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STATE PUBLIC ACCOMMODATIONS LAWS, FUNDAMENTAL LIBERTIES AND ENFORCEMENT PROGRAMS

Wallace F. Caldwell*

Members of minority groups face widespread discrimination when they seek to patronize barber shops, bars, beauty shops, cafes, hotels, lunch counters, motels, parks, resorts, restaurants, taverns, theaters, and other places offering services to the public. Because of their race, creed, color or national origin, they are often barred from access to some places and given unequal service in others. Although Negroes are the principal subjects of discrimination in the use and operation of such facilities, Jews, Chinese, American Indians, Japanese, Mexicans, and others are frequently subjected to the same treatment. For example, Jews are apt to be barred from hotels and resorts. Mexicans may find it impossible to hold jobs that require extensive travel; they may be kept out of meeting rooms, banquet halls and restaurants. American Indians may be barred from cafes, taverns, barber shops and theaters. The pervasive nature of these discriminatory practices is self evident and specific examples could be cited almost indefinitely. Discrimination in public accommodations exists throughout the country and is not restricted to any particular state or geographic region. It applies in some form to members of all minority groups.

This article purports to investigate state legislation which prohibits discrimination in public accommodations and some of the more important administrative efforts which have been undertaken to implement these statutes. More specifically, the article attempts to: (1) summarize legislation currently in effect which prohibits discrimination in public accommodations; (2) investigate litigation which has contested public accommodations statutes in order to determine whether the statutes threaten wider and more fundamental liberties; and (3) review some of the main activities of anti-discrimination commissions.

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1 The term "discrimination" as used herein means differential treatment of individuals or groups of individuals on the basis of ethnic, religious or racial categorizations which has no relation to individual capacities or merits or to the concrete behavior of individuals. ALMOND, THE NATURE OF PREJUDICE 50-52 (1958).

2 President's Comm. on Civil Rights, To Secure These Rights 76 (1947).

3 See STATE ADVISORY COMMS. TO THE COMM'N ON CIVIL RIGHTS, THE 50 STATES REPORT (1961).
agencies which have undertaken to execute or apply public accommodation laws.

I. SUMMARY OF LAWS

Thirty-one states and the District of Columbia\(^4\) have enacted civil rights statutes providing for criminal, civil and/or administrative remedies for persons subjected to discriminatory treatment in the use of public accommodations. Those states with effective laws, dates they were first enacted and remedies available are outlined below.\(^5\)

A. Objectives

The legal objective of public accommodations statutes is to make equal access to and the use of places of public accommodation, resort and amusement a public right. In order to insure that the right is realized, states have declared it to be their public policy, in the interest of the general welfare, to use the police power to prohibit discrimination.\(^6\)

1. **Definition.** Public accommodations are usually thought of in a

\(^4\) ALASKA STAT. §§ 11.60.230-240 (1962);
CAL. CIV. CODE §§ 25-1-1 to -2-5 (1953);
CONN. GEN. STAT. REV.: 53-35 (1961);
DE. CODE ANN. tit. 6, ch. 45 (1963);
ID. CODE ANN. §§ 18-7301 to -7303 (1965);
ILL. ANN. STAT. ch. 38, §§ 13-1 to -4 (Smith-Hurd, 1961), ch. 43, § 133 (1944);
IND. ANN. STAT. §§ 10-901 to -914 (1961);
IO. CODE ANN. §§ 735.1 to -5 (1950);
KAN. GEN. STAT. ANN. § 21-2424 (Supp. 1962);
ME. REV. STAT. ANN. ch. 137, § 50 (1954);
MD. ANN. CODE art. 49B, § 11 (1964);
MASS. ANN. LAWS ch. 140, §§ 5-8 (1957), ch. 272, §§ 9B, 92A (1963);
MICH. STAT. ANN. §§ 28.343-344 (1962);
MINN. STAT. ANN. § 327.09 (1947);
MONT. REV. CODES ANN. § 64-211 (1962);
NEB. REV. STAT. §§ 20-101 to -102 (1954);
N. H. REV. STAT. ANN. §§ 354-1, -2, -4, and -5 (1963);
N. J. STAT. ANN. §§ 10-1-2 to -1-7, 18-25-1 to -25-6 (1963);
N. M. STAT. ANN. §§ 49-8-1 to -8-7 (1963);
N. Y. CIV. RIGHTS LAW §§ 4-40 to -41
EXECUTIVE LAW § 15-2901,
PENAL LAW § 46-513 to -515;
N. D. CENT. CODE § 12-22-30 (1963);
OHIO REV. CODE ANN. §§ 2901-35-36 (Page 1954);
ORE. REV. STAT. §§ 30.670-680 (1963);
PA. STAT. ANN. tit. 18, § 4654 (1963);
R. I. GEN. LAWS ANN. §§ 11-24-1 to -24-6 (1956);
S. D. SESS. LAWS ch. 58 (1963);
Vt. STAT. ANN. tit. 13, §§ 1451-52 (1958);
WASH. REV. CODE §§ 49.60.010-170, 9.91.010 (1962);
WIS. STAT. ANN. § 942.04 (1958);
WYO. STAT. ANN. §§ 6-83.1 to -83.2 (1963);
non-legal sense simply as facilities "open to the public." In a more formal sense, they are defined in a variety of ways. For purpose of analysis, the statutes may be divided into four main categories: (1) statutes with relatively narrow coverage; (2) statutes which have added names of new places to an older specific list; (3) statutes which have added examples of newer types of public places, preceded or followed by such language as, "to include, but not to be limited to," or,

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<sup>a</sup> For statutory citation, see note 4 <i>supra</i>.  
<sup>b</sup> Statute was initially enacted by the Alaska Territorial Legislature.  
<sup>c</sup> Statute does not contain specific provision for civil damages, but state courts have awarded them.  
<sup>d</sup> A newly created Civil Rights Commission will evidently have authority to provide administrative remedies.  
<sup>e</sup> Statute contains no penalty provision.  
<sup>f</sup> E.g., the New Mexico statute provides that, "It is hereby declared to be the policy of the state . . . in the exercise of its power for the protection of the public welfare, to prohibit discrimination in places of public accommodation, resort or amusement due to race, color, religion, ancestry or national origin." N. M. STAT. ANN. § 49-8-1 (1963).  
<sup>g</sup> <i>Greenberg, Race Relations and American Law</i> 79 (1959).
“and all other places, etc.”; and (4) statutes written broad enough to cover all places which offer services to the public, without naming specific types of places.

The District of Columbia and Maryland statutes are examples of the “narrow coverage” category. The District’s law applies only to licensed establishments. The Maryland statute defines public accommodations as:

...any hotel, restaurant, inn, motel or an establishment commonly known or recognized as regularly engaged in the business of providing sleeping accommodations, or serving food, or both, for a consideration, and which is open to the general public; except that premises or portions of premises primarily devoted to the sale of alcoholic beverages and generally described as bars, taverns, or cocktail lounges are not places of public accommodation.8

New York is an example of a state which fits into the “new name to an old list” category. Public accommodations, as defined by New York’s Executive Law, include:

...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, 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 preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bathhouses, 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, 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 and structures occupied by two or more tenants, or by the owner and one or more tenants.9

New Jersey and New Mexico statutes have somewhat similar provisions.

Most public accommodations laws fit more or less into the third category of “newer examples followed or preceded by general lan-

9 N. Y. Executive Law § 292(9) (1952).
guage." Included are Alaska, Colorado, Connecticut, Idaho, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Washington and Wisconsin. The Washington statute, for example, provides that:

Any place of public resort, accommodation, assemblage or amusement is hereby defined to include, but not to be limited to, any public place, licensed or unlicensed, kept for gain, hire or reward, or where charges are made for admission, service, occupancy or use of any property or facilities, whether conducted for the entertainment, housing or lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation or rest, or for the sale of goods and merchandise, or for the rendering of personal services, or for public conveyance or transportation on land, water or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation or public purposes, or public halls, public elevators and public washrooms or buildings and structures occupied by two or more tenants, or any public library or any educational institution wholly or partially supported by public funds, or schools of special instruction, or nursery schools, or day care centers or children’s camps...

The fourth category, “broad and general statutory provisions,” are evidently designed to cover all places which offer services to the public, and are found in several states. For example, California law specifies that “all citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”

This statute is unique in that it refers to “business establishments” without using the term “public accommodations.”

The Montana public accommodations statute simply provides that “no person, partnership, corporation, association or organization owning or managing any place of public accommodation or amusement shall discriminate against any person or group of persons solely on the ground of race, color or creed.”

Delaware, Indiana, Massachusetts, New Hampshire, Vermont and

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Wyoming statutes are similarly broad and evidently meant to be inclusive.

2. Applicability. Public accommodations statutes have broad provisions of applicability. They are commonly addressed to "any person who shall violate," "whoever denies," "every person who violates," "whoever violates," "any person who violates," "any person violating," or "any person who shall willfully violate." Several statutes are somewhat more specific. For example, Idaho indicates that "every person" subject to the law:

... shall be construed to include any owner, lessee, proprietor, manager, agent or employee whether one or more natural persons, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees, receivers, of this state and its political subdivisions, boards and commissions, engaged in or exercising control over the operation of any place of public resort, accommodation, assemblage or amusement.\(^{14}\)

Several other states, e.g., Alaska, California, Iowa and Maine, make their laws applicable to "anyone who aids in or incites the denial of equal accommodations." Some statutes may also be used against those who participate in discriminatory advertising. Rhode Island's provision concerning advertising is typical:

No person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement shall directly or indirectly... publish, circulate, issue, display, post or mail any written, printed or painted communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race or color, religion or country of ancestral origin, or that the patronage or custom thereat of any person belonging to or purporting to be of any particular race or color, religion or country of ancestral origin is unwelcome, objectionable or not acceptable, desired or solicited.\(^{15}\)

Several other statutes provide that the production of any such communication shall be presumptive evidence in any legal action. However, Colorado, New York and Massachusetts statutes specify that this provision does not apply to the mailing of private communications sent in response to specific written inquiries.

3. Facilities Covered. Public accommodations statutes vary widely as to type of facilities covered. Almost all legislation includes inns,
restaurants, hotels and taverns. These provisions obviously trace back to common law requirements which bound innkeepers, in the absence of reasonable grounds for refusal, to receive, lodge and feed all travelers.\textsuperscript{18} In addition, it is generally acknowledged that, at common law, public carriers and certain types of utilities are under a duty not to refuse service except for just cause, but other places and facilities are apparently free to discriminate as they see fit. Some states have explicitly rejected this common law duty, and other factors limit its effectiveness.\textsuperscript{17} But the general trend in states having public accommodations statutes has been to broaden common law provisions to include under statutory coverage newer types of service facilities and professional and business places not ordinarily thought of as "public accommodations." Those services and facilities affected by this trend include a wide variety of public and private business facilities, medical and health, recreational and athletic, educational, transportation and even public and publicly assisted housing facilities. This trend, evident in many states, has not been at all uniform. In any given instance, determination of coverage will not only depend upon the wording, but also upon judicial construction of a statute.

4. Limiting Clauses. Most public accommodations statutes contain limiting clauses which restrict their applicability. The obvious purpose of limitations is to make it clear that the statutes do not give superior rights, but merely place members of minority groups on the same level and subject to the same reasonable disabilities as other citizens.

It is, for example, not unusual to find provisions in statutes that they shall not be construed to confer any right or privilege not applicable to citizens of every color, race, ancestry, or national origin. Another common limitation provides that nothing in the statutes shall be construed to apply to places which are distinctly private, such as fraternal organizations and private clubs. Some statutes specifically exclude from coverage religious and sectarian educational institutions.

5. Liberal Construction and Severability Clauses. A number of states, in an obvious attempt to convey legislative intent, have provided statutory clauses of liberal construction and severability provisions. The Rhode Island statute, for example, stipulates that "the provisions of . . . [the law] . . . shall be construed liberally for the accomplish-

\textsuperscript{18} E.g., Beale, INNKEEPERS AND HOTELS 2, 42, passim (1906).
\textsuperscript{17} See, e.g., Note, Legislative Attempts to Eliminate Racial and Religious Discrimination, 39 COLUM. L. REV. 986 (1939).
ment of the purposes thereof, and any law inconsistent with any prov-

8ision thereof shall not apply." The severability clause provides that:

if any clause, sentence, paragraph or part of ... [the law] ... or the ap-
plication thereof to any person or circumstance shall, for any reason, be
adjudged by a court of competent jurisdiction to be invalid, such judg-
ment shall not affect, impair or invalidate the remainder of said sections
or their application to other persons or circumstances.²⁹

B. Remedies

Depending upon the specific statutory provisions, and in some
instances on judicial precedent, persons subjected to discrimination
in the use of public accommodations may seek civil, criminal and/or
administrative remedies.

1. *No remedy.* The Montana public accommodations statute does
not provide a penalty provision, and state courts have not clarified
liability. Therefore, it is impossible to determine precisely what sanc-
tion a violation would incur. Montana's attorney general entertains
"serious doubt that one might be criminally punished"²⁰ for violating
the law. In so far as civil liability is concerned, Montana law provides
that, "for every wrong there is a remedy."²¹ However, it would be
necessary in a civil action for a person to show that he had actually
suffered damages, and the extent thereof. Another provision of Mon-
tana law specifies that:

in any action for a breach of obligation not arising from contract, where
the defendant has been guilty of oppression, fraud, or malice, actual or
presumed, the jury, in addition to the actual damages, may give damages
for the sake of example, and by way of punishing the defendant.²²

It has been held in Montana, however, that before exemplary damages
may be awarded, actual damages must first be found to have existed.²³
Therefore, it is possible to assume that the Montana public accom-
modations statute provides a basis of civil liability to the extent of actual
damages incurred, and that exemplary damages may be awarded after
jury has found actual damages.

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³⁰ Letter from Attorney General Forrest H. Anderson, State of Montana to Wallace
³³ Gilham v. Devereaux, 67 Mont. 75, 214 Pac. 606 (1923).
2. Civil remedy. California's "business establishments" statute provides only actual and limited exemplary civil damages:

Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry or national origin, contrary to the provisions of ..., this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto. . . .

3. Criminal remedies. Eleven states—the District of Columbia, Idaho, Iowa, Maine, Nebraska, New Hampshire, New Mexico, North Dakota, South Dakota, Vermont and Wyoming—provide only criminal penalties. Iowa courts have, on occasion, awarded civil damages. Whether civil action can be brought under statutes which only provide criminal penalties appears to be an open question in some other states. For example, Mr. Richard F. Upton, Chairman of the New Hampshire Civil Rights Committee, was asked if the provisions of that state's law precluded civil action. He replied:

I do not know the answer to your question. The section to which you refer was put into the bill in the State Senate by senators who were unfriendly to the proposal. The supporters of the bill were forced to accept the amendment.

I think the people who wrote this amendment were trying to outlaw civil suits altogether but there is quite a question in my mind whether they succeeded in so doing because the language which they employed does leave it open to some doubt.

Specific penalties assessed by these statutes are fines and/or imprisonment. Idaho, Iowa, Nebraska, New Mexico, North Dakota and Wyoming statutes indicate that violation is a misdemeanor. District of Columbia, Maine, New Hampshire, South Dakota and Vermont statutes impose fines and/or imprisonment without indicating the nature of the offense. Nebraska, New Mexico, New Hampshire and South Dakota statutes provide for fines without imprisonment. The District of Columbia statute provides for a fine and forfeiture of business license. The Maine statute varies somewhat in that it provides for fine and/or imprisonment for a first offense and a substantial in-

24 CAL. CIV. CODE § 52 (1959)
25 See, e.g., Goostree, The Iowa Civil Rights Statute: A Problem of Enforcement, 37 IOWA L. REV. 242-44 (1951). Civil suits have also been successfully pursued in Michigan, Pennsylvania and Washington, although statutes in effect prescribed only criminal penalties.
crease in the fine for each additional offense. Imprisonment provisions, however, remain the same for additional offenses.

The amount of the fines which may be levied varies. Vermont provides for a maximum of 500 dollars. The District of Columbia provides for a minimum of fifty dollars. Idaho allows a fine not to exceed 300 dollars. Iowa, North Dakota and Wyoming specify a maximum fine of 100 dollars. South Dakota provides for a maximum of 200 dollars. The Maine statute allows a fine of not more than 200 dollars for a first offense and a maximum of 500 dollars for each additional offense. Nebraska provides a minimum of twenty-five dollars and a maximum of 100 dollars; in addition, the violator must pay the costs of prosecution. New Hampshire's maximum fine is 100 dollars and the minimum ten dollars. New Mexico's statute subjects a violator to a fine of not less than ten dollars nor more than fifty dollars. Imprisonment provisions may also vary. Iowa, Maine, North Dakota and Vermont provide for imprisonment not to exceed thirty days. Wyoming specifies a maximum term of ninety days. Idaho provides for maximum imprisonment of six months.

4. Criminal and/or civil remedies. Illinois, Minnesota and Wisconsin statutes provide for both criminal and civil remedies. The Illinois statute allows a criminal penalty not to exceed a 1,000 dollar fine or imprisonment for not more than six months, or both. Also, an operator of a place of accommodation, who commits a violation, is liable to the aggrieved person in a civil action for not less than 100 dollars, nor more than 1,000 dollars. The Illinois attorney general or state's attorney of the county where the violation occurs may also bring an action in equity to enjoin the facility as a public nuisance. Violation of the injunction may be summarily treated as contempt of court.

Any person who violates Minnesota's public accommodations law is deemed to be guilty of a gross misdemeanor, punishable by imprisonment for not more than one year or by a fine of not more than 1,000 dollars. In addition, the violator is liable in a civil suit to the aggrieved person for damages not to exceed 500 dollars.

Wisconsin allows both criminal and civil action. The criminal sanction is a fine of not more than 200 dollars and/or imprisonment for not more than six months. An aggrieved person may also recover damages of not less than twenty-five dollars, and costs, in a civil suit.

5. Criminal and/or civil and administrative remedies. The Alaska, Colorado, Connecticut, Delaware, Indiana, Kansas, Maryland, Massa-
chusetts, Michigan, New Jersey, New York, Ohio, Oregon, Rhode Island, Pennsylvania and Washington public accommodations statutes allow proceedings, under certain circumstances, by anti-discrimination commissions. In all of these states, except for Maryland and Rhode Island, administrative action is in addition to, or in lieu of, criminal and/or civil remedies. Various statutory provisions regarding these remedies are outlined in the Appendix at the end of this article.

II. Litigation

A. Civil Rights Cases

The first public accommodations statutes appeared shortly after the Civil War. State legislation, with a few exceptions, followed an abortive attempt by Congress to act in the area. Prior to that time, it was thought that the Constitution did no contain adequate authority for Congress to legislate concerning encroachments upon civil rights by state governments or private individuals. Following the enactment of the thirteenth, fourteenth and fifteenth amendments, Congress adopted a series of seven implementing statutes aimed specifically at prohibiting discriminatory practices by both state governments and private individuals. Among these statutes was the Civil Rights Act of March 1, 1875, which was designed to guarantee to members of minority groups equal accommodations in all inns, public conveyances, theaters and other places of amusement. This statute was tested before the United States Supreme Court in the famous Civil Rights Cases. Mr. Justice Bradley, speaking for the majority of the Court, Mr. Justice Harlan dissenting, held that the fourteenth amendment did not invest Congress with power to legislate on subjects which were exclusively within the domain of state authority. The wrongful act of one individual against another was regarded as a private wrong, subject only to state control.

Subsequent application of the rule established in the Civil Rights Cases has been fairly consistent. The Supreme Court has interpreted the prohibitions of the fourteenth amendment to limit invasions of civil

27 Early legislation is discussed in Stephenson, Race Distinctions in American Law (1910).
30 109 U.S. 3 (1883).
liberties by state agencies only, and not to restrain private individuals. Protection afforded is dependent on the bounds of the concept of "state action." If "state action" cannot be shown, then the Constitution is of no avail in providing relief for the offended person. However, recent Supreme Court decisions\(^2\) have substantially extended the meaning of "state action." The cases in question determined that Negroes could not be prosecuted on trespass charges for seeking services in privately owned stores in cities where segregation was the official public policy. The Court, however, left open the corollary question: What happens in a community without segregation laws when individual owners refuse to serve members of minority groups? It would seem that in order to bring the fourteenth amendment to bear on this question, the Civil Rights Cases would have to be overruled.

B. Civil Rights Act of 1964

A partial national solution to discrimination in public accommodations was provided on July 2, 1964, when President Johnson signed into law the Federal Civil Rights Act,\(^3\) the first national legislation on the subject since Reconstruction.

Title II of the act is of particular importance to this article. It undertakes, in the interest of the general welfare, to prohibit discrimination in a wide variety of public accommodations which affect interstate commerce. Anyone denied rights under title II is authorized to sue in federal district court for preventive relief by civil injunction. District courts, in their discretion, may permit the United States Attorney General to intervene or bring a civil action when he has reasonable cause to believe that a person or group of persons is engaged in a pattern or practice of resistance to the full exercise of rights granted under the act. If the alleged discrimination takes place in a state which has a public accommodations law, thirty days written notice must be given to the appropriate state authority before suit can be initiated in federal court. If the alleged discrimination takes place in a state which has no public accommodations law, district courts may refer the matter to the Community Relations Service (established by title X of the act) for 60 to 120 days, if there is a reasonable chance of obtaining voluntary compliance.

The constitutionality of title II was decided by the United States

Supreme Court on December 14, 1964, in *Heart of Atlanta Motel v. United States.*

The Court, in an opinion by Mr. Justice Clark, dismissed due process and involuntary servitude objections. The core of the opinion dealt with whether Congress, in passing the act, exceeded its power to regulate commerce. In answering the question, Mr. Justice Clark adroitly sidestepped the *Civil Rights Cases,* holding that the Civil Rights Act of March 1, 1875, had not been conceived in terms of the commerce power. After finding "overwhelming evidence that discrimination by hotels and motels impedes interstate travel," and relying heavily upon Chief Justice Marshall's definition of the commerce clause in *Gibbons v. Ogden,*

Mr. Justice Clark had little trouble finding the operations of the motel in question within the scope of Congressional regulatory powers.

Where does the *Heart of Atlanta Motel* case leave those states with public accommodations statutes? The best answer seems to be that they are almost unaffected. As noted above, before any suit alleging discrimination in the use of public accommodations can take place in federal court, notice must be given appropriate state authorities to allow an opportunity for state remedies to have effect. In addition, the Civil Rights Act of 1964 covers only accommodations which affect interstate commerce. As a matter of fact, many states have much more comprehensive statutes currently in force. Furthermore, the prevailing philosophy of the new Civil Rights Act is to let states solve complaints without federal intervention. Thus, it can still reasonably be argued that the main burden of protecting minority group citizens from discrimination in the use of public accommodations lies with state government.

C. Constitutionality

Prior to the recent *Heart of Atlanta Motel* case, a number of cases had tested the constitutionality of public accommodations statutes in state courts, and in at least two important cases decided by the United States Supreme Court. Two nineteenth-century state cases had more or less settled most constitutional objections. The first case, *Donnell v. State,* arose from the enforcement of Reconstruction legislation in Mississippi. A doorkeeper of a concert hall, in conflict with a Mississippi law securing to people of all races equal accommodations in public conveyances and places of entertainment or amusement, had attempted

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36 Id. at 253.
37 48 Miss. 661 (1873).
to separate two Negroes from a white audience. In a habeas corpus proceeding resulting from a conviction for this discriminatory act, the Mississippi Supreme Court upheld the conviction against a plea that the statute took private property for public use without compensation, stated:

We see no constitutional objection to that portion of the statute which has application to this case; counsel for the appellant has pointed to none, except the inhibition that private property shall not be taken for public use unless compensation be first made. It is not perceived in what manner this law infringes that section of the bill of rights. The assertion of a right in all persons to be admitted to a theatrical entertainment, and the punishment as an offense the act of the owner, lessee or manager, who denies or refuses to sell a ticket to a person for the reasons asserted in these proceedings, in no sense appropriates the private property of the lessee, owner or manager, to the public use.\[38\]

The second, and still considered to be a leading case, was People v. King,\[39\] which resulted when three Negroes were denied tickets to a New York skating rink because of their color. The main contention, on appeal from a conviction for violating New York’s public accommodations law, was that the law unconstitutionally interfered with private rights by restricting the owner of property in its lawful use. The New York Court of Appeals reasoned that the due process clause must be interpreted liberally, but that life, liberty and property might justly be affected by law which did not transcend the limitations of the Constitution. The public accommodations statute was viewed as a legitimate exercise by the state of the police power:

... a power incapable of exact definition, but the existence of which is essential to every well-ordered government. By means of this power the legislature exercises a supervision over matters involving the common weal and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals and general welfare of the community, and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion with which the courts cannot interfere. In short, the police power covers a wide range of particular unexpressed powers reserved to the state affecting freedom of action, personal conduct and the use and control of property.\[40\]

The constitutionality of public accommodations statutes has been

\[38\] Id. at 682.  
\[39\] 110 N.Y. 418, 18 N.E. 245 (1888).  
\[40\] Id. at 423-24, 18 N.E. at 246-47.
challenged in a number of other cases, but most do not present novel arguments. However, an Illinois case, *Pickett v. Kuchan,* raised two arguments not previously made in *Donnell* and *King.* The *Pickett* case resulted when a Negro was refused a ticket for admission to the main floor of a theater. The appellant, on appeal from conviction, maintained that operating a theater was a private business, that any regulation which served to diminish freedom of contract deprived him of due process of law and that any legislation which undertook to regulate the business of operating a theater and did not regulate other businesses which catered to the public was arbitrary and discriminatory. The Illinois Supreme Court, upholding the statute, said:

The right of the State to regulate theaters and all places of public amusement is universally recognized.... The Legislature has the power to classify businesses for purposes of regulation, and the courts will not disturb the classification unless it is clear that there is no fair reason or basis for the inclusion of the business regulated and the exclusion of other private businesses.... The statute in question is... a regulation of places of public entertainment and amusement, requiring that the facilities and accommodations of such places be extended to all without discrimination, and there is no merit to the contention of appellant that it deprives him of his liberty or property without due process of law.... The legislature undoubtedly had the power to pass the act in question. Whether it acted wisely is a matter for it to determine. The judiciary have nothing to do with the wisdom of policy or legislation.

Public accommodations statutes first came to the United States Supreme Court in *Western Turf Ass'n v. Greenberg.* The case involved the exclusion from a race track of a person who made his livelihood publishing a newssheet of racing information. California's Supreme Court heard the case twice and upheld the regulation as a valid exercise of the police power. Western Turf Association made

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43 *323 Ill. 138, 153 N.E. 667 (1926).*

44 *Id. at 140-41, 153 N.E. at 668.*

45 *Greenberg v. Western Turf Ass'n,* 140 Cal. 357, 73 Pac. 1050 (1903), 148 Cal. 126, 82 Pac. 684 (1905)
four arguments before the Supreme Court. First, it contended that the statute denied equal protection of the law. Mr. Justice Harlan, speaking for the Court, found this argument without merit, "for the statute is applicable to all persons, corporations, or associations conducting places of public amusement or entertainment." The second and third contentions were that the statute abridged the rights and privileges of citizens and deprived the race track corporation of liberty without due process of law. The second argument was denied because "a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the law of a state." Roughly the same observation disposed of the third contention, "for the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial persons." The main argument of the case was that the public accommodations statute deprived the corporation of property rights without due process. In denying this contention, Mr. Justice Harlan recognized the sweeping scope of police power regulation:

Decisions of this court, familiar to all, and which need not be cited, recognize the possession, by each state, of powers never surrendered to the general government; which powers the state, except as restrained by its own Constitution or the Constitution of the United States, may exert not only for the public health, the public morals, and the public safety, but for the general or common good, for the well-being, comfort, and good order of the people. The enactments of a state, when exerting its power for such purposes, must be respected by this court, if they do not violate rights granted or secured by the supreme law of the land.

The second case before the United States Supreme Court which tested the constitutionality of public accommodations statutes came from Michigan. In Bob-Lo Excursion Co. v. Michigan, a Negro was denied passage on a vessel used to transport patrons between Detroit and its amusement park located on an island in Canadian waters. Michigan courts found that the vessel was a public conveyance within the statutory requirements of their public accommodations law.

The Bob-Lo Company contended that the statute could not be applied to them because article I, section 8, of the Constitution gives Congress exclusive power to control interstate and foreign commerce. The

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46 Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1906).
47 Ibid.
48 Ibid.
49 Ibid.
50 333 U.S. 28 (1948).
question considered by the Supreme Court was whether the Michigan court was correct in holding that the commerce clause did not forbid applying the public accommodations act to sustain the conviction. Mr. Justice Rutledge, speaking for the Court, held that while the company's transportation of its patrons was foreign commerce and within the scope of the Constitution, the power of Congress over foreign commerce did not exclude state regulation which was consistent with federal policy.\(^{51}\)

1. **Limited construction.** The fact that public accommodations statutes have been held to be constitutional does not mean that they have had a wide and liberal interpretation or application. To the contrary, many courts have exhibited decided hostility to them by using the following principles of construction to insure limited application: (1) the statutes are in derogation of the common law, except as applied to innkeepers, common carriers and certain utilities and, as such, are to be strictly construed; (2) penal statutes must be narrowly construed; (3) the statutes limit the use of private property; and (4) Lord Tenderden's Rule, or the rule of *ejusdem generis*.\(^{52}\)

These rules of construction have served at one time or another to exclude from coverage of public accommodations statutes such facilities and accommodations as ice cream and soda fountains,\(^{53}\) skating rinks,\(^{54}\) billiard rooms,\(^{55}\) barber shops,\(^{56}\) family or apartment hotels,\(^{57}\) saloons,\(^{58}\) bootblacking stands,\(^{59}\) mercantile establishments,\(^{60}\) ceme-

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\(^{51}\) However, see Pryce v. Swedish-American Lines, 30 F. Supp. 371 (1939), where it was held that the New York public accommodations statute could not be construed as forbidding racial discrimination between passengers by common carriers engaged in commerce between the Port of New York and foreign ports, since, if so construed, the statute would illegally interfere with foreign commerce.

\(^{52}\) *Black's Law Dictionary* 651 (4th ed. 1951), explains *ejusdem generis*, as follows:

In the construction of laws, wills and other instruments, the 'ejusdem generis rule' is that where general words follow an enumeration of persons or things by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.


\(^{54}\) Bowlin v. Lyon, 67 Iowa 536, 25 N.W. 766 (1885).


\(^{57}\) Alsberg v. Lucerne Hotel Co., 46 Misc. 617, 92 N.Y. S. 851 (1905).

\(^{58}\) Rhone v. Loomis, 74 Minn. 200, 77 N.W. 31 (1898); Gibbs v. Arras Bros., Inc., 222 N.Y. 332, 118 N.E. 857 (1918); Kellar v. Koerber, 61 Ohio St. 388, 55 N.E. 1002 (1899).

\(^{59}\) Burks v. Bosso, 180 N.Y. 341, 73 N.E. 58 (1905).

teries, dance halls, restaurants, beauty parlors, golf courses, women's apparel stores, dentists' offices and gymnasiums.

A few selected examples will show how courts have narrowed the effect of public accommodations statutes. In Faulkner v. Solazzi, a Negro was refused service at a barber shop. Hinging its decision on the "private property" argument, the Connecticut Supreme Court found that public regulation had effect only

...from the devotion of the property of the business agency to a use in which the public has an interest, so that the manner of its use is of public consequence and affects the community at large, and especially if a natural or virtual monopoly is enjoyed, as in the case of railroads, telegraph and telephone companies, theatres and places of public amusement, gas and water companies, public warehouses, grain elevators, etc.

In Gibbs v. Arras Brothers, Inc., several Negroes were refused drinks in a public saloon. The New York Court of Appeals, upholding a lower court finding that a liquor saloon was not a place of public accommodation, said:

...the statute must be strictly construed for the reason that it imposes restrictions upon the control of management of private property by the owner and is both penal and criminal. Its effect is not to be extended through implication or analogy.

In Harvey, Inc. v. Sissle, a retail store selling apparel for women was held not to be included within the statutory provision, "other places of public accommodation and amusement." Using the ejusdem generis rule to justify the restrictive interpretation, the Ohio court said:

In olden times we were taught that the right of private contract was a constitutional guaranty. If a farmer had grain or cattle to sell or a manufacturer had machinery to sell or a merchant had merchandise to sell, we were told that he could sell it whenever, to whomsoever and upon

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66 Harvey, Inc. v. Sissle, 53 Ohio App. 405 (1936).
69 79 Conn. 541, 65 Atl. 947 (1907).
70 Id. at 542, 65 Atl. at 947.
71 222 N.Y. 332, 118 N.E. 857 (1918).
72 Id. at 335, 118 N.E. at 858.
73 53 Ohio App. 405 (1936).
whatever terms he chose. He could refuse to sell to a German, Irishman, Negro, Jew or any other person for any or no reason. It is now said that this former concept must be modified to the extent that anyone who offers the market price for his wares may enforce the sale. Before this modification of the right of private contract becomes statute law, it should at least receive legislative declaration.\textsuperscript{74}

A more recent California case, Coleman v. Middlestaff,\textsuperscript{75} represents an instance when a young Negro made a telephone appointment with a dentist to have a painful tooth extracted. He was then refused service because of his race. The court, applying rules of strict construction, held that a dentist’s office was not included within the statutory provision, “other public places of amusement and accommodation.”\textsuperscript{76}

2. Liberal construction. Ambiguous and unclear statutory provisions have probably contributed to some of these restrictive decisions. However, legislatures cannot be blamed for all of them. Courts have not been entirely consistent in applying the statutes. A line of precedent now runs directly counter to the aforementioned narrow decisions. There are any number of reported cases where such facilities as hotels,\textsuperscript{77} restaurants,\textsuperscript{78} theaters,\textsuperscript{79} skating rinks,\textsuperscript{80} saloons and taverns,\textsuperscript{81}

\textsuperscript{74} Id. at 408-09.
\textsuperscript{76} Narrow construction has also resulted in restricting the types of relief available to persons discriminated against. See Comment, \textit{Availability of Injunctive Relief Under State Civil Rights Acts}, 14 U. Chi. L. Rev. 174 (1956) and Comment, \textit{Private Remedies Under State Equal Rights Statutes}, 44 Ill. L. Rev. 363 (1949).
\textsuperscript{80} Proctor v. Mt. Vernon Arena, 292 N.Y. 168, 54 N.E.2d 349 (1944); People v.
bowling alleys, public resorts, bootblack ing stands, dancing pav ilions and ballrooms, soda fountains, swimming pools, beaches and bath houses, club houses of race tracks, golf courses, shoe stores and reducing salons have been held to be encompassed by public accommodations statutes. That these facilities have been held to be public in nature is not so illuminating as the reasoning some courts have used to find them so. Some of these facilities are clearly included in the wording of respective statutes, giving courts little or no discretion in considering them subjects of regulation. This, however, has not been true in all instances. For example, in a New York case, Babb v. Elsinger, the court applied the *ejusdem generis* rule, but found a saloon was a public facility even though it was not an “inn” or “hotel” as provided by the law. The court felt that a saloon was of the same character and kind as those facilities enumerated and therefore came within the statutory scope.

In Darius v. Apostolos, the Colorado Supreme Court acknowledged that the public accommodations statute was penal and that the rule of strict construction applied, but refused to follow a New York case, Burks v. Bosso, which had held a bootblack ing stand was not a public facility. The court said of the Burks decision:

This, we think is incorrect. . . . A bootblack ing stand is a “place of public accommodation.” It is of the same general class as “barber shops,” in that the business of each consists principally in furnishing personal service

King, 110 N.Y. 418, 18 N.E. 245 (1888); Jones v. Broadway Roller Rink Co. 136 Wis. 595, 118 N.W. 270 (1908).  
64 Darius v. Apostolos, 68 Colo. 323, 190 Pac. 510 (1920).  
71 Browning v. Slenderella Systems of Seattle, 34 Vol. 40: 841
and the two are quite generally operated in conjunction... the doctrine of ejusdem generis is not applicable.  

Exclusion of a Negro from a theater caused the Indiana Supreme Court, in a case upholding the application of that state’s public accommodations statute, to say: “It is true that this is a penal statute and should be strictly construed but strict construction does not require us to ignore the plain meaning of the statute.”

Several other early cases show that strict construction of public accommodations statutes did not necessarily require state courts to depart from clear legislative intent. However, a more recent New York case, Camp-of-the-Pines v. New York Times Co., represents a decided departure from traditional and restrictive court attitudes. In this case, the proprietor of a vacation camp brought suit against the New York Times for an alleged breach of contract in refusing to publish advertisements that the camp was operated for the benefit of “select clientele.” The court, in denying the suit, pointed out that discrimination, either direct or indirect, against any person because of race, color or religion was barred under the state’s public accommodations law. Furthermore, the court felt that the words, “select clientele,” if printed in the newspaper, would have violated the statute. Perhaps even more important, the court held that the public accommodations statute was remedial and must be liberally construed.

Camp-of-the-Pines served as a useful precedent to other state courts. For example, in Everett v. Harron, the Pennsylvania Supreme Court held that a swimming pool was a place of public accommodation and fell under statutory prohibitions against discrimination. In addition, the court held that the cause of action in the case was a tort and granted injunction relief against the swimming pool operator. An Iowa case, Amos v. Prom, held a public ballroom to be a place of amusement within the Iowa statute. The court pointed out that “[t]he rule of ejusdem generis is to be used as an aid in ascertaining the intent of a statute and not to thwart it.” A New York court, upholding a prosecution against a hotel owner for denying a room to an interracially married couple, held that the state’s public accommodations statute was remedial and must be liberally construed. California has held

95 68 Colo. at 326, 190 Pac. at 511.
97 184 Misc. 389, 53 N.Y.S.2d 475 (Sup. Ct., Special T. 1945)
99 117 F. Supp. 615 (N.D. Iowa 1954)
100 Id. at 625
that the state's public accommodations law is to be given a liberal
construction and that a store retailing shoes is included under the
provision, "all other places of public accommodation."\(^{102}\) Negroes who
were refused service because of their race were allowed to maintain
action for damages.

In a New Jersey case, *Evans v. Ross*,\(^{103}\) concerning discrimination
by the proprietor of a dining room, the court found that in construing
the public accommodations statute it was obliged to give effect to the
overriding plan or purpose of the legislature as fairly expressed in the
language of the statute and must avoid any interpretation that would
render any part inoperative, superfluous or meaningless.

The Washington court, in *Browning v. Slenderella Systems*,\(^{104}\) held
that a reducing salon was a public accommodation. The court pointed
out that discrimination in violation of the public accommodations
statute might arise through "subtleties of conduct" as well as an openly
expressed refusal to serve, and might arise even though no physical
violence was used or threatened and the discriminator was courteous.
The court's liberal interpretation also allowed for civil damages, even
though specific statutory provisions were not available for them.

III. ACTIVITIES OF STATE COMMISSIONS

A. Regulatory and Non-regulatory Activities\(^{105}\)

Sixteen states have now given anti-discrimination commissions re-
sponsibilities to eliminate discrimination in public accommodations.
The programs and activities of these commissions vary widely. There-
fore, only general observations can be made regarding them.

1. Regulatory Programs. Formal adjudicatory proceedings play a
very small part in the activities of anti-discrimination commissions;
the vast majority of complaints are adjusted by conciliation processes.
The Indiana Civil Rights Commission has reported that not one com-
plaint has been taken to a public hearing, although approximately
twenty-five complaints per month have been handled since their public
accommodations statute went into effect.\(^{106}\) Kansas has processed six

\(^{102}\) Lambert v. Mandel's of California, 156 Cal. App. 2d 855, 319 P.2d 469 (Los


\(^{104}\) 54 Wn.2d 440, 341 P.2d 859 (1959).

\(^{105}\) Regulatory activities are regarded as those procedures ordinarily considered to
be of a "judicial" nature. These include both "formal" and "informal" processes. Non-
regulatory activities are the variety of functions anti-discrimination commissions
undertake to supplement and complement their regulatory responsibilities.

\(^{106}\) Letter from Dr. Donald M. Royer, Indiana Civil Rights Comm'n, to Wallace F.
complaints so far under its law: five have been closed without public hearing. Annual reports of other anti-discrimination commissions tell a similar story. The Race Relations Law Reporter, which has undertaken since May, 1954, to publish materials where the issue of race or color is presented as having legal consequences, reports through 1964 only ten instances where anti-discrimination commissions have held formal hearings on complaints. Four of these cases were from Ohio, two from New York and Pennsylvania and one each from Colorado and Washington. Two complaints resulted from discrimination by tavern owners, four from discrimination by barbers, and one each from discrimination in the use of roller-rink facilities, a golf course, a cemetery and discriminatory advertising by a resort owner. Discrimination was found in every instance and cease and desist orders were issued.

The paucity of reported instances of administrative adjudication suggests a timidity or reluctance on the part of anti-discrimination commissions to resort to formal sanctions. It might also partially be explained by the efficacy of the conciliation process. The fact of the matter, however, probably lies somewhere between these two positions. Anti-discrimination commissions do seem to be reluctant to proceed to the formal hearing stage unless they have a very good case and only after conciliation procedures have been exhausted. The success of the conciliation process and the fact that most complaints do not require formal hearings also seem to stem from the adoption by commissions of what might be called "follow-up procedure." This procedure works as follows: when a complaint of discrimination in the use of a

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107 Personal interview with Mr. Carl W. Glatt, Executive Director, Kansas Comm'n on Civil Rights, Topeka, Kansas, Dec. 31, 1963.
108 Gegner, 7 RACE REL. L. REP. 974-76 (Ohio Civil Rights Comm'n 1962); Roller-cade Skating Rink, 7 RACE REL. L. REP. 985-88 (Ohio Civil Rights Comm'n 1962); Frye, 7 RACE REL. L. REP. 1293-95 (Ohio Civil Rights Comm'n, 1962); Rose Hill Securities Co., 8 RACE REL. L. REP. 749-61 (Ohio Civil Rights Comm'n, 1963).
113 E.g., the Executive Director of the Ohio Civil Rights Comm'n says, "I believe the most successful technique employed involves follow-up in terms of either personal observation by staff or compliance reports by the respondent." Letter from Ellis L. Ross, Executive Director, Ohio Civil Rights Comm'n, to Wallace F. Caldwell, Aug. 15, 1963.
public accommodation has been made to an anti-discrimination commission, an investigator discusses the discriminatory act with the owner or operator. Should the owner or operator agree to change his policy, or should there be an indication that the discriminatory act resulted from misunderstanding, the case is continued rather than closed. The person discriminated against, or some other member of a minority group, is then directed to the facility. If he is served without discrimination, the case is then marked "adjusted" and closed. As an alternative, commission staff members may from time to time visit the accommodation to observe whether the discriminatory policy of the facility has in fact been altered.

Follow-up procedure raises the question of whether the initial complainant has had his rights "bargained away." In those states that allow criminal and civil procedures in lieu of, or in addition to, administrative remedies, the problem does not arise—the person subjected to discrimination is still free to initiate civil proceedings against the owner for damages suffered. However, the vast majority of complaints, for reasons suggested below, are not made before courts. But follow-up procedure and any "bargaining away" of an individual's rights which may occur would appear to be justified by the changed policy on the part of the owner or operator of the facility without incurring hostility or necessitating the expense and time involved in litigation and the realization by all members of minority groups of the opportunity to use the facility or accommodation on future occasions. While the jurisprudential "soundness" of this procedure is subject to debate, it does seem to be in keeping with the reasons for establishing anti-discrimination commissions and with the best interests of all members of minority groups.

Follow-up procedure also raises the problem of whether an individual's rights have not been sacrificed for the realization of superior "group rights." It must be kept in mind, however, that "rights" realized by members of minority groups by the use of follow-up procedure are not superior "rights." What is realized are the rights of individuals, who also happen to be members of a minority group, to be treated like anyone else, i.e., without regard to their race, creed, color, etc. They are merely placed in the same status and subjected to the same disqualifications as other persons.

The reluctance of anti-discrimination commissions to resort to formal adjudicatory hearings might also be explained, in some instances, by
the difficulty of proving discrimination and the procedural requirements that have been foisted upon agencies by enabling statutes. For example, the Kansas public accommodations statute requires the Commission on Civil Rights to follow rules of evidence and procedure prevailing in courts of law and equity. The Executive Director of that Commission, Mr. Carl W. Glatt, maintains that proof of discrimination often requires the submission and consideration of evidence and information that would be unacceptable under these rules. Hence, when an owner or operator of a public accommodation is adamant in refusing to change his discriminatory policy, the Commission's "hands are tied." It does not wish to risk its "reputation" by pursuing a case that might well be quashed for procedural irregularities in appeal to the courts.\footnote{114 Personal interview with Carl W. Glatt, Executive Director, Kansas Comm'n on Civil Rights, Topeka, Kansas, Jan. 2, 1964.}

Since most public accommodations complaints are settled amicably by the conciliation process and formal sanctions rarely resorted to, possible abuse of administrative discretion by anti-discrimination commissions might be avoided by having sanctioning power exclusively in the hands of courts. This procedure, however, has been found to be unsuccessful for a number of reasons and, although still used in some states, it has been supplemented by administrative remedies. The experience of several commissions illustrates some of the problems involved when anti-discrimination commissions are not given powers to issue orders.

Ohio first enacted a public accommodations statute in 1884, permitting a choice of filing a civil suit for damages or proceeding by criminal action. The records show that despite the provisions permitting maximum civil damages of 500 dollars there were few, if any, cases indicating payments over 300 dollars, and these were infinitesimally few. In fact, fines were often levied against a guilty party in the sum of one dollar. With regard to the election of criminal procedure under the law, there was always the factual consideration of the requirement that a case be heard in the county in which the alleged discriminatory act occurred. Pre-judgment notwithstanding, it was not unusual for a complainant who was not a native of the defendant's county to be confronted with a "home-town" sheriff, prosecutor, judge and/or jury. These odds were difficult to overcome. Research undertaken by the Ohio Civil Rights Commission in 1960 clearly established
the fact of discrimination in every section of the state despite the public accommodations statute. Based on this research and recommendations to the legislature and governor, the Civil Rights Commission was given regulatory jurisdiction in the area of public accommodations in 1961. The old law remains on the books however, and enables a complainant to file under either or both.\textsuperscript{115}

The experience of Ohio has been duplicated in a number of other states. For example, the Executive Director of the Kansas Commission on Civil Rights gives the following reasons why efforts were made to get an enforceable “administrative agency type” of public accommodations law enacted:

\begin{itemize}
  \item a. This criminal statute placed the burden of following through with a complaint upon the complainant whose financial resources might not permit extensive legal action involving numerous appeals.
  \item b. Enforcement varied among county attorneys—some were indifferent, some were outright negative in refusing to process complaints in their counties, some did process complaints diligently depending on their own philosophy regarding racial matters or the fact of a large Negro voting constituency in their area. But it was the uncertainty of this enforcement which created the need for the new law.
  \item c. The coverage was limited in substantive scope and also through interpretation. That is, the phrase “for which a license is required by any of the municipal authorities of this state” caused some county attorneys to rule certain places of public accommodations were not covered by the law.\textsuperscript{116}
\end{itemize}

A research sociologist attached to the Indiana Civil Rights Commission, Dr. Donald M. Royer, gives somewhat similar reasons why that state’s public accommodations statute, minus administrative remedies, did not work:

We found that the law was not used because: a) many of the people who had complaints could not afford the legal fees involved in employing a lawyer or felt the legal process was too laborious to warrant the time and money involved, and b) most Negroes were not aware that they could use the services of the local prosecuting attorney to fight the case, and when they were aware of it they were skeptical of his willingness to act on their behalf. Our own experience with prosecuting attorneys tends to support their skepticism. The prosecutor’s reluctance seems to be based on two grounds: a) the political sensitivity of his job, \textit{i.e.}, civil rights

\textsuperscript{115} Conclusion based on a letter from Ellis L. Ross, Executive Director, Ohio Civil Rights Comm’n, to Wallace F. Caldwell, Aug. 15, 1963.

\textsuperscript{116} Letter from Carl W. Glatt, Executive Director, Kansas Comm’n on Civil Rights to Wallace F. Caldwell, July 19, 1963.
actions often alienate the voting public, and b) involvement in other more pressing cases. The new law gives the initiative for prosecution to the agency most directly concerned with the problem, the Civil Rights Commission.\textsuperscript{117}

These comments might be partially discounted due to the nature of the source. Each writer undoubtedly has a personal attachment to, and an interest in, the purposes of public accommodations legislation. More impartial studies, however, tend to indicate that the substance of their contentions is correct. For example, Professor Robert E. Goostree undertook a survey of all county attorneys in Iowa regarding the enforcement of that state's public accommodations law and found, among other things, that: (1) judges and juries were not "friendly" to public accommodations suits; and (2) the prosecution of public accommodations offenders was not as vigorous as it might have been.\textsuperscript{118}

2. Non-regulatory Activities. All commissions charged with eliminating discrimination in public accommodations emphasize the importance of maintaining a continuing "grass roots" educational program. These programs seem primarily to serve two purposes: (1) to disseminate to potential complainants information concerning their rights under law, and (2) to inform owners and operators of public accommodations of their obligations. Publicizing takes place by using all communications media, e.g., press, radio, television, public speeches, etc., and by distributing pamphlets and other written materials. These activities are limited by certain factors, such as time available, number of staff members and operating budgets. The effect of the programs are impossible to calculate and some dissemination techniques are probably of questionable effectiveness. Nevertheless, education seems to be an important part of all commission programs and should not be underemphasized by any analyst. Several other commission activities also deserve mention.

Commissions are now increasingly instituting what is called the "industry-wide approach" to eliminate discrimination in public accommodations. This approach entails the convening of various groups, e.g., motel, hotel, barber and beauty shop owners and operators, through their professional associations and organizations, to review provisions of public accommodations laws and expose commission staff members to questions relative to the manner and means of compliance. The

\textsuperscript{117} Letter from Dr. Donald M. Royer, Indiana Civil Rights Comm'n to Wallace F. Caldwell, Sept. 13, 1963.

approach may also entail formal compliance agreements on the part of the owners and operators. Whether industry-wide procedure is in fact effective is a matter of judgment. For example, the Executive Director of the Ohio Civil Rights Commission, Mr. Ellis L. Ross, reports that "we have approved in some instances an industry-wide approach which I am inclined to believe is an improvement over the case-by-case method."\(^{119}\)

Most anti-discrimination commissions also use personal visitations to secure compliance with the law. These visitations may be ad hoc and sporadic, or they may be comprehensive and designed to cover all facilities in a given area of a state.

Commissions also mail out vast quantities of notices which are required to be posted on the premises of facilities. Thus, for example, the Executive Director of the Kansas Civil Rights Commission, Mr. Carl W. Glatt, reports that his Commission mailed out approximately 8,500 notices when the Kansas public accommodations law was first enacted and sends approximately 150 to 200 replacements and new additions each month.\(^{120}\) The effectiveness of these notices is subject to some difference of opinion. Mr. Glatt indicates that his staff, through personal visits, has found approximately fifty per cent compliance with posting requirements.\(^{121}\) However, Mr. Ellis L. Ross of the Ohio Civil Rights Commission says, "Our experience inclines us to believe that the least effective part of the entire program was the mere mailing of the mandatory notices . . . and assuming that they would be properly posted."\(^{122}\)

**CONCLUSION**

Thirty-one states and the District of Columbia have legally prohibited discrimination in places of public accommodations. Sixteen of these states have provided for administrative enforcement of their laws. This type of information is not by itself very enlightening. It does, however, indicate that a large number of Northern and Western states have been concerned enough about civil rights problems to enact public measures to provide relief for minority group citizens who suffer unequal treatment when they seek to secure their rights.

\(^{119}\) Letter from Ellis L. Ross, Executive Director, Kansas Comm'n on Civil Rights to Wallace F. Caldwell, Aug. 15, 1963.

\(^{120}\) Personal interview with Carl W. Glatt, Executive Director, Kansas Comm'n on Civil Rights, Topeka, Kansas, Dec. 31, 1963.

\(^{121}\) Ibid.

\(^{122}\) Letter from Ellis L. Ross, Executive Director, Kansas Comm'n on Civil Rights to Wallace F. Caldwell, Aug. 15, 1963.
An overview of public accommodation legislation illustrates some of the problems inherent in a federal system of government. Coverage of the laws, in terms of prohibited conduct, varies greatly from state to state. A number of states still do not have statutes to provide relief from discrimination. The most conspicuous example of the latter is the block of Southern states which seceded from the Union during the Civil War. It should be noted, however, that there are still some Northern and Western states which have not ventured into this "sensitive" area of public policy. There has also been a rather haphazard development of remedies available under currently effective public accommodations laws. The well-tested administrative process has not yet been adopted in almost one-half the states with effective laws. Persons discriminated against in these states have to bear the burden of seeking relief in civil proceedings or of having a local prosecutor institute criminal action.

The failure of some states to act and the rather haphazard development of existing statutory coverage and remedies available under state statutes resulted in a need for some type of national solution to the problem of discrimination in public accommodations. Title II of the Civil Rights Act of 1964 seems to offer a partial solution. The constitutionality of this measure has now been established. But it would seem that the statute is complementary and was not meant to supplant remedies available to citizens in states which have effective public accommodations statutes. It is difficult to gauge what long-range effect this new federal law will have on the activities and programs of state anti-discrimination commissions. The answer, of course, will not be clear until experience has been gained under its administration. However, it would seem that most state commissions will only be minimally affected. If anything, the federal law should enable commissions to operate in a climate of opinion more favorable to problem solving and exercising current responsibilities. Problems may arise in coordinating state and federal enforcement activities, but if coordination is undertaken in good faith this would not seem to be insurmountable. A possibility also exists that a number of states that do not have public accommodations laws and anti-discrimination commissions, or that have existing laws which are not so comprehensive as the new federal statute, may adopt or broaden laws and establish commissions. This would certainly be a "step in the right direction" in so far as the philosophy of the federal statute is concerned. However, there is also a
possibility that some states may establish commissions and pass public accommodations laws ostensibly to stifle or delay the effect of the federal law. This might result in some conflict, but the Attorney General, the Community Relations Service and the federal courts have sufficient authority to circumvent any action that would tend to embarrass the act’s purpose.

Public accommodations statutes are not new attempts to regulate in the public interest. A number had their genesis in the period immediately following the Civil War. Their constitutionality also seems beyond question. There are no reported cases where such statutes have been held unconstitutional. Many courts have held that they are clearly a proper exercise of the police power; they do not arbitrarily deprive a person of liberty or property without due process of law; nor do they infringe upon the right to contract or present arbitrary classification schemes. While it does appear that, in passing laws under the police power, there may be a certain amount of interference with property rights, laws are not usually condemned on this account, unless the interference amounts to a practical confiscation. Public accommodations statutes appear to present no problem in this respect. The main difficulty in applying the statutes to specific instances of discrimination seems to be the narrow attitudes some state courts have taken in regard to them. However, other courts have adopted a liberal attitude and applied the statutes within the obvious scope of legislative intent. Even with a liberal approach, public accommodations statutes hardly present a serious threat to any fundamental liberties that characterize a democratic society.

The use of the administrative process as a device to secure the rights of citizens under public accommodations statutes can also hardly be regarded as something which has been imposed upon the people. It has been developed and perfected in a trial and error process in this particular sphere over almost a twenty-year period. This is not to say that anti-discrimination commissions have been totally successful in eliminating discrimination in public facilities. Improvement obviously can and should be made. But measuring the success or lack of success in eliminating discrimination is most difficult, for success is a relative matter and depends to a large degree upon the perspective of those who would measure it. Nevertheless, a wide variety of public accommodations have been desegregated as a direct result of anti-discrimination commission activities.
## APPENDIX

### CRIMINAL AND/OR CIVIL AND ADMINISTRATIVE REMEDIES FOR PUBLIC ACCOMMODATIONS STATUTES

<table>
<thead>
<tr>
<th>State</th>
<th>Criminal Remedy</th>
<th>Civil Remedy</th>
<th>Administrative Agency</th>
<th>Other Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>Misdemeanor; punishable by imprisonment for not more than 30 days or a fine of not more than $500, or both.</td>
<td></td>
<td>Human Rights Commission</td>
<td>Failure to comply with administrative order leads to criminal prosecution by state’s Attorney General.</td>
</tr>
<tr>
<td>Colorado</td>
<td>Fine of not less than $10, nor more than $300, or imprisonment for not more than 1 year, or both.</td>
<td>Damages in a sum of not less than $50, or more than $500.</td>
<td>Anti-Discrimination Commission</td>
<td>Administrative remedy is exclusive.</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Fine of not less than $25, nor more than $100, or imprisonment for not more than 30 days, or both.</td>
<td></td>
<td>Civil Rights Commission</td>
<td>Administrative remedy is in addition to criminal penalties.</td>
</tr>
<tr>
<td>Delaware</td>
<td>Misdemeanor; fine of not more than $500, or imprisonment for not more than 90 days, or both.</td>
<td></td>
<td>Human Relations Commission</td>
<td>No criminal prosecution can be instituted unless a majority of the commissioners certify that it is in the public interest.</td>
</tr>
<tr>
<td>Indiana</td>
<td>Fine of not less than $25, nor more than $100, or imprisonment for not more than 30 days, or both.</td>
<td>Damages of not less than $25, nor more than $100, with costs.</td>
<td>Civil Rights Commission</td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>Misdemeanor; fine of not less than $10, nor more than $1,000.</td>
<td></td>
<td>Commission on Civil Rights</td>
<td>Administrative remedy is exclusive.</td>
</tr>
<tr>
<td>Maryland</td>
<td>Misdemeanor; fine of not less than $25, nor more than $500, or imprisonment for not more than 1 year.</td>
<td>Damages.</td>
<td>Commission on Interracial Problems and Relations</td>
<td>Respondent may at any stage of proceedings elect to have a complaint submitted directly to a court.</td>
</tr>
</tbody>
</table>
### APPENDIX (Cont’d)

<table>
<thead>
<tr>
<th>State</th>
<th>Criminal Remedy</th>
<th>Civil Remedy</th>
<th>Administrative Agency</th>
<th>Other Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Massachusetts</td>
<td>Fine of not more than $300, or imprisonment for not more than 1 year, or both.</td>
<td>Damages not less than $100, nor more than $500.</td>
<td>Commission Against Discrimination</td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td>Misdemeanor; fine of not less than $100, or imprisonment for not less than 15 days, or both.</td>
<td>Treble damages sustained.</td>
<td>Commission on Civil Rights</td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>Misdemeanor; fine of not more than $500, or imprisonment for not more than 90 days, or both.</td>
<td>Upon criminal conviction, respondent shall pay a sum of not less than $100, nor more than $500, to be recovered in a civil action, with costs.</td>
<td>Division on Civil Rights</td>
<td>Administrative remedy is exclusive.</td>
</tr>
<tr>
<td>New York</td>
<td>Misdemeanor; fine of not less than $100, nor more than $500, or imprisonment for not less than 30 days, nor more than 90 days, or both.</td>
<td>Damages not less than $100 nor more than $500.</td>
<td>Commission for Human Rights</td>
<td>Administrative remedy is exclusive.</td>
</tr>
<tr>
<td>Ohio</td>
<td>Fine of not less than $50, nor more than $500, or imprisonment for not more than 30 days.</td>
<td>Damages of not less than $50, nor more than $500.</td>
<td>Anti-Discrimination Commission</td>
<td>Administrative remedy is exclusive.</td>
</tr>
<tr>
<td>Oregon</td>
<td></td>
<td>Damages not to exceed $500.</td>
<td>Civil Rights Division</td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td></td>
<td></td>
<td>Commission Against Discrimination</td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Misdemeanor; fine not to exceed $500, or imprisonment not to exceed 3 months, or both.</td>
<td></td>
<td>Human Relations Commission</td>
<td>Administrative remedy is exclusive.</td>
</tr>
<tr>
<td>Washington</td>
<td>Misdemeanor; fine not to exceed $500, or imprisonment not to exceed 3 months, or both.</td>
<td></td>
<td>State Board Against Discrimination</td>
<td></td>
</tr>
</tbody>
</table>

* For appropriate citation, see: *supra*, note 4.