52 MD. ANN. CODE, Art. 49B, § 14 (1972 Repl. Vol., 1972 Supp.); Sutin, *supra* note 7, at 1013-40. The administrative structure of many state agencies in form and operation is patterned after the National Labor Relations Board, 29 U.S.C. § 160 (1970); *see*, City of Highland Park v. Fair Employment Practices Comm'n, 364 Mich. 508, 111 N.W.2d 797 (1961); Arnett v. Seattle Gen. Hosp., 65 Wash. 2d 22, 395, P.2d 503 (1964).

53 The party filing a complaint is designated the "Complainant." The party against whom a complaint is filed is designated the "Respondent."

54 Love v. Pullman Co., 404 U.S. 522 (1972); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970); King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355 (6th Cir. 1969); Marquez v. Omaha District Sales, 440 F.2d 1157 (8th Cir. 1970); Graniteville Co. v. EEOC, 438 F.2d 32 (4th Cir. 1971).

55 Newton v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968); Jenkins v. United Gas Corp., *supra* note 54 at 33.

56 Hall v. Wertham Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966).

pleading which limits the scope of the agency's investigatory-conciliatory process to those allegations which are explicitly raised in the charge.[57]

B. *Investigation*

The investigation of a complaint involves several steps. After the agency's professional staff has analyzed the initial complaint and conducted a preliminary inquiry, it must identify the issues involved in the case. This process often involves an inquiry which extends beyond the scope of the original complaint.[58] For example, the initial complaint may charge racial discrimination in an employer's promotional practices. While the agency's inquiry may indeed confirm the original charge, it might also reveal suspect employment practices involving hiring and recruiting. The investigation could further reveal discriminatory employment practices on the basis of sex. Identification of possible sex discrimination could expand the scope of the initial complaint to include sex as well as race.

The policy underlying such an expanded scope investigatory technique is implicit in the administrative process. The Supreme Court defined the power of the administrative agency to set investigative machinery into motion in *United States v. Morton Salt Co.*:

> [An administrative agency] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on the suspicion that the law is being violated, or even just because it wants assurance that it is not.[59]

The *Morton Salt* doctrine has been applied to federal civil rights agencies and state administrative agencies.[60]

Under Title VII, which is identical in all substantive respects to most state fair employment practices laws, federal court decisions have established that the investigation by the EEOC or others is not limited to the specific allegations recited in the initial charge, but may encompass any matter like and related to, or growing out of, the original charge. In *Sanchez v. Standard Brands, Inc.*[61] the complainant alleged sex discrimination in her complaint but failed to allege discrimination based upon national origin. The federal court held that the *Sanchez* charge triggered the Commission's investigation. The scope of the judicial complaint is only confined to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.[62] The key terms of the *Sanchez* doctrine are subject to expansion: "like and related to"

57 Jenkins v. United Gas Corp., *supra* note 54.
58 Sanchez v. Standard Brands, Inc., *supra* note 54, at 466.
59 338 U.S. 632, 642-43 (1950).
60 Bowaters Southern Paper Corp. v. EEOC, 428 F.2d 799, 800 (6th Cir. 1970); Vulcan Waterproofers, Inc. v. Maryland Home Improvement Comm'n, 253 Md. 204, 252 A.2d 62 (1969).
61 *Supra* note 54, at 458.
62 *Id.* at 466, 467, *citing with approval* King v. Georgia Power Co., *supra* note 53 at 947.

may be defined as similar and relevant.[63] For example, patterns of discrimination in discharge are relevant to determine whether discrimination has occurred in hiring.[64] Information concerning a hiring pattern is relevant to determine discrimination in promotion.[65] Discrimination in promotion is relevant to determine discrimination in hiring.[66] Hiring involves initial job assignment so hiring patterns are also relevant.[67] The company's general hiring practices at other plants in the state are relevant.[68]

An agency's legislative mandate usually requires the elimination of all forms of discrimination.[69] If discrimination is identified, whether by initial complaint or during the course of an investigation, that discrimination must be acted upon by the law enforcement agency. If the state agency identified discrimination, but chose to ignore it merely because it was not alleged by the original lay complaint, this conduct could amount to nonfeasance similar to a police officer called to a bank to investigate a public nuisance complaint and who then ignored a robbery in progress. Failure of the agency to act on discovered but unalleged matters could also be construed as unconstitutional state action permitting unlawful discrimination to continue unabated.[70]

These decisions take on significant meaning for state agencies by allowing them the opportunity to broaden their inquiries and seek class-directed relief. Implementation of these federal concepts at the state level is critical to the future effectiveness of state agencies. Failure to effectuate the transition to federal standards could erode the intent of Congress to implement federal laws at a local level.

C. *Special Problems*

Subpoena power is a basic investigatory tool for a state civil rights agency. While federal agencies, primarily EEOC, have been accorded ease of access to records during investigation, the state experience has not been so happy. For example, in *State ex rel. Colo. Civil Rights Comm'n v. Adolph Coors Corp.*,[71] the Colorado Court of Appeals substantially impeded the efforts of the state agency to broadly investigate charges of employment discrimination. Failure to obtain adequate documentation to support a charge of discrimination is the most serious administrative problem encountered by the state agency. Fortunately, however, state decisional law is not uniform.[72] In *Liberty Mutual Insurance Co.*

63 Johnson v. Georgia Highway Express, Inc., *supra* note 53.
64 Blue Bell Boots, Inc. v. EEOC, *supra* note 53, at 358.
65 Marquez v. Omaha District Sales, *supra* note 53.
66 Graniteville v. EEOC, *supra* note 53, at 37.
67 Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970); Mabin v. Lear Siegler, Inc., 457 F.2d 806 (6th Cir. 1972).
68 Madlock v. Sardis Luggage Co., 302 F. Supp. 866 (N.D. Miss. 1969).
69 MD. ANN. CODE, Art. 49B § 13(b) (1972 Repl. Vol.).
70 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Testa v. Katt, 330 U.S. 386 (1947); Gilliam v. City of Omaha, *supra* note 2; *see also* Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967); Weiner v. Cuyahoga Community College Dist., 44 Ohio Op. 2d 468, 238 N.E.2d 839 (1968), *cert. denied* 396 U.S. 1004 (1970).
71 29 Colo. App. 240, 486 P.2d 43 (1971).
72 Nevada Comm'n on Equal Rights of Citizens v. Smith, 80 Nev. 469, 396 P.2d 677 (1964); D.C. Human Relations Comm'n v. National Geographic Soc'y, 475 F.2d 366 (D.C. Cir. 1973).

v. City of New York Commission on Human Rights,[73] a New York court took a more liberal view of civil rights enforcement by holding the agency possessed implicit authority to investigate. In this regard, state courts would do well to heed the words of Justice Frankfurter that ". . . courts and administrative agencies are collaborative 'instrumentalities of justice,' and not business rivals."[74]

It should be noted that state agencies usually possess some form of rule-making authority, either substantive or procedural, the use of which can aid an investigative process that traditionally has had to rely upon a respondent's co-operation.[75] Use of the rule-making power in this investigation stage is a necessary adjunct to decisional law since one must possess the tools to investigate before discrimination can be established. The Md. COHR has adopted rules of procedures that provide serious administrative sanctions against those who fail to cooperate with the agency staff during an investigation.[76] Should information be withheld, a respondent could be held liable on the merits of a charge without further proceedings. At least one other state imposes similar sanctions.[77]

D. *Probable Cause*

After the investigation phase is completed, the results are set out in a written finding which describes the scope of the inquiry, identifies the issues, and contains determinations as to whether there is probable cause to believe that the law has been violated.[78] A probable cause decision against a respondent usually generates indignation, denials, and attacks upon the agency's impartiality. Often there are attempts to involve commissioners at this stage and convince them the agency should reverse the findings or otherwise suppress the complaint without benefit of a hearing.

Such results indicate that the function of probable cause has been misconceived. It is clearly not the purpose of probable cause to determine conclusively that a respondent's conduct or practice is unlawful. That judgment should be made only at hearing. The sole purpose of the probable cause determination is to serve as an administrative device to sift out frivolous complaints and to trigger subsequent administrative proceedings.[79]

The determination of probable cause, unlike its namesake in criminal law, is not subject to independent review. In *United States v. International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 1,*[80] the federal court denied defendant's motion to require discovery of facts supporting the Justice Department's "reasonable cause" belief. The legislative history of

73 39 App. Div. 2d 860, 332 N.Y.S.2d 971 (1972).
74 United States v. Ruzicka, 329 U.S. 287, 295 (1946) (citations omitted).
75 Sutin, *supra* note 7, at 1023. For discussion of a state civil rights agency's rule-making power, see Ross v. Arbury, 206 Misc. 74, 133 N.Y.S.2d 62 (Sup. Ct. 1954); New Jersey Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 288 A.2d 855 (1972).
76 MARYLAND COMM'N ON HUMAN RELATIONS, RULES OF PROCEDURE (1973). These were adopted May 8, 1973, and approved by the Attorney General July 6, 1973.
77 NEW JERSEY DIVISION ON CIVIL RIGHTS, RULES OF PRACTICE AND PROCEDURE.
78 MD. ANN. CODE, Art. 49B § 13(a) (1972 Repl. Vol.).
79 A. BLUMROSEN, *supra* note 27, at 84-89; *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARVARD L. REV. 1109, 1204-06 (1971).
80 438 F.2d 679, 681 (7th Cir. 1971).

section 707 of the Civil Rights Act of 1964[81] supports the view that the Attorney General's "reasonable cause" belief is not a litigable issue. As Congressman Celler, floor manager in the House, stated:

> Finally, the statute contains the usual directive to the Attorney General that he should have a reasonable case before he sues, but of course, he—not the court—decides whether reasonable cause exists, and the issue of reasonable cause does not present a separate litigable issue.[82]

Federal courts have denied motions for interrogatories aimed at discovery of the factual basis for determination of the Attorney General's reasonable cause belief.

A similar conclusion as to the power to review the finding of probable cause was made in *Wilson v. Sixty-Six Melmore Gardens*[83] where the state court decided that the alleged lack of investigation prior to the New Jersey Division on Civil Rights' finding of probable cause was irrelevant to the merits of the adjudication on full hearing. In *Board of Education v. State Division of Human Rights*[84] the respondent sought to have a finding of probable cause made by the staff of New York Human Rights Commission vacated because of the absence of a statutory procedure to review the finding of probable cause. The respondent there challenged the finding on the grounds that absence of review denied procedural due process. In the words of the court:

> [N]o violation of procedural due process can be spelled out of a statutory scheme which requires notice and affords a plenary opportunity to be heard on the subject matter of the complaint.[85]

The probable cause decision should be accorded the same dignity as other discretionary governmental functions which are subject to later review only if fraud or bad faith are present.[86]

E. *Conciliation*

Conciliation is a process of negotiation, usually tripartite in nature, which involves the complainant, the respondent, and the agency itself.[87] During this process the agency operates under a specific legislative mandate to eliminate all discrimination identified in the previous stages. The agency's professional staff serves as an active participant-mediator between the complainant and the respondent. While the agency should seek to vindicate the rights of the complainant pursuant to its obligation under both state and federal laws, the complainant represents not only an individual, but a class as well, since by definition the term "discrimination" has been held to be class-directed.[88] Therefore, the

81 42 U.S.C. § 2000e-6 (1970).
82 110 CONG. REC. 15895 (1964).
83 106 N.J. Super. 182, 254 A.2d 545 (1969).
84 68 Misc. 2d 1035, 330 N.Y.S.2d 274 (Sup. Ct. 1972).
85 *Id.* at 1038, 330 N.Y.S.2d at 276.
86 *See, e.g.*, Sollins v. Baltimore County, 253 Md. 407, 252 A.2d 819 (1969). *Contra,* Jeanpierre v. Arbury, 4 N.Y.2d 238, 149 N.E.2d 238, 173 N.Y.S.2d 597 (1958) (dismissed; complaint held reviewable).
87 See, A. BLUMROSEN, *supra* note 27, at 150.
88 Hall v. Wertham Bag Corp., *supra* note 56.

conciliation stage must involve negotiating complete remedial action that will vindicate both the rights of the public and the rights of the individual.

Conciliation is fraught with pitfalls to effective enforcement of the law. Traditionally, state agencies have had a penchant to settle cases at all costs and thus avoid a hearing.[89] Many times this occurred at the expense of either the complainant or the class or both. Aside from an agency's historical timidity, outside pressures can impede the conciliation process. The more local the commission, the more susceptible it is to political influence, as commissioners and others may seek to "advise" the professional staff on the merits of settlement in a particular case.

Conciliation is not a forum for the review of evidence obtained by the agency or past civic accomplishments of the respondent. For conciliation to be effective, it must result in an enforceable agreement which eliminates and not merely ameliorates discrimination. If such an agreement is not obtained, the case should proceed to the following stage.

F. *Evidentiary Hearing, Administrative Order and Judicial Review*

At this point in the administrative process, the respondent has an option. Should the respondent disagree with the professional staff's probable cause determination, the respondent can avoid completely or terminate the conciliation stage and demand a plenary evidentiary hearing. The hearing is administrative in nature but follows a trial-type format which permits direct and cross-examination and other traditional evidentiary devices. After the hearing, should the respondent's practices be found in view of all the evidence to be unlawful, the agency then will issue an order compelling the respondent to cease and desist from the unlawful practices or to take such other affirmative action which may be necessary to effectuate the purposes of law.[90]

Following the issuance of the order, either party usually has the right to obtain judicial review of the agency's action. At this point in the administrative process two problems have developed which can impede prompt enforcement of civil rights laws. The problems have resulted from a legislative and judicial attitude that state civil rights agencies are not traditional administrative agencies and therefore need not be treated as such.[91] For example, the filing of the appeal from an administrative agency decision is usually required within a specified period. Failure to file a timely administrative appeal normally operates as an absolute bar to judicial review. However, in *State Division of Human Rights v. Bystricky*,[92] a respondent in contempt of the state agency's order failed to file a timely appeal, but nevertheless was given an opportunity for full judicial review. The same holding occurred in *State of Maryland Commission on Human Rela-*

89 Sutin, *supra* note 7, at 1035.

90 There is a difference among the states regarding the specificity with which the various laws set forth the agency's remedial authority. Some state laws are specific regarding authority to award compensatory damages, others are not. Maryland belongs to the latter group. MD. ANN. CODE, Art. 49B § 14(e) (1972 Repl. Vol.).

91 Sutin, *supra* note 7, at 1043.

92 30 N.Y.2d 322, 284 N.E.2d 560 (1972).

tions v. Armco Steel Corp.[93] The effect of these procedural rulings adds time and expense to an administrative process which is already lengthy.[94] Another problem involves the fact that the actions of civil rights agencies are often given less weight than normally given to other types of administrative decisions. Often a reviewing court will substitute its judgment for that of the civil rights agency in regard to weight-accorded evidence and inferences drawn from the evidence.[95]

IV. Interpretation of State Civil Rights Law

If state civil rights agencies are to be effective, it depends upon how broadly they develop and apply the law. The other stages of the administrative process, investigation and conciliation, are dependent upon the establishment of a strong, viable agency. Consequently, a state civil rights agency is only effective to the extent that the law is actually enforced by decisional law and administrative interpretation.

A. *Decisional Law*

1. General

One criticism of state agencies has been that they have failed to develop a body of law defining discrimination.[96] While there is still a paucity of state decisional law, sufficient law has now evolved from both federal and state court decisions to aid the understanding of state civil rights laws.

The traditional concept of discrimination has been unequal treatment of the races. A black must receive the same treatment as a similarly situated white; otherwise the disparity in treatment constitutes discrimination.[97] As a simple example, in the rental of an apartment, blacks cannot be subjected to more stringent standards than those applied to whites.[98]

In the fields of public accommodations and housing, state agencies have not only applied the unequal treatment concept but also have expanded its coverage. In *Clover Hill Swimming Club, Inc. v. Goldsboro,*[99] a New Jersey court applied substance over form to defeat the respondent's claim of private club status. Several other state decisions have followed this approach.[100] In *Wilson v. Sixty-Six Melmore Gardens,*[101] the New Jersey court rejected the respondent's defense that the complainant had not formally offered to lease the apartment

93 5 CCH EMPLOYMENT PRACTICES DECISIONS ¶ 8578 (Md. Cir. Ct. 1972).
94 Cramton, *Causes and Cures of Administrative Delay,* 58 A.B.A.J. 937 (1972).
95 *See* City of Philadelphia v. Pa. Human Relations Comm'n, 7 Pa. Cmwlth. 500, 300 A.2d 97 (1972); Adolph Coors Co. v. Colo. Civil Rights Comm'n, Colo. App., 502 P.2d 1113 (1972); Scovill Mfg. Co. v. Comm'n on Civil Rights, 153 Conn. 170, 215 A.2d 130 (1965); *contra,* Arnett v. Seattle Gen. Hosp., *supra* note 52.
96 A. BLUMROSEN, *supra* note 27, at 19-20.
97 Wilson v. Sixty-Six Melmore Gardens, *supra* note 83.
98 Stearns v. Fair Employment Practices Comm'n, 6 Cal. 3d 205, 98 Cal. Rptr. 467, 490 P.2d 1155 (1971).
99 47 N.J. 25, 219 A.2d 161 (1966).
100 In re Holiday Sands, Inc., 9 Race Rel. L. Rep. 2025 (1964); Castle Hill Beach Club v. Arbury, 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957).
101 *Supra* note 83.

he sought. The court held this law was broadly designed to prohibit all forms of discrimination including conduct which tended to discourage the complainant from pursuing his rights. Other states have also followed this approach in housing cases.[102]

One area where states have been particularly active is the formulation of remedies for victims of housing discrimination. States quite often developed new concepts of compensatory damages, including damages for humiliation, mental anguish, and pain and suffering, before federal decisions did so. A progressive line of state authority has upheld such remedies formulated by state agencies. New Jersey, for example, in *Jackson v. Concord Co.*[103] held at first that the state civil rights agency possessed authority to award compensatory damages for economic loss. New Jersey later extended this authority in *Zahorian v. Russell Fitt Real Estate Agency,*[104] and also sanctioned the award of compensatory damages to include pain and suffering damages. In *State Commission for Human Rights v. Speer*[105] damages for pain and suffering awarded by the state agency were upheld by the New York Court of Appeals. Also, in *Massachusetts Commission Against Discrimination v. Franzaroli,*[106] the state agency's award of mental suffering damages was upheld. An Oregon court has upheld an award of humiliation damages in *Williams v. Joyce.*[107] These decisions are especially significant since each court allowed the damages to be awarded without a specific statutory reference to compensatory damages.[108]

The employment field represents an area where state agencies still experience difficulty in defining the law. States have still remained complaint-orientated and failed to examine possible systematic discrimination.[109] The Supreme Court has recently announced several significant employment discrimination decisions which interpret civil rights laws broadly and can be readily applied to state laws. In *Griggs v. Duke Power Co.,*[110] the Court defined discrimination to include the unequal effect of an employer's conduct and not his intent or motivation. The Court also held unlawful the use of certain employment practices which, although neutral on their face, operated to exclude minorities from the work force. The Court excepted those practices which can be shown to be job-related. In *McDonnell-Douglas Corp. v. Green,*[111] the Court while applying the *Griggs* unequal effect concept to an individual plaintiff also established minimum standards of proof in employment discrimination cases necessary to establish a prima facie case. This then places on the employer the burden to justify that the challenged employment practice is not a "pretextual"

102 Elgart v. Pa. Human Rights Comm'n, 4 Pa. Cmwlth. 616, 287 A.2d 887 (1972); State ex rel. Balfour v. Bergeron, 290 Minn. 351, 187 N.W.2d 680 (1971).
103 54 N.J. 113, 253 A.2d 793 (1969).
104 62 N.J. 399, 301 A.2d 754 (1973).
105 29 N.Y.2d 555, 272 N.E.2d 884, 324 N.Y.S.2d 297 (1971).
106 357 Mass. 112, 256 N.E.2d 311 (1970).
107 4 Ore. App. 482, 479 P.2d 513 (1971).
108 *See* note 90, *supra; see also* Rody v. Hollis, 81 Wash. 2d 88, 500 P.2d 97 (1972).
109 *Compare* Marshall v. Fair Employment Practices Comm'n, 21 Cal. App. 3d 680, 98 Cal. Reptr. 698 (1971) *and* Adolph Coors Co. v. Colo. Civil Rights Comm'n, *supra* note 95, *with* McDonnell-Douglas Corp. v. Green, 93 S. Ct. 1817 (1973).
110 *Supra* note 36. The *Griggs* unequal effect concept has also been applied to housing in United States v. Real Estate Development Corp., 347 F. Supp. 776 (N.D. Miss. 1972).
111 *Supra* note 109.

device which operates as a cloak for discriminatory practices. Moreover, the Supreme Court has further accorded considerable dignity to the local civil rights agency by its ruling in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[112] There the Court rejected a constitutional challenge to the local commission's order in an employment discrimination case.

It is still too early to evaluate how state agencies will respond to these decisions. Like the earlier decision in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*,[113] the opportunity is now clearly presented for state agencies to establish and pursue policies of broad civil rights enforcement.

2. Maryland Law

In 1970 the Md. COHR first began to vigorously enforce its newly acquired mandate through the administrative hearing process. During that year the Commission held its first public hearing involving an employment case. In *Jones v. American Totalizator*[114] the Commission issued a comprehensive order that required the respondent to alter its hiring and recruiting system. Its system had been found to have had the effect of perpetuating the all-white nature of respondent's work force. The complainant, however, was found not to have been a victim of the discriminatory system and was left without relief by the Commission. The respondent fully complied with the Commission's order without the necessity of judicial intervention.

The *Jones* case involved a turnabout from the Commission's past role as a mere adviser in the field of civil rights. *Jones* was particularly significant since it represented the first time a Maryland employer had been cited by a state agency for discriminatory practices and ordered to take remedial actions. Since *Jones* the Commission has engaged in a continuing fact-finding activity while interpreting its powers in a broad and comprehensive manner.

Later, in *Harp v. Vernon's Roller Skating Rink*,[115] the Commission ruled in the area of public accommodations holding that a roller-skating rink was covered by the law and could not exclude blacks from using the facility under the guise of being a private club. The case also involved a significant procedural ruling that the Commissioners in their quasi-judicial capacity could not exercise a supervisory role over the Commission staff conciliation efforts. The respondent in *Harp* failed to comply with the Commission's order to take affirmative action to advertise the facility as a public accommodation throughout the Baltimore metropolitan area. Consequently, the Commission instituted an action in which it sought and obtained its first enforcement order.[116]

In *Valcourt v. The Great Atlantic and Pacific Tea Co.*,[117] the Commission ruled an employment practice unlawful, but this time awarded the complainant compensatory damages. The Commission ruled by a split vote of the hearing panel that the complainant was entitled to back pay as a result of the respon-

112 93 S. Ct. 2553 (1973).
113 *Supra* note 26.
114 Md. COHR No. FEP 70-796 (June 22, 1971).
115 Md. COHR No. P.A. 70-453 (Sept. 24, 1971).
116 Md. COHR v. Bush, Cir. Ct. for Baltimore Co., Equity No. 71555 (Feb. 16, 1972).
117 Md. COHR No. FEP 70-918 (Jan. 12, 1972).

dent's discriminatory practice regarding sex and that the Commission had authority to make such an award. Meanwhile, the Commission, using its initiatory powers, had instituted its own complaint against Armco Steel Corporation. After ten days of hearings the Commission found that Armco was engaged in a pattern and practice of racial discrimination in the promotion of front-line supervisors and ordered Armco to promote the black employees into supervisory jobs until blacks held twenty percent of the supervisory jobs.[118] Both *Valcourt* and *Armco* are pending judicial review before the Circuit Courts of Howard County and Baltimore City, respectively.[119]

After the *Griggs v. Duke Power Co.*[120] decision, the Commission applied the Supreme Court's rationale in *Ferguson v. United Parcel Service.*[121] Ferguson was a black male who applied at United Parcel Service (UPS) for the position of "truck loader-unloader." He had a prior arrest and conviction record and had been incarcerated for nonsupport. Ferguson also had credit problems. On the basis of these factors UPS rejected him for employment although the company admitted Ferguson could do the job. The Commission reviewed evidence that such job selection factors tended to adversely affect blacks and that the company could not justify their use as job-related. The UPS selection system was ruled illegal and UPS was ordered to alter its selection criteria to comply with the law. On appeal, the Circuit Court for Prince Georges County reversed the Commission's order on the ground the Commission's remedy exceeded the scope of the charge.[122] The case is now pending before the Maryland Court of Appeals as a case of first impression involving the scope of the Commission's powers.[123]

Since the *Ferguson* case, the Commission has continued to define its authority in a number of cases encompassing all areas of discrimination. In *Lewis v. Cross Roads Inn*[124] the Commission ruled that a tavern was a place of public accommodations and could not exclude blacks from service. For the first time, the Commission awarded a complainant damages for the humiliation he suffered as a result of the respondent's discriminatory treatment. In the housing area the Commission has been particularly active, holding in a number of cases that blacks cannot be subjected to more stringent standards than whites in either the sale or rental of a dwelling. The Commission has also awarded substantial damages for humiliation upon a finding of racially discriminatory housing practices.[125] The Commission held in *Walker v. Dixie Manufacturing Com-*

118 Md. COHR No. FEP CC-1 (April 17, 1972).
119 Md. COHR v. Armco Steel Corp., Cir. Ct. for Baltimore City, Equity No. A 52698; Md. COHR v. The Great Atlantic and Pacific Tea Co., Cir. Ct. for Howard Co., Equity No. 8282.
120 *Supra* note 36.
121 Md. COHR No. FEP 70-850 (March 8, 1972).
122 6 CCH EMPLOYMENT PRACTICES DECISIONS ¶ 8670 (Md. Cir. Ct. 1973).
123 Md. Ct. of App., No. 130 (Sept. Term 1973).
124 Md. COHR No. P.A. 70-436 (May 17, 1972).
125 Lord v. Malakoff, Md. COHR No. H 71-0062 (July 20, 1972) (awarding $1,500); Primrose v. Shannon & Luchs, Realtors, Md. COHR No. 71-0033 (April 3, 1973) (awarding $985); Mosely v. Aldon Management Corp., Md. COHR No. H 72-0312 (April 10, 1972) (awarding $250); Scott v. Diamond, Md. COHR No. H 72-0194 (April 19, 1973) (awarding $150); King v. B. J. & G. W. Frederick, Inc., Md. COHR No. H 71-0011 (May 17, 1973) (awarding $650); Christian v. Isaac Merowitz & Sons, Md. COHR No. H 72-0189 (May 30, 1973) (awarding $1,000).

pany[126] that a no probable cause finding would not bar a complainant at hearing from pursuing his charge of racial discrimination in employment once conciliation failed on other issues. The theory of this case was later confirmed by the U.S. Supreme Court in *McDonnell-Douglas Corp. v. Green.*[127] And in *Bailey v. Holiday Inn,*[128] a case which was reduced to a Commission consent order, the Commission ordered compensatory damages of $1,200 in response to a charge of sex discrimination in employment for the respondent's failure to promote a female.

To date the Commission has issued orders in eighteen cases and although several of the Commission orders have been voluntarily obeyed, the Commission is involved in litigation of several of its orders throughout the state.

B. *Administrative Interpretation*

Another criticism leveled against state agencies concerned their past failure to administratively define their laws.[129] It has been recommended that administrative agencies articulate their policies and standards as a means of reducing the number of case-by-case adjudications occasioned by the lack of defined agency policy.[130] This recommendation is particularly applicable to civil rights agencies.

The EEOC experiences illustrate the success of this approach. EEOC has developed a series of guidelines interpreting Title VII. In *Griggs v. Duke Power Co.*[131] the Supreme Court reviewed with favor the EEOC Guidelines on Employee Selection Procedures and stated that such administrative guidelines are entitled to great deference by a reviewing court.[132] This deference to administrative interpretation of the law was also applied in the housing field.[133]

Like the EEOC, a state civil rights agency has a similar opportunity to interpret the scope of the state civil rights laws by promulgating a number of interpretative guidelines. These guidelines should be accorded great weight by the state courts. The Md. COHR has followed this approach. In the employment area, the Commission has issued guidelines concerning employee selection techniques, and sex and religious discrimination.[134] In the housing sector the Commission has issued guidelines concerning fair housing recruitment[135] and the lending practices of financial institutions.[136]

126 Md. COHR No. FEP 70-973 (March 13, 1973).
127 *Supra* note 111.
128 Md. COHR No. FEP 71-390 (June 19, 1973).
129 A. BLUMROSEN, *supra* note 27, at 19-20.
130 Cramton, *supra* note 94, at 941.
131 *Supra* note 36.
132 *Id.* at 433-34.
133 Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).
134 MARYLAND COMM'N ON HUMAN RELATIONS, GUIDELINES ON EMPLOYEE SELECTION PROCEDURES, SEX DISCRIMINATION GUIDELINES AND GUIDELINES ON RELIGIOUS DISCRIMINATION (1972).
135 MARYLAND COMM'N ON HUMAN RELATIONS, GUIDELINES ON FAIR HOUSING LAW (1972).
136 MARYLAND COMM'N ON HUMAN RELATIONS, HOUSING FINANCE GUIDELINES (1973).

V. Constitutional Requirements

State civil rights agencies operate under a constitutional obligation to enforce federally protected rights. In effect, the state agency must provide the same rights and remedies in the civil rights field that are available in federal court. This principle has two constitutional sources, the supremacy clause[137] and fourteenth amendment.[138]

In *Testa v. Katt*,[139] the Supreme Court held that a state court could not, under the supremacy clause, deviate from national policy and ignore the full application of federal rights. Also, for this same reason, the Court in *Sullivan v. Little Hunting Park, Inc.*[140] reversed the decision of Virginia courts for their failure to act in accordance with federal standards.

The failure of the state to affirmatively seek out and eliminate discrimination makes the state an instrument of that discrimination. In *Burton v. Wilmington Parking Authority* the Court stated: "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them. . . ."[141] If the state does not act, it becomes a joint participant in the illegal discrimination by allowing it to continue unabated.[142]

Consequently, the approach taken in *Gilliam v. City of Omaha*[143] was based upon sound authority. There a federal district court stated that the Nebraska Equal Opportunity Commission must enforce not only state civil rights laws but also fourteenth amendment prohibitions against discrimination. In holding that the state commission could not avoid awarding remedies available under the federal civil rights scheme, the court said:

> If punitive damages are necessary to fully vindicate a Constitutional right, when that right is before a federal court, then such damages are every bit as necessary when that right is before a state administrative commission or a state court. Basic Federal Constitutional rights cannot be watered down by state statutes or state court opinions.[144]

The practical application of these principles to state civil rights agencies means that the agency itself must develop its administrative decisions and interpretations to coincide with minimal federal standards. Indeed, the federal civil rights enforcement program has been characterized as a cooperative venture with state agencies to eliminate discrimination. Accordingly, state agencies have been extended an invitation to join this effort.[145]

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137 U.S. CONST. art. VI, cl. 2. State courts have the power and a duty to enforce rights secured by the Federal Constitution and laws enacted thereunder. Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946).

138 U.S. CONST. amend. XIV.

139 *Supra* note 70.

140 396 U.S. 229 (1969).

141 *Supra* note 70, at 725.

142 *See* State ex rel. Balfour v. Bergeron, *supra* note 102; *see also* Etheridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967) and Weiner v. Cuyahoga Community College District, *supra* note 70.

143 *Supra* note 2.

144 *Id.* at 8 (citation omitted).

145 Address by William H. Brown II, Chairman of the EEOC, before the International Association of Human Rights Commissions, July 15, 1970.

VI. Conclusion

If state civil rights agencies are to operate as viable entities within the concept of federalism, they must apply rights and remedies equivalent to federal law.[146] Failure to do so raises three obvious results:

1. Federal courts, which may eventually review the actions of state agencies, as illustrated by *Cooper v. Philip Morris, Inc.*,[147] will accord little respect to those actions, not only rendering the state agency's action a wasteful use of taxpayers' funds, but also working an unnecessary hardship on some complainants.

2. State agencies which hold themselves out to the public as designed to vindicate civil rights will be effectively rendered a sham organization unable to fulfill that purpose. By the time a state complainant has learned that his rights are not to be fully vindicated at the state level, he may have lost his federal rights.

3. State agencies which water down civil rights will find that the federal government will quickly preempt its functions.

The purpose of this article has not been to suggest that state agencies are to operate as carbon copies of the federal civil rights structure. State agencies provide a unique forum where new and creative approaches can be designed to eliminate discrimination and meet the needs of the particular state. Certainly the present case backlog at the federal level indicates that the need exists for state agencies to participate in the civil rights field. Experience has shown there is sufficient discrimination to support the existence of civil rights agencies at all levels, federal, state and local. To maintain their "separate but equal" status, the state agencies must accept the federal invitation to eliminate all forms of discrimination.

146 Address by William H. Brown II, before the International Association of Human Rights Commissions, July 18, 1973.

147 *Supra* note 4.