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CONTENTS

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The Politics of Antidiscrimination Legislation ‡

DUANE LOCKARD*

The task of assuring equal opportunity in employment, public accommodations, and housing at the state and local levels has of late been made easier by the passage of modern federal civil rights laws. Mr. Lockard, a student of the past history of that struggle, discusses below the proponents and opponents of, the legislative dynamics of, and the background of state and local antidiscrimination laws. He concludes with a brief analysis of the threat of the initiative-referendum to equal opportunity in some areas.

LAWS to suppress racial discrimination are not a recent innovation, but go back more than a century. An 1855 Massachusetts law provided that no school should reject students "on account of the race, color, or religious opinions of the applicant or scholar."[1] Following the Civil War the federal government made its unsuccessful attempt to affirm the equal status of the newly freed Negroes, but neither the general public, Congress, nor judges were ready for such liberality. It took a five-year campaign—from the introduction of the bill by Senator Charles Sumner of Massachusetts in 1870 to its passage in 1875—to enact the Civil Rights Act,[2] since the familiar dilatory tactics and obstructions of Congressional procedure delayed action then as they still do.[3] The law provided for equal access to public accommodations, but it did not go far toward eliminating the humiliation of Negroes, partly because in the area where it was most needed, the South, federal troops were soon withdrawn and total hegemony returned to southern whites. Nor was the Act effective in the North, where it was rarely used and was challenged on grounds of its constitutionality.

When this challenge succeeded in nullifying the Act in the *Civil Rights Cases*[4] of 1883, several states soon enacted public accommodations laws; within two years a dozen northern states

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*Professor of Politics, Princeton University; B.A., Yale, 1947; Ph.D., Yale, 1952. Mr. Lockard is currently Director of the Undergraduate Program in the Woodrow Wilson School of Public and International Affairs.

had such laws, and by the end of the century six more had acted.[5] Ironically, these laws were created almost concurrently with the Jim Crow laws in the South, but the pro-Negro laws had far less impact than the anti-Negro ones. Jim Crow laws were rigorously enforced, but the non-discrimination laws were not, being nearly unenforceable. They relied upon either criminal prosecution or a civil suit for damages. Although an occasional Negro won a suit for damages, this was a slow, uncertain, and expensive process, and even if successful, it usually had no effect beyond the particular case. Nor was recourse to criminal law any more useful, since prosecuting attorneys do not seek out such cases and are reluctant to try them even when victims press charges. A law prohibiting discrimination in public places without administrative remedies may be better than no law at all, but the margin of difference is not impressive.[6] Effective legal restraints on this form of discrimination had to await the creation of administrative agencies handling antidiscrimination policy.

The first major effort to use the law to promote equal job opportunities was the federal government's World War II experiment with the Committee on Fair Employment Practices. The war produced a heavy demand for labor, opening some new opportunities for Negroes, but the customary reluctance to hire Negroes was so great that Negro leaders started calling for a fair share of jobs for Negroes. Even before the United States was at war, A. Philip Randolph, President of the Brotherhood of Sleeping Car Porters, began consulting with other Negro leaders about ways to achieve federal action to improve the Negro's chances of getting wartime jobs. Out of this grew the March on Washington Movement, a loosely coordinated organization with many local committees, which planned a march on the capital to protest the lack of job opportunities. Randolph announced the March for July 1, 1941, at first saying 10,000 would be present, but this grew to 100,000 later. Walter White, Executive Secretary of the NAACP, when asked by President Franklin Roosevelt, "Walter, how many people will *really* march?" told him, "No less than one hundred thousand."[7] This probably was more than they could have mustered, but no effort was spared to acquaint Negroes with the March plans. According to one of the planners, orders were placed for as many busses and trains

as possible, and in some cities rosters of clubs and the membership lists of churches were used to draw up imposing assignment sheets for specific railway cars and busses. Were the leaders of the March on Washington Movement bluffing? One judicious assessment of the question arrives at the conclusion that conceivably they were, but "we shall never know.... That they were gambling seems clear. It is doubtful that the Negro leaders or anyone else could have foretold accurately just how successful a March on Washington was in the making in June of 1941."[8] If it was a bluff, it was not called, for Roosevelt capitulated a week before the date of the March and it was cancelled.

Dismayed at the prospects of a March, officials in Washington, from the President on down, did everything they could to persuade the leaders to cancel the demonstration. President Roosevelt addressed a letter to the co-chairmen of the Office of Production Management denouncing discriminatory hiring practices in defense industries, but the Negro leaders refused to be placated with words. Then the President sent New York Mayor Fiorello H. La Guardia to negotiate with Randolph and the other leaders of the Movement, authorizing La Guardia to say that the President was prepared to sign an executive order barring discrimination in war industries. After much negotiation an executive order was drafted that met the desires of the leaders of the Movement, especially Randolph and Walter White of the National Association for the Advancement of Colored People. The President signed it on June 25, 1941.

The Committee created by that executive order (Number 8802) was a very weak instrument for so large a task. During the two years of its existence it had little staff, an indequate budget, was shifted from one agency to another and, although it held some hearings, its accomplishments were negligible. (Ironically, it functioned in a public building with a segregated cafeteria!) Accordingly protests were renewed and Randolph again began talking about a March on Washington—this time with the nation openly at war. Finally in May of 1943 the President issued Executive Order 9346 by which the Committee was placed in the Executive Office of the President and given broader powers. Appropriations were greatly increased and a much larger staff went to work, producing substantial results. The elimination of

some barriers to employment was partly the result of the need for labor, but as the FEPC said in its final report, "The practice [of discrimination] . . . seldom disappeared spontaneously. The intervention of a third party, with authority to act if necessary, was required to start the process in motion."[9]

The enemies of FEPC were determined not to allow it to outlive the war and they succeeded. They began by cutting its budget in half in 1945, and followed by curtailing its operations completely in 1946, and finally defeating a proposal in 1948 to establish it as a peacetime agency. The experiment was over, temporarily, but the frustration of defeat at the national level only encouraged advocates to press for state and city laws. By 1949 half a dozen states and several cities had established administrative commissions to promote equal job opportunities.

These laws were the logical next step beyond the race relations committees created during the war to study and try to reduce tensions that developed in northern cities. Following a bloody race riot in Detroit in 1943 that city established a Mayor's Interracial Committee to investigate the sources of conflict that resulted when vast numbers of Negroes came to seek the job opportunities of the converted automobile industry. In Chicago after Negroes began to spill over the boundaries of the Southside ghetto, racial tension led to open conflict. "Bombings, fires, and attacks on Negro families ensued. Other areas of conflict were the beaches, parks, schools, and places of public accommodation. A similar situation in Detroit in 1943 had erupted into a four-day summer riot in which many people were killed, many more seriously hurt, and millions of property [*sic*] damaged. Chicago's response to the growing crisis was the formation of the Mayor's Committee on Race Relations by Mayor Edward Kelley."[10] Mayor La Guardia formed a Mayor's Committee on Unity in the aftermath of a devastating riot in Harlem in the summer of 1944. Cleveland followed the same route, first by the executive action of Mayor Frank Lausche and then in 1945 by a city ordinance establishing the Community Relations Board. Other cities followed the same course. A 1964 survey turned up 225 official human relations commissions among the 589 cities of more than 30,000 population.[11]

A number of governors appointed *ad hoc* committees of the

same sort. Amid the flurry of activity in the spring of 1941 associated with the March on Washington, Governor Herbert Lehman of New York appointed a Committee on Discrimination in Employment, acting some three months earlier than his mentor in Washington, Franklin Roosevelt. Governor Thomas E. Dewey continued the committee, but ran into difficulty with its members in 1944 when he requested the Legislature to delay action on a proposed fair employment law and to appoint a new committee to study the whole question. Immediately eight members of the existing Committee on Discrimination in Employment resigned, giving their letter of resignation to the New York *Times*. "Whatever reasons may have moved you to suggest the delay," the resigning members said, "[we] are unwilling...to share...the responsibility for the postponement of action.... [The] Committee cannot continue to function without any real power, particularly when it is held out to the public as a Committee on Discrimination in Employment...and the public believes that it has and exercises powers to reduce such discrimination."[12] (It is a reasonable assumption that both Governor Dewey's decision to delay action and the strong reaction of the Committee members had something to do with the Presidental election campaign which Dewey was currently waging.) The Governor got his study commission which, under the chairmanship of Assemblyman Irving M. Ives, conducted fifteen hearings around the state. In 1945 the Legislature passed the Ives-Quinn Law, the first state antidiscrimination law dealing with *private* employment. (Several states in the 1930's had prohibited discrimination in public jobs, and a few banned discriminatory hiring by holders of government contracts.)

In 1943 Governor Raymond Baldwin of Connecticut appointed an Inter-Racial Commission to investigate employment discrimination and violations of civil rights, and that agency four years later acquired authority to enforce a fair employment practices act. Even earlier, New Jersey had by law created the "Good-Will Commission," composed of fifteen persons appointed by the Governor "to foster racial and religious amity and understanding." From 1938 until its repeal by the 1945 Fair Employment Practices Act, the Good-Will Commission carried on a program of education and persuasion.[13] Pressure mounted in New Jersey

during 1944 and 1945 for some stronger policy, and when New York passed its FEPC law certain key politicians in New Jersey decided to act. Governor Walter E. Edge concluded, apparently reluctantly, that he had to commit himself to such a law. "As the session drew to a close," Edge wrote in his autobiography, "minority racial and religious groups pressed for adoption of an antidiscrimination program. While it was a subject which I would have preferred to give greater study, politically it could not be postponed because New York had passed a similar measure and delay would be construed as a mere political expedient."[14] At Edge's insistence, resisting legislators finally voted for an FEP law with enforcement powers in 1945.

From these beginnings the roster of states with antidiscrimination laws has grown steadily. Table 1 lists existing statutes as of July 1965.

Table I

Statutory Provisions Against Discrimination Existing in July 1965

	Fair Employment Comm. Statute	Only	Fair Housing Comm. Statute	Only	Open Public Accommodations Comm. Statute	Only
Alaska	X		X		X	
Arizona	X				X	
California	X		[1]			X
Colorado	X		X		X	
Connecticut	X		X		X	
Delaware	X				X	
Hawaii	X					
Idaho		X		[2]		X
Illinois	X			[2]		X
Indiana	X		X	[2]	X	
Iowa		X				X
Kansas	X				X	
Maine				[3]		X
Maryland	X				X	
Massachusetts	X		X		X	
Michigan	X		X		X	
Minnesota	X		X		X	
Missouri	X					
Montana				[4]		X
Nebraska	X					X

Table I (cont.)

	Fair Employment Comm. Statute Only		Fair Housing Comm. Statute Only		Open Public Accommodations Comm. Statute Only	
Nevada		X				
New Hampshire[6]	X		X		X	
New Jersey	X		X		X	
New Mexico	X					X
New York	X		X		X	
North Dakota						X
Ohio	X		X		X	
Oklahoma		[5]				
Oregon	X		X		X	
Pennsylvania	X		X		X	
Rhode Island	X		X		X	
South Dakota						X
Utah	X					X
Vermont		X				X
Washington	X			[4]	X	
Wisconsin	X			[2]		X
Wyoming						X
TOTALS	27	5	15	6	19	14

[Source: This table is compiled from data found in several places. The main source is the biennial report on such laws by Joseph B. Robison for the American Jewish Congress and distributed in mimeograph form, the latest being "Summary of 1962 and 1963 State Anti-Discrimination Laws." See also the Library of Congress, Legislative Reference Service publication dated December 7, 1962, compiled by Goler T. Butcher, "State Laws Dealing with Non-Discrimination in Employment." Details are supplied on housing matters by *Trends in Housing*, the publication of the National Committee Against Discrimination in Housing; see especially the Sept.-Oct. 1963 issue. A listing of all state laws as of spring 1962 also appears in the Anti-Defamation League of B'nai B'rith publication by Paul Hartman, *Civil Rights and Minorities* (pamphlet). See also *Fair Housing Laws*, a HHFA publication, September 1964.]

1. The California housing law was curtailed but not repealed outright by the "Proposition 14" amendment to the State Constitution adopted in November, 1964.
2. Applies only to public housing or publicly assisted housing, including Urban Renewal housing.
3. Applies to rental housing only.
4. Applies only to housing associated with Urban Renewal programs.
5. Applies only to public employment.
6. In 1965 the New Hampshire legislature passed an act establishing a commission with jurisdiction over employment, housing, and public accommodations, but it included no appropriations for operation, leaving the new agency in a doubtful status.

It is one thing to have passed a statute on discrimination and quite another to have passed one that has substantial impact. The foregoing table must be read with caution, for many of the laws cited are of very little consequence either because effectiveness must await law suits by the victims of discrimination, or because

of various administrative or statutory deficiencies. In recent years some states have also created general investigatory-educational agencies more or less in the fashion of the early mayoral-gubernatorial agencies created during World War II. For example, Oklahoma, West Virginia, and Kentucky have recently established commissions with the power to investigate interracial relations and charges of discriminatory practices, but they all lack enforcement power and operate on miniscule budgets (Oklahoma's bountiful legislature appropriated the sum of $2500 a year) and can therefore be expected to achieve little except perhaps to lead the way to stronger laws.

The following table suggests the tendency for antidiscrimination laws with administrative enforcement to be passed in stages, beginning with FEP, then following with public accommodations and housing. The tendency for the laws to be passed in odd-numbered years is in part the result of the mere fact that many legislatures meet only biennially following the even-numbered year election, but another reason may be that even where annual sessions are held there is enough political heat associated with these laws to make it easier to enact them in non-election years. Only five of the 63 enactments listed came in even-numbered years. Observe that eight FEP measures were enacted between 1945 and 1949, and that all private housing laws were passed in 1959 or after.

Table II

The Timing of Passage of Antidiscrimination Laws Having Administrative Enforcement

Year	Fair Employment Practices*	Public Accommodations	Private Housing
1945	N.Y., N.J.		
1946	Massachusetts		
1947	Connecticut		
1948			
1949	N.M., Ore., R. I., Wash.	Conn., N.J.	
1950			
1951			
1952		N.Y., R.I.	
1953		Mass., Oregon	
1954			
1955	Michigan, Minn., Pa.		

Table II (cont.)

Year	Fair Employment Practices*	Public Accommodations	Private Housing
1956			
1957	Wis., Colo.	Wash., Colorado	
1958			
1959	Cal., Ohio		Mass., Conn., Colo., Ore.
1960	Delaware		
1961	Ill., Kan., Mo.	Ohio, Pa.	N.J., Minn., N.Y., Pa.
1962			
1963	Alaska, Indiana, Hawaii	Alaska, Ind., Kan., Mich.	Alaska, Cal., Colo., Mich.
1964		Del., Md.	
1965	Ariz., Md., Nev., Utah, N.H., Neb.	Ariz., Minn., N.H.	Ind., R. I., N.H. Ohio

*The FEP, public accommodation, and housing laws without enforcement powers are not included; therefore the dates indicate the time when enforcement powers were acquired, not necessarily the original date of passage.

I.

What are the significant characteristics of the campaigns that produced these laws? Are civil rights law campaigns different from other legislative struggles? Do states differ among themselves in the way battles are conducted, and what significant factors are associated with greater and lesser levels of policy achievement? Does a high proportion of Negro population, for example, make it likelier that strict laws will succeed? Or conversely does action follow more readily when there are fewer Negroes? Is there a relationship between the kind of party system a state has and the probability of success? Or the degree of urbanization, industrialization, or geographical location? And what are the roles of various officials and organizations—pro and con—in hastening or smothering action? To these and related questions of antidiscrimination politics we now turn, first considering the effects of Negro population concentration.

Negro population is spread very unevenly around the nation, although not nearly so unevenly as it was 25 years ago, before the most massive of the migrations from the South, which since 1940 has had a net loss of almost three million non-whites. The pull of northern and western jobs combined with dissatisfaction at life in the South create a magnet, pulling people from southern farms to the cities of the North. (Mississippi politicians who

claim that Negroes there are not really dissatisfied with their lot are challenged by the fact that between 1940 and 1960 no less than 649,000 non-whites migrated from the state, which has a total population of under two million.[15]) During the 1950's all the southern states had a net loss of almost 1.5 million non-whites, while the remainder of the nation experienced an average of a 25 per cent increase in non-whites. Relocation of the migrants is naturally uneven, with some areas receiving dramatically large proportional increases largely because few Negroes were in the states before (New Hampshire had a 137 per cent increase in non-whites, but still had less than 2000 in 1960), while other areas had large additional numbers of non-whites added to existing and fairly large non-white populations (the Middle Atlantic, East North Central, and Pacific States added 1,317,000 non-whites, or a number equal to 90 per cent of the net loss from the South).[16] Negroes account for 22.8 per cent of the South's population, however, in contrast with the border states, which have 12.5 per cent, and the remainder of the northern and western states' 6.1 per cent.

A heavy concentration of Negro population obviously has *something* to do with the passage of antidiscrimination laws, but the large number of non-southern states with considerable Negro population and few or no significant laws is evidence that this is not the cardinal cause of success. If one takes as the breaking point the figure of 6 per cent Negro population (since the northwest average is 6.1 per cent), one finds 11 states with more than that percentage of Negroes. In six of these states (Delaware, Maryland, New Jersey, New York, Ohio, and Pennsylvania) two or more significant laws have been enacted.[17] Among the other four, two have done little or nothing and the other two, Missouri and Illinois, have passed only fair employment practices acts.[18] Here the geographical factor is relevant, for the remaining two states, Kentucky and Oklahoma, border on the South. The semi-southern tradition of the border states clearly offsets the pressure of large Negro populations — Kentucky and Oklahoma have created only investigatory commissions, and Delaware and Maryland acted late and produced minimal laws.[19] (West Virginia, another border state, with five per cent Negro population has recently also inaugurated an investigatory-study commission.)

At this end of the scale then, where the heaviest proportions of Negroes reside, the chances of action are good, except where typical Southern attitudes still affect state politics.

There is also a rough correlation between the near absence of Negro population and non-existence of laws, although there are several deviant cases. That is, in many instances the total Negro population is so small (around 1 per cent) that Negroes could hardly be a significant political force, and yet these states have quite extensive legislation (*e.g.,* Oregon and Minnesota[20]). Similarly there are a number of states, all with less than 2.5 per cent Negro population, with two or more significant laws on their books (Colorado, Massachusetts, New Mexico, Rhode Island, Washington, and Wisconsin).[21] Three other states with slightly higher proportions of Negroes, Arizona, Nebraska, and Nevada,[22] acted finally in 1965, partly in reaction to the U. S. Civil Rights Act of 1964,[23] the fair employment provisions of which came into effect July 1, 1965. By enacting FEP laws, these states hope to retain jurisdiction of cases that otherwise would have gone to the federal agency. The states which have done the least are those with the sparsest Negro population, as might be expected, although if the calculation were made for all non-white population, the results would differ, since there are western states with considerable Indian population that have not done much to curtail discrimination toward that minority along with Negroes (*e.g.,* Montana, South Dakota, North Dakota, and Wyoming).

In geographic terms, the area that has the greatest number of states with extensive laws is the northeast (six of nine), and the area where the least has been done is the border state region. Four out of five far western states have extensive legislation (Hawaii being the exception, presumably because few Negroes live there, although the non-white population is the largest of any state in the Union — 68 per cent). Only 6 of 12 midwestern states have extensive laws, if one includes Kansas, which has not acted against discrimination in housing, and only one of the eight mountain states (Colorado) has extensive laws.

The geographical distribution of states coincides roughly with the patterns of party competition, since the eastern and western regions have a high proportion of states with highly competitive party systems and have the greatest number of states with strong

antidiscrimination laws, whereas the midwestern and border states have generally lower levels of party competition. The influence of party systems on legislative campaigns is clearly important, but discussion of that may be deferred until we consider the role of party leaders as forces involved in the campaigns.

Nor does it appear that the degree of urbanization of a state nor the extent of its industrialization greatly affect the incidence of antidiscrimination laws. It is apparent that most of the highly industrialized states do have extensive laws, but there are exceptions — Illinois and Wisconsin, for example. And there are many other states with relatively low levels of industrialization (Alaska, Colorado, Oregon, and Minnesota) which have quite extensive laws. Thus it appears that no single characteristic of the population of the states gives a complete "explanation" of the incidence of antidiscrimination laws, although the concentration of Negro population, geographic location, and party competition all correlate to a degree. More light on these conditional influences is shed by examination of the varying roles of the actors involved in the campaigns.

II.

Do campaigns for antidiscrimination legislation differ significantly from any other legislative struggles? In one sense they do not; they are attempts to penetrate the same kind of procedural and political blocks that face any proposal. Other familiar campaign problems occur here too: maneuvering around committee chairmen who may be able to sabotage a bill, fighting for legislative time, and staving off attempts to postpone action until too late in a session, and the general problem of holding a coalition together. There is also the same need for favorable publicity to overcome the diffidence of most legislators and to impress wavering ones with the extent of favorable public opinion on an issue. As in other campaigns it is usually the promoter's problem to keep his relatively few legislative allies in action and in reasonable agreement, to contain the relatively few vocal and powerful antagonists, and to persuade the unconcerned or undecided to listen.

In all these ways campaigns for antidiscrimination laws are of

a kind with other legislative contests, but in other significant ways they differ. For one thing, they are largely non-economic battles. It is true that the opposition is usually drawn from economic interest groups (employers, hotel owners, real estate associations and, in recent battles involving apprentice programs, labor unions), but the promoters usually lack basic economic incentives. Even though the bills actually concern matters of economics in a sense, the advocates themselves are more often moved by emotional commitment, or moral or political considerations than by economic ones. In a sense, therefore, civil rights battles fall outside the usual pattern of American legislative politics, since they are not at root economic disputes. The truth of this is borne out by the examination of the opposition's arguments and behavior — they are in fact less concerned with economic interests than vague (or overt) racial prejudice. This point holds less for the campaigns on housing legislation than for others, and yet even here the point is not wholly out of place. Civil rights bills are somewhat unusual too in that, unlike one other major kind of "non-economic" legislation — bills concerned with governmental operation and political control — civil rights bills do not involve far-reaching questions of ultimate political control.

It is highly significant too that civil rights bills are promoted on behalf of a not particularly popular minority. The average white legislator, lobbyist, or party politician is at best unconcerned toward Negroes, or more likely, antagonistic. Moreover, the beneficiaries of the legislation are poor, unskilled at legislative maneuvering from simple lack of experience, and badly distributed to make the most of their political potential. (That is, they are concentrated in ghettos where their potential power to elect representatives is diminished, since they elect their legislators by overwhelming majorities rather than being able to be the decisively largest minority force in many scattered areas.) Finally, it is unique that at least early in the struggle Negroes were themselves little involved in the lobbying and maneuvering to advance civil rights bills. There were few Negro legislators, Negro organizations were not effective in the legislative arena, and consequently most of the leadership was white. That has now changed in all states and cities, although in varying degrees, as Negro leaders gain experience and militancy rises.

Some of the "who, what, and how" of these campaigns becomes

clearer when one focusses on the roles of the various actors who participate. The actors may be reasonably divided into these categories: Negroes, labor groups, religious groups, *ad hoc* groups formed especially to push for civil rights, party leaders, chief executives, other organizations or institutions (such as the League of Women Voters or newspapers), and opposition forces.

III.

In the course of the last two decades the role of Negroes in these campaigns has changed remarkably. As noted previously, their role in the early stages was negligible. Their emergence as an active force occurred at different times in various states but in no state are Negroes practically non-participants now as they were in the past. Whereas they lacked money, experience, staff, or intergroup coordination in the past, they now have in nearly all states leaders who have some experience in legislative maneuvering, and their organizations are more adequately staffed and have working budgets.

In the early days liberal legislators, lobbyists for labor, the League of Women Voters, and Jewish and a few other religious groups directed legislative strategy on civil rights. Usually there was consultation with Negro leaders, but whites made decisions to compromise for half a loaf when the whole loaf was unattainable. Robert Satter, a white Hartford lawyer who has been a legislator and at other times a labor lobbyist, was for years the chief strategist of civil rights laws in Connecticut. Negroes appeared at hearings before the legislative committees, and they provided delegations to occupy the galleries when civil rights bills were to be debated, but until 1963 they were not major participants in negotiations. As late as 1959 and 1961 the major proponents of housing bills in Connecticut were the labor unions. The House Republican majority leader in 1961 recalls that it was Satter who approached him in behalf of the housing law and not Negro lobbyists. A delegation of Negroes did contact the Republican majority leader in 1963, but the House Speaker for that year has no recollection of any Negroes approaching him on the issue although he was in a key position to — and did — influence the

Republican caucus on the housing law. Even in New York, where there is a large and politically active Negro population, the early contribution of the Negro organizations was not extensive. In the opinion of one participant in those affairs — Jack E. Wood, who was formerly Housing Secretary in the national office of NAACP in New York and who is now with the National Committee Against Discrimination in Housing—Negroes did not begin to play a major role in state legislative operations until the time of the Metcalf-Baker Law (giving the State Commission Against Discrimination authority to combat discrimination in publicly assisted housing) in 1955.[24]

Ironically, while the emergence of Negroes as more important participants in the inside negotiations on legislation has made white politicians take a more serious interest in the issue, Negro participation has complicated the process of negotiation—for an obvious reason. Negro leaders have to face their followers directly, and since they are likely to be somewhat militant themselves, they are less flexible than their white predecessors. Some present day Negro leaders are contemptuous of liberal whites who, they believe, often sold out the cause by conceding too much and fighting too little. No doubt the criticism is often merited, but it is also important that the circumstances of campaigning have changed greatly. The mood of the community in the North has obviously changed with a growing awareness both of the Negro problem and of the rising militancy and insistence on action. The potential for action is accordingly different. Nevertheless significant legislation can be won today only at the price of compromise and negotiation, and rigidity inevitably complicates negotiation. For example, there have been difficulties over the inclusion of criminal penalties in civil rights bills; Negro leaders often insist on their inclusion, although realizing they are not very useful. Howard Bennett, a Negro lawyer and former judge in Minnesota and for years a participant in the drafting and promotion of civil rights statutes in that state, held out for a criminal penalty in the 1961 housing law. Other statutes, he contends, routinely contain this ultimate sanction (*e.g.*, anti-monopoly laws) so why make an exception here? Bennett had no organizational position to defend that made him unyielding on this point, but his sense of justice and equity drove him to op-

pose the final draft of the bill partly because the criminal penalty was missing. Indeed he came to a legislative hearing prepared to testify against the bill, but he couldn't go through with his opposition after he heard an opponent of the bill tell a friend that the bill was dead now because "that colored judge is going to oppose it."[25]

In Berkeley, California, a fair housing law was defeated in a referendum in April of 1963, and there is some reason to believe that adamant refusal to delete a criminal penalty clause from the ordinance was a major reason for its defeat. Although the Commission that recommended the ordinance divided 8-7 in favor of the penalty clause, just the day before the council acted there was agreement among its promoters to delete the criminal penalty, but in response to pressure from Negro and other groups who saw this as a matter of principle, the move to delete failed. Since there was inadequate recourse to the courts for judicial orders for compliance, the refusal to delete made some sense, and yet in view of the long history of non-use of criminal sanctions in such laws and the expected use of this point to defeat the ordinance, the argument against inclusion was more persuasive. The real estate interests of the city had raised strong objection to the clause in the public hearing, and indeed their counsel had come close to pledging the organization to non-opposition if the penalty clause were left out. But with the jail provision in the ordinance, propagandists had a sure line of attack—frighten home owners with thirty days in jail. The proponents never developed an adequate response and apparently many voters were frightened. In any event, a post-election poll showed that the fear of jail was the second most frequently mentioned reason given for voting against the ordinance.[26]

On the other hand, there have been many instances when Negroes have proved right when they pressed timid legislators to accept more extensive legislation, claiming that the situation would permit getting something nearer the whole loaf than the insider thought possible. Particularly in recent years has this been true—in Connecticut and Oregon, for example. In Minnesota many experienced proponents of civil rights legislation were absolutely certain that the leaders were asking for far more than they would ever persuade the 1961 legislature to accept.

After a long and tense battle a fairly extensive housing bill did pass, however, and one long-time advocate of civil rights legislation wrote to a friend: "Had you asked me four months ago as to whether we would have even gotten this kind of a law, I would have answered that it was impossible and that we were four to six years away from the passage of such a law."[27]

The election of Negroes to state legislatures and city councils has been a significant development for the obvious reason that it places a representative in the inner circle where he can maneuver, report, and press for action. While the election of Negroes to legislatures is not a new phenomenon, there has been a significant increase in their numbers in the last ten years. Their relative success depends in part upon the extent of party control in the legislature. Where the party is of great significance the Negro legislator is less able to use his personal influence to affect civil rights legislation, but where the party is weak the Negro legislator accordingly has a better chance. In Connecticut, where Negroes came to the House of Representatives for the first time in 1959, their presence had little effect on the progress of legislation, for in the Connecticut General Assembly the parties are very strong and discipline is firm. A Negro or any other newcomer to the very large House of Representatives concentrates his efforts on a few bills, but he will necessarily be working with the party leaders to move the bill along in committee, to get it approved in caucus and so on.

In the Mayor-dominated City Councils of Chicago, Philadelphia, and New York Negro council members play only a marginal role in promoting civil rights (and hardly that in Chicago, where the Negro Councillors are derisively called the "Silent Six"). Militant Negroes often use the term "so-called Negroes" in referring to members of their race who have been chosen by white political machines. "So-called Negroes" are far from militant; they are politicians well aware that their futures depend on loyalty to the white political machine, not to race goals. Negro councillors in New York had some leverage in the 1957 fight on a housing law, but not much. By threatening to use publicity to embarrass Mayor Robert Wagner they won minor concessions, but they were not by any means the major actors in that performance. In New Jersey Herbert Tate, a Republican who served

several terms in the lower house, had an inside position which paid some benefits, but he never achieved the spotlight position that has gone to California Negro legislators who operate in a political vacuum at least as compared with the New Jersey, New York, or Connecticut party systems. In California party discipline is weak and individual legislators have more importance. Augustus F. Hawkins, a Negro legislator from Los Angeles, was the sponsor of several civil rights laws, and one of them is commonly referred to as the Hawkins Act. Similarly W. Byron Rumford, Negro Assemblyman from Berkeley, has been a major force for civil rights legislation in California, and accordingly the 1963 fair housing law bore the title, "Rumford Act." In the maneuvering to get the bill through a reluctant legislature, Rumford was one actor among many; the Governor, Jesse Unruh, powerful Speaker of the House, and many others inside and outside the legislature were involved, but Rumford's easy way with his colleagues and his personal persuasiveness were significant factors in the ultimate passage of the law.

To accompany Negro legislators to the state house or the council chamber there are an increasing number of highly effective Negro lobbyists and organizational leaders who now assume major responsibility for civil rights strategy. In Ohio, for example, Theodore H. Berry, once a member of the City Council of Cincinnati and currently chairman of the Ohio Committee for Civil Rights, is a very effective organizer and promoter of housing legislation. In 1963 he was in the forefront of the battle for a housing law, ultimately focussing much public attention on Governor Rhodes' refusal to exert himself for a fair housing law. Having managed to get out of both gubernatorial candidates a pre-election pledge to support a housing law, the Berry-led group distributed far and wide a facsimilie of the Governor's signed pledge when, late in the session, it became obvious that the Governor would not move. Making use of the unrest among Negroes, Berry disavowed responsibility for the scheduled sit-in at the legislature, but he said that "such direct action movements will multiply in Ohio as the inevitable result of the vacuum created by the lack of executive and legislative response."[28]

The various forms of demonstrations recently used by Negroes

have become a much disputed element in legislative campaigns. In 1964 three protesters sat down on the front steps of the New Jersey state house and proclaimed a hunger strike until Governor Richard Hughes consented to meet their demands. In Ohio, demonstrators demanding a housing law in 1963 chained themselves to the seats in the House gallery and another group blocked the hallway to the governor's office. A mass march was staged in Connecticut in behalf of the 1963 housing law; in Kentucky in March, 1964, some 10,000 marchers came to the capital to hear Martin Luther King and Jackie Robinson, and shortly thereafter 30 demonstrators began a fast and sit-in in the Kentucky House of Representatives. Dozens of these protest marches and demonstrations have been timed to impress legislators, as have the arrival of large delegations of Negroes to sit in the balconies of legislative chambers when hearings are held or vital votes are being taken. Here color is an asset, for there can be no mistaking the purpose of these visitors: they are not civics classes or tourists, but people on a mission.

What effect do these ventures have on legislators? Many legislators say that demonstrations have a negative effect, claiming that some lawmakers decided not to support civil rights bills because they resented the implicit threats and coercion of the demonstrators. Representative Hugh Flournoy in California, a supporter of fair housing, believes the Rumford Act almost failed of passage because of a CORE demonstration in the capitol. The demonstration, he contends, produced great antagonism among legislators who might otherwise have been more agreeable.[29] I suspect, however, that the legislators who were most antagonized by the demonstrations in California and elsewhere were those who were most opposed to the laws in the first place. The demonstrations offer a convenient rationalization for refusing to approve. To be sure, many of the ardent supporters of the law also objected to the demonstrations in California—Mr. Rumford, for one—but there is no doubt that demonstrations of all kinds serve one indispensable purpose in the drive for civil rights legislation: they get publicity for the issue. Given the historic ability of Americans to blot out of consciousness the whole question of the Negro, the drama of a demonstration or a sit-in fast may do more to create interest and favorable concern than to arouse

antagonism. Whatever the net consequences of the demonstration tactic, it will be used, since there are many Negroes and whites who are so driven by a sense of injustice that they might demonstrate even if they did not think it would help the situation. And however much the non-demonstrating leaders may "deplore" the demonstration, they are able to point to the spectacle as a token of much worse to follow unless action is taken to redress grievances. Had there been no demonstrations of any kind—orderly or less orderly, organized or spontaneous—there is reason to believe that the hand of the civil rights law promoter would have been much weaker.

Finally, there is the role of the ultra-militant Negro who may disavow direct interest in civil rights legislation, but who nevertheless promotes it indirectly. The Black Muslims, who profess total lack of interest in integration, have aided the integrators by frightening some whites into a more compliant mood. Others who institute school boycotts, tie up traffic on bridges, and even the rioters who pillaged and rampaged in Harlem and elsewhere in the summer of 1964 likewise focus public attention on the seriousness of the problem, and they also help to arouse some Negroes who otherwise are apathetic. Most of the intentionally disruptive but non-violent demonstrations are aimed at sweeping or very imprecise objectives, and even if those who are confronted with the demands were inclined to do their utmost they could not produce the demanded jobs, eliminate slums, and instantly end *de facto* school segregation.

But it is not the function of the demonstrator to negotiate, to work out settlements in a democratic fashion; his role is to make such negotiation more feasible. Without some such pressure the Negro has too few resources to bring issues to the bargaining table. But violence and disruption, even peaceful picketing or quiet mass marches are unsettling to Americans, who in this century take their violence on TV and in the movies, but deplore it at first hand. A threat of violence in an American community unaccustomed to direct action often produces among whites a negative reaction toward all Negro demands and a call for repression. To say the least, in view of the rising frequency of non-violent protests, the moderate leader faces no small problem in adapting his strategy to that of allies with whom he often has little or no real communication.

Labor's role in civil rights law promotion is an ambiguous one. On the one hand, labor leaders in many states have been in the front ranks of the promoters, contributing money, leadership, and political muscle. But in other states labor's role has been negligible, and at various times elements of labor have vigorously opposed the laws. What role labor takes depends upon the kinds of unions involved and the issue at stake. In general, the industrial unions have warmly supported fair employment laws while the craft unions have been neutral or opposed because they are apprehensive about their job security under FEP. In recent years this division between unions has been accentuated as Negroes attempt to enter the apprenticeship programs of the skilled trades where traditionally they have been excluded. And, presumably reflecting the fears of their white membership, labor leaders have also had a mixed reaction to fair housing legislation, backing it in some states, but remaining quiescent in others.

It is no accident that labor union leaders contributed most in promoting fair employment practices laws in states where the CIO was strong. In Massachusetts, Connecticut, New York, Pennsylvania, and Ohio the CIO unions were significant forces in the fair employment campaigns. In Connecticut, as already noted, the major force not only for employment but also housing laws was the union movement; union lobbyists drafted laws, union men in the legislature worked for their passage, at hearings labor representatives were always prominent supporters, and legislative leaders often negotiated directly with labor leaders in hammering out compromises. In New York the labor movement was among the most significant forces in the early stages of the fight for fair employment. It is true, however, that the railway brotherhoods opposed the Ives-Quinn fair employment bill in 1945. The head of the Brotherhood of Firemen and Engineers wrote members of the Senate asking defeat of the bill.[30] Early in the 1945 legislative session the AFL "passively" opposed the bill, but as the CIO became increasingly identified as a major proponent, the AFL position changed. The CIO responded to business opposition by redoubling its efforts to pass the law, and Louis Hollander, president of the state CIO, got considerable publicity as a result. Perhaps it was concern for its competitive position in intra-labor politics that made the AFL endorse the bill and join the CIO in testifying favorably at a legislative hearing.

In Massachusetts the CIO was particularly active in support of FEP, so much so that one Republican legislator complained that "every form of lobbying has been engaged in to coerce members of the House to vote for the bill. . . . Unless you're for it the CIO will get you."[31] In Pennsylvania Harry Boyer, head of the CIO (and later President of the combined AFL-CIO), was chairman of the *ad hoc* group that sought FEP, and indeed in 1945 the first organization officially to endorse FEP in Pennsylvania was the state CIO. During 1955, the year when FEP finally became a law, the state CIO provided more than a quarter of the $10,600 budget of the State Council for a Pennsylvania FEPC, and the AFL contributed another 13 per cent.

In states where industrial unionism is not so strong labor has played a less significant role. In Oregon, for example, labor's role in the several civil rights law campaigns was not important. In Ohio the unions aided the FEP campaign, but have participated less in the housing battles. In Minnesota labor unions have not been as prominent as they have elsewhere. California labor unions assisted in the FEP drive, but were not the key force behind the FEP bill in 1959. Although the names of 64 labor leaders appeared on the letterhead of the California Committee for Fair Practices while it was seeking passage of a fair housing law, labor was much less involved in housing there than in some eastern states.

An impending battle is shaping up between Negro organizations and the skilled labor unions, one that may reduce labor support for the civil rights campaign. As Negroes seek to move into high-paying skilled trades, the old barriers against free entry into the unions cause friction. Although the barriers were not in most cases established to exclude Negroes—they were meant to exclude all except relatives and friends so as to keep control over labor supply—union rules helped keep most skilled trades white. In 1960 only 2.2 per cent of all apprentices were Negroes, an increase from the 1.7 per cent of 1950, but far short of the proportion of Negroes in the population. FEP laws cover labor union discrimination, but there are innumerable ways of getting around the law, and as a result campaigns have begun to eliminate these avenues of evasion. The fight in New York state over such a law in the spring of 1964 is no doubt a forecast of other battles to come.

The bill to eliminate evasion of the law in apprenticeship selection was submitted to the New York Legislature by Attorney General Louis J. Lefkowitz because, he said, "selection for apprenticeship training is often so subjective and arbitrary that it is impossible to test whether an applicant was discriminated against because of his race, creed, color, or national origin."[32] The bill made it unlawful to select persons for apprenticeship programs on any basis other than their qualifications. Selections would have to be made by "objective criteria which permit review," and the review would be by the Labor Department and the Commission for Human Relations. Some labor organizations favored the bill—the state's United Automobile Workers for example—but the weight of the state AFL-CIO organization was concentrated in opposition. Peter Brennan, head of the State Building and Construction Trades Council, sent telegrams to legislators saying the bill was "unfair to our members as well as to the entire industry" and dropping the reminder that there were 355,000 members in his organization. Raymond Corbett, President of the state AFL-CIO, sent a memorandum to legislators stating his opposition to the bill and, according to a *Times* reporter, many New York City legislators who normally vote for civil rights legislation voted against the bill in response to Corbett's plea. The bill was at first defeated in the Assembly, winning a majority of the votes, but less than the absolute majority needed for passage. Said Herbert Hill, labor secretary for the NAACP: "The fact that the State AFL-CIO Council mobilized its full political power to defeat a bill to eliminate racial discrimination in apprenticeship training programs is further proof of the adamant refusal of organized labor to eliminate racist practices. . . . A certain consequence of this dubious victory will be intensified mass protests at construction sites, especially where state funds are used."[33]

Unions that did not support Corbett's position joined civil rights groups in a campaign to revive the bill. As a result of intra-labor conflict Corbett withdrew his objections to the bill, but within two days he reverted to his earlier position and argued again for its defeat, claiming that the bill was defective in its vagueness about standards of admission to apprenticeship and about who would apply the law. The Senate nevertheless approved the bill by a vote of 56-0 in contrast to the action of the

Assembly a week earlier.[34] The Assembly later went along and the bill was signed by Governor Rockefeller. One need not be clairvoyant to foresee other such divisive battles pitting civil rights groups and some unions against other unions, leaving the politician who supports both labor and civil rights in an anomalous position.

Today religious leaders of most faiths have become significant actors in the drive for civil rights. The dramatic March on Washington in August, 1963, showed their prominence both on the speaker's platform and in the huge assemblage around the Lincoln Monument. Similarly in many states clergymen are among the most vocal supporters of civil rights; they have organized *ad hoc* local and state groups, stressed the moral aspects of race relations in the course of their ministry, in a few places have converted slum churches into living symbols of the fellowship of man; and not a few ministers have demonstrated for the cause both in the South and the North. When civil rights laws are challenged in referendum campaigns, church leaders have been significant sources of support. The California campaign to save the Rumford Act was a significant example of this for, although some radio-preacher types noisily denounced the law, most of California's clergy urged their followers to support fair housing. It is still true, as one minister has said, that "eleven o'clock on Sunday morning is the most segregated hour in America," but much credit for awakening whites to the need for civil rights legislation—both at the national and state levels—goes to the clergy.

There was, however, little support for civil rights from the Christian clergy twenty years ago. Although there were occasional Catholic priests and Protestant clergymen who testified before legislative committees on the early FEP bills, few Christian clerics (with the obvious exception of Negro ministers) were conspicuous proponents of civil rights. There are individual exceptions to this rule, and there is also the notable exception of the Society of Friends (Quakers) which contributed a great deal to the campaigns in Philadelphia and Pennsylvania. The Friends in 1943 were instrumental in the establishment of the Philadelphia Fellowship Commission which became a major source of strength in the many campaigns of the ensuing years. Prominent Friends were key leaders in each battle, and Friends were major contributors of funds.

The religious group that contributed the most, both early and late, has been the Jews. To some extent Jews acted in self-interest as fellow victims of discrimination, but it is clearly their history of suffering abuse that produces the deep commitment to civil rights among Jews rather than hopes for personal gain. The kinds of discrimination that Jews still face are usually beyond the capacity of antidiscrimination agencies to deal with, and few charges have ever been filed with agencies by Jews. Whatever the motivation, Jewish religious and social organizations and their leaders deserve much credit for the initiation of hundreds of civil rights campaigns. In every state there is evidence of some major contribution from Jewish groups: money to finance campaigns, staff to coordinate and direct activities, lobbying and intra-legislative assistance, substantial legal advice and assistance in the drafting and in the defense of civil rights laws.

Much of this assistance has come through the Commission on Law and Social Action, a subdivision of the American Jewish Congress. From its headquarters in New York the Commission has issued a steady stream of publications, corresponded with state and local groups, and offered legal and strategic advice to local Jewish organizations, *ad hoc* committees, and individuals involved in civil rights work. From that office came original drafts of bills that were to become laws in dozens of places. In the files of many *ad hoc* committees and Jewish organizations one finds extensive correspondence with, for example, Joseph Robison of the Commission on Law and Social Action, who is one of the country's leading authorities on civil rights law. He advises on the drafting of laws, provides a kind of clearing house for information exchange among the states, and contributes scholarly analyses of legal aspects of civil rights. Other Jewish organizations also are heavily involved—such as the American Jewish Committee, the Anti-Defamation League of B'nai B'rith, Jewish Labor Committee, and local Jewish Community Relations Councils, and to a lesser extent groups like Hadassah and the Jewish War Veterans. Individual Jewish leaders in nearly every state have been significant participants, many of them active for twenty or thirty years. On *ad hoc* committees for civil rights, Jewish organizations are heavily represented; for example, the following attendance at a meeting of the New Jersey Committee Against Discrimination in Housing on May 4, 1960, is typical

of that committee's usual roll call: of the 21 persons present, seven represented Jewish organizations, three were from labor, three were from Negro groups, and one represented a Protestant church group.

Despite the prominence of Jews in the campaigns of the past, their relative position is less significant today, partly because the more militant Negro leaders are disinclined to accept decisions made by anyone but a Negro. The extent to which Jews have been nudged aside varies considerably from state to state. In New Jersey the staff functions of the state Committee Against Discrimination in Housing are still provided by the Newark Jewish Community Relations Board and several of the key leaders in the movement are full-time employees of Jewish organizations. In a number of other states the relative significance of Jewish organizations is markedly less. I have found no evidence that the anti-Semitism prevalent in some Negro slums has anything to do with the relative decline in Jewish civil rights participation. This anti-Semitism is largely lower class Negro resentment toward Jewish landlords, merchants, and employers, and is not common among Negro civil rights leaders who, if for no other reason than expediency, could hardly refuse help from Jewish organizations.

Part of the decline, however, is due in certain states to the cooling ardor of some Jewish leaders who frankly are distrusted by Negro leaders. These Negroes believe certain old time leaders are too ready to compromise on matters about which they have no personal involvement.

Finally, there is some resentment among a few Jewish organization members at the extent to which their leaders have committed the groups to civil rights causes. Jacob Joslow, Executive Director of the New England Region of the American Jewish Congress reports that in Boston there is a certain amount of grumbling by a few who claim that, after all, these laws interfere with property rights and that Jewish organizations need not be initiators in the field. He recalls that in 1955 there was considerable opposition from within the American Jewish Congress' own ranks to a law against discriminatory practices in publicly assisted housing, and it was decided that an educational program was all the AJC would back for the time being. After a year, it

was agreed, if educational activity did not produce results, the matter would be reconsidered. In the 1956 meeting the issue of organizational support for legislation was put to a vote and the result was 50 in favor, one opposed, and three abstaining. It is not easy to measure the extent of intra-Jewish organization "backlash" and resentment; it apparently has developed to a degree, but its impact seems minimal.

Ad hoc groups composed of as many as 100 assorted organizations endorsing civil rights laws were used at some point in all the states on which I have information. The *ad hoc* organization provides coordination of effort, and intensifies the campaign by placing full time workers in staff jobs rather than depending on part-time volunteers or lobbyists for other causes. All the committees have sought to create favorable publicity, and several have distributed newsletters to keep their followers aware of and active in the campaign. A roster of the faithful take the effort to send telegrams or letters to legislators at strategic points. Having one designated set of leaders authorized to negotiate about details also helps, and this also makes it easier to call on experts to draft bills and advise on technical details.

Still, the committees vary greatly in their operations. In some instances they are composed solely of other interest groups, while other committees attempt to create local fair employment or fair housing committees which, it is hoped, will supplement the central group's efforts by needling local legislators at timely intervals. The financing of *ad hoc* groups is not always easy to describe, since they tend to borrow staff and facilities from their constituent groups, but some have depended on budgets ranging from $10,000 to $25,000 per year. During 1959, the year when the Ohio fair employment law passed, the Ohio Committee for Fair Employment Practice Legislation is reputed to have had a budget of $25,000, and the Pennsylvania Committee spent from $10,000 to $20,000 a year during its long fight for FEP in that state.

The varied roles of the *ad hoc* committees can be illustrated by the example of one of the more successful ones—the State Council for a Pennsylvania FEPC—which conducted a ten year battle before winning its goal in 1955. A smaller *ad hoc* group in Philadelphia, the Council for Equal Job Opportunity, had been

instrumental in winning a Philadelphia fair employment ordinance in 1948, but *ad hoc* committees at the state level had a rocky beginning in Pennsylvania. Two organizations existed in 1947, duplicating efforts and being unable to reconcile their differences. One of the groups (the Pennsylvania Committee for FEPC) dissolved after the 1947 session, but the other grew and became more active. The survivor group (State Council for a Pennsylvania FEPC) after the 1948 victory in Philadelphia got the support of several leaders from the Philadelphia Council on Equal Job Opportunity, and set about such tasks as winning preelection pledges of support for FEP from legislative nominees. Its bills failed in both 1949 and 1951, but in 1952 Governor John Fine appointed a number of prominent citizens to a Commission on Industrial Race Relations for the purpose of ascertaining the obvious: whether there was discrimination against Negroes in employment. The Council for FEPC used the Commission report, which not surprisingly found evidence of discrimination, in 1953 in another unsuccessful drive for the bill.

In 1954 Elliott M. Shirk, who had been with the Fine-appointed Commission as staff director, became the Executive Director of the Council for FEPC. Shirk worked during the 1955 session in close collaboration with Harry Boyer, head of the state CIO and chairman of the Council for FEPC. A budget of $10,000 for six months of operation was set, and a decision was made to concentrate operations in Harrisburg instead of trying to organize local units across the state. It was also decided to concentrate on the Senate, since the House had on several occasions passed FEP bills only to have them expire in the upper chamber. Shirk and Boyer were allowed a considerable degree of discretionary authority, although all major decisions were made in meetings of the executive committee of the Council. Throughout the session Shirk and Boyer prodded the committee members and chairmen to move the bill along, kept in constant communication with Governor George M. Leader, and made strategic use of his support. Constant efforts were made to get good press coverage, and a major conference of FEP was held in Harrisburg, where 450 persons representing more than 100 organizations heard Governor Leader call for passage of the bill. Before the session was over, Shirk and his collab-

orators became shadows after each member of the Senate Education Committee, where the bill was languishing. On one occasion they went into a committee room, following a closed session where by written ballot the bill was killed, dug crumpled ballots out of the waste basket, and proceeded to reveal that all six Democratic members had voted for the bill and only one Republican had done so. It was decided by the Council that they would resort to paid ads blasting the individual Republican Senators who were holding up the bill, if, after all other means were exhausted, the bill could not be moved. Following appeals by Council members to a Republican U. S. Senator, Republican leaders in Philadelphia, and other maneuvers, the bill was voted out of committee, passed the Senate, and ultimately was signed by the Governor in October 1955. Appropriately the leaders in the Council for FEPC were present for the ceremony.

One other important *ad hoc* group should be mentioned: the National Committee Against Discrimination in Housing. Created in 1950, the Committee is currently composed of 37 religious, civic, labor, and minority groups organizations with a central office in New York City. Operating on a budget of approximately $50,000, the Committee distributes a bi-monthly publication called *Trends in Housing* which reports on developments in fair housing programs both public and private, on research in the field, court rulings, housing finance, and on specific local efforts to facilitate housing integration. Through *Trends* and other publications the Committee attempts to inform and educate about housing desegregation, although as a tax-exempt organization it does not directly engage in political activity.

Because political partisanship is present in some degree in all states (including the two states, Nebraska and Minnesota, which elect legislators on nonpartisan ballots) civil rights legislation is inevitably affected by party alignments. Legislators vary greatly in their party loyalty, but when the roll is called on key votes, legislators across the nation in varying degrees tend to line up by party. (This is true only of states where there is more than one party represented in the legislature, but all the states studied here have representation by both parties.) There is, however, great variation from state to state in the extent to which parties affect civil rights legislation. In some states there is tight

party discipline and a recognized and normally accepted party position on key issues; in such states civil rights advocates manifestly must make every effort to persuade the key party leaders, and sometimes the battle is practically over when that is achieved. In states with less party discipline, party membership may still be significant, although party leaders do not control the votes of their followers. In these states similarity of attitudes among fellow partisans, party control over legislative offices and over the legislative schedule often vitally influence policy outcome.

Civil rights legislation has fared better when Democrats control a legislature than when Republicans do. There are notable exceptions to this rule, but the most common pattern on roll call is for a majority of Democrats to favor an antidiscrimination bill while a minority of them object, whereas the Republicans tend to divide more evenly, with frequent majorities in opposition. A survey of partisan differences in voting for civil rights laws passed between 1944 and 1949 found 59 occasions on which civil rights laws came to a vote in 27 states. It had the following distribution of favorable and unfavorable actions:[35]

Republican controlled legislature passed laws:	7
Democratic controlled legislature passed laws:	1
Legislatures with divided control passed laws:	1
One house Democratic, one house equally divided passed laws:	1
Republican controlled legislature defeated laws:	30
Democratic controlled legislature defeated laws:	6
Divided legislatures: Republican house defeats:	9
Divided legislatures: Democratic house defeats:	2

I confirmed this tendency in a review of thirty roll calls between 1944 and 1963 including votes on housing as well as FEP and found Democratic delegations voted 90 per cent or more for the bills most of the time, whereas Republicans infrequently achieved high unity even when they favored the issue:[36]

Democrats voted 90 per cent or more for bills:	23
Democrats voted in majority against bills:	1
Democrats divided on issue (but majority favors) :	6
Republicans voted 90 per cent or more for bills:	6
Republicans voted in majority against bills:	6
Republicans divided on issue (but majority favors):	18

The extent to which the issue divides the parties varies from state to state; in a few cases there is not much difference between

the parties, but in others there is a marked divergence. In Massachusetts the early FEP campaigns produced sharp cleavage between the parties, but in more recent years there have been no roll calls on civil rights there, and indeed little overt opposition or even debate on the floor when the bills come to a vote. In 1945, shortly after New York had become the first state to enact an FEP law with teeth, an FEP bill caused a long and acrimonious debate in Massachusetts. The House Democrats and a splinter group of Republicans pressed for immediate action, while the Republican majority leadership wanted to appoint a study commission to report to the next session. The Democrats, anxious to embarrass the Republicans as much as possible, taunted them with charges of "jamming" through the study bill in order to escape public attention. (The Republicans had in fact accelerated the legislative process to go through all the necessary stages of passage in one day.) The Boston *Globe's* headline writer was not far wrong when he put these words over a story about the battle: "Legislators Judge Hot Discrimination Issue with Votes in Mind." One columnist said that "over 75 per cent of the House membership, Republicans and Democrats, wanted to kill the Anti-Discrimination bill. . . . But stronger than that desire . . . was the wish to avoid being recorded as 'killing' through a roll call vote." [37]

But there were deep feelings involved too, as the developments in the Senate were to indicate. The Republican floor leader in the Senate declared that the adoption of the bill would "turn the clock back on civilization by 75 years," "would make matters worse . . . and would bring back the Ku Klux Klan days."[38] Four rebellious Republicans joined 14 Democrats and brought the bill to the Senate floor despite the objections of the Republican leadership (15 Republicans and one Democrat wanted to scuttle the bill). Ultimately a tie vote killed the measure in the Senate. When the issue came up again in 1946, it passed, but the difference between the parties remained. The Senate roll call in 1946 showed 10 Democrats favoring the bill and none opposed, while the Republicans split 12 in favor and 11 in opposition. The division between the parties has since declined greatly; in 1961, for example, there were no roll calls on the passage of a bill to grant the Massachusetts Commission Against Discrimination the au-

thority to seek a court injunction to hold property available for the complainant in a housing discrimination case during the period of negotiations on the matter. This is in marked contrast with other states where not only opposition but unbreakable resistance has prevented the enactment of such a provision, although other broad antidiscrimination laws have been passed. And in 1963 Massachusetts passed the most inclusive of the nation's housing laws and there was little open opposition to its passage, and not even a roll call vote.

Connecticut and New York are prime examples of states in which the party leaders are capable of exerting enough pressure on legislators to make the difference between success and failure in a campaign. This is not to say that this pressure is constantly being applied, nor that the actions came solely because of open threats and coercion. On the contrary, pressure is employed as a last resort and normally is applied only when the party leaders believe that not to do so would cause some serious harm to the party. The party's reputation on civil rights and similar issues is a frequent, although not the only, incentive to resort to coercive tactics. Coercion is important, but it should not be assumed that all the control over policy that party leaders possess comes from overt threats and use of sanctions. More important than coercion is the prevailing custom of going along with the party; where that exists *not* to go along seems abnormal. Where this is true, leaders can depend on a hard core of support merely as a result of making known the leadership position.

On the whole, the existence of discipline assists rather than inhibits the passage of civil rights laws. Discipline can be used both ways and at times has been used to defeat bills, but odds favor civil rights when both party control and interparty competition exist. For one thing, the existence of party controls makes it infinitely more difficult for a small minority to tie the hands of a potential majority by pigeon-holing a bill in committee or otherwise obstructing action. If committee chairmen are a law unto themselves and not part of a more or less integrated party group, then obviously the chances are greater for losing bills without even an opportunity to vote on them. The situation in Connecticut in 1963 is a good illustration of how discipline can be used to advance laws despite considerable intraparty objection. Early in the session at a meeting of Republican party leaders and Re-

publican House committee chairmen, it was decided that they would not support proposals to extend the housing bias law to include all housing (instead of including only housing which was part of three or more contiguous units in a development as had the 1961 law), and to create authority for courts to issue an injunction to prevent disposal of property involved in a case. The chairman of the committee to which the proposed housing bill would come, Representative Gerard Spiegel, told the group that he did not want to be the target of criticism for holding the bill in committee; rather he preferred to have the caucus vote for no action, and he would then conform. On May 7, 1963, the Republican caucus—that is all the Republican members of the House—voted not to support any civil rights amendments in that session. Immediately there was an outburst of criticism. A Negro Democratic member of the House told the press that Republican leaders were unable or unwilling to give more than lip service to the bills; "in the final analysis," he said, "they surrendered their leadership."[39] The Republican majority leader responded that it was the function of the leaders to take their cue from the majority of Republicans, but as the pressure mounted the leaders gave some cues themselves. On May 17 the NAACP announced plans for a mass demonstration on the grounds of the state capitol. The Connecticut Council of Churches wrote Republicans urging them to reconsider their negative vote in caucus. The Catholic Archbishop of Hartford gave his approval to the proposed mass meeting that the NAACP was organizing. The Democratic Senate passed the housing bill, taunting their Republican colleagues about the House caucus decision. The Senate's minority Leader, Republican Peter Mariani, stated that all 13 Republican Senators were in favor of the bill. At this point a petition was circulated (at the suggestion of the leaders who said they would hold another caucus on the issue if 100 members signed it) and within a short time 101 names had been signed to it, including that of the Speaker of the House. The caucus duly reversed its position.

Representative Spiegel was bitter about what he deemed a breach of promise by the leaders whose will he claims he was following in having the bill tabled in his committee. He vigorously opposed the reversal in the caucus as did several others. After the second caucus vote the leaders proceeded to hoist the

bill out of his committee "behind my back," Spiegel says, by negotiating with his committee members and not with him. Spiegel's attitude toward the bill is ambiguous, for he claims that he had no objection to it on its merits but resented the party leadership switch under pressure and that he was not given the courtesy due a committee chairman. In discussion of the issue, however, Mr. Spiegel stressed that such laws tend to destroy the rights of a majority in behalf of a minority, and he went on to say that a man who had worked hard and saved money to buy a house should not be told to whom he could or could not sell it.[40]

The House in due course passed the housing bill, going slightly further than the Democratic Senate had done. The House added the so-called New York amendment whereby a two-family housing unit occupied by the owner is exempted from the provisions on rental discrimination and also to exempt rental of rooms in an owner-occupied house. This differed from the Senate version, which had retained the three contiguous units rule for *rental* housing while eliminating it for sales. The Senate caucus at first balked at accepting the House version, and it is reported that the objection came from Senators who said they owned property that would be affected by the new provision and they wanted no part of it. The resistance in the caucus lasted until John Bailey, state Democratic party chairman (and simultaneously national party chairman) put on pressure and insisted that the Senate go along. It did and the bill became law with the Republican amendment intact.

In New York during the governorship of Thomas E. Dewey party pressures were frequently applied to reluctant Republicans in order to move civil rights legislation, beginning with the 1945 FEP Act. Governor Harriman supported civil rights legislation, but as a Democrat with a Republican legislature, party pressure was unavailable to him and, as so often happens when power is divided between the parties, little happened. Only one significant bill passed during his four-year tenure — the Metcalf-Baker bill on public and publicly assisted housing. Under Governor Nelson Rockefeller legislation concerning private housing was passed first in 1961 and then extended in 1963, and in each case party pressure was applied. Criticized for not supporting a private housing bill in the spring of 1959, Rockefeller urged passage of

such a law in 1960, but a conflict between the Governor and Republican legislative leaders resulted in the bill's failing to emerge from committee. Senate Majority Leader Walter J. Mahoney refused, after many requests, to permit the bill to leave the Senate committee, and Rockefeller then proposed a compromise measure which would have barred discrimination in developments of 20 or more houses and multiple dwellings with 10 or more units. To his surprise the Senate rejected the offered compromise. The *Times* reported that "When word of the Senate's rejection arrived at the Governor's office, his press staff was engaged in preparing a Rockefeller statement hailing approval of the bill."[41]

Other examples of party pressures being used to push and to delay civil rights legislation might be cited. In New Jersey the lower house passes civil rights legislation partly in response to party leadership urging, but the Senate is another matter. The New Jersey Senate is a powerful agency in New Jersey government, and it is completely under the control of the Senate Republican caucus which, to prevent unwanted embarrassment, does not allow bills to come to the floor when voting on them would be too revealing. Since a majority of the Republican caucus must approve of a bill before it can come to the floor (to prevent a minority of Republicans from joining a majority-making group of Democrats), everything depends upon the approval of the caucus. It is true that the Senate has voted out a great deal of civil rights legislation over the years, since New Jersey has a fairly inclusive set of laws on the subject, but on certain points the Senate refused to yield—on the injunction issue, for example, and the question of extending the housing law to cover all private housing. Pennsylvania is another example of party discipline being used to defeat antidiscrimination laws, for during the decade 1945-1955 it is apparent that the long-standing agreement between the Republican party and industrial interests repeatedly prevented favorable action in the legislature.

In states with disciplined parties where concern for party reputation is great, there is some maneuvering and manipulation by party leaders that civil rights advocates accurately assess to be deceitful. In the past Negroes, like other ethnic groups, were given a patronage plum here and there, and the party campaigns

stressed the number of Negroes in various jobs. Playing the same game today party leaders like to boast of their civil rights record, but often they want to boast about empty gestures rather than concrete action. Thus the game of legislative "bean bag" is at times used on civil rights bills—that is, a bill is amended late in a session and shuttled back and forth between the two houses only to have it die on the calendar with both parties having a "record" of having passed a bill, while neither has a record of having killed it. Or party leaders will condemn the opposition in great gestures of parliamentary challenge which they know can get nowhere and indeed are not intended to do so. The Republican challenge to Mayor Wagner over his refusal to act on the private housing law just before the New York City election in 1957 is a perfect example of the meaningless grandstand play. Wagner had indeed delayed action until he was safely reelected, but the Republican candidate criticized the Democrats for not acting if "they were sincerely behind" the bill, despite the fact that the same Republican candidate refused to take a position on the bill. New York Democrats were familiar with this gambit, however; they had used something like it against Dewey in 1944 and used it again against Rockefeller in 1960.

Civil rights advocates are also at times suspicious—with good reason—of claims by party leaders that they have tried to pressure legislators to support civil rights. This kind of shamming was suspected—whether rightly or wrongly, it is difficult to say—in Rhode Island when in 1964 a fair housing bill failed in the House of Representatives. With a Republican governor, the Democratic Speaker of the House, majority leader, deputy leader, and the Republican minority leader all announced for the bill, and only the deputy Republican leader opposed, the bill still died 32 to 61. Pawtucket, where the enormously powerful Speaker lives, has 9 representatives, but only the Speaker voted yea. Majorities of both parties opposed, and both urban and suburban legislators divided on the issue. Perhaps this was merely a case of party leaders getting too far ahead of their following to succeed, but many observers do not believe that was the case. In any event a year later a fair housing law was enacted partly as a result of activities of party leaders on both sides.

States with less party discipline represent a different strategy

problem. There the proponents have no assurance that winning over the party leadership will turn the battle. In Oregon, for example, party leadership on both sides—with the exception of some governors—have been unimportant figures in civil rights campaigns. It is largely a matter of persuading individual legislators to vote for the bill, concentrating on winning over respected legislators in the hope they will bring others along. To a degree the same thing is true in Minnesota, although there is considerably more party leadership in that state than in Oregon. During the fight in Minnesota for a housing law, the Democratic Farmer Labor Party chairman did talk to legislators in favor of the bill, but the chief responsibility for action rested with a few intra-legislative leaders like Senator Donald Fraser, the *ad hoc* committee for civil rights, and the governor. When Republican Governor Elmer Anderson pressed for action he did so not on a partisan basis but through letters to legislators of both parties urging favorable votes in committee or on the floor. Yet there is a difference between the parties in their voting on the 1961 housing bill, as these figures show:

		Liberals	*Conservatives*
House vote	(Yes	58	26
	(No	11	30
Senate vote	(Yes	21	15
	(No	3	27

California represents another situation, for it is in the process of changing from a state with no party discipline whatever to one in which some authority is being centered in the hands of a few leaders and a degree of discipline is emerging. In the not very distant past the California legislature was almost entirely devoid of partisanship in the sense in which partisanship prevails in some eastern states. Interest groups, individual legislators, the governor, and a few powerful lobbyists held the key to power in the institution, and both Republican and Democratic legislators sought to avoid election contests by running in both party primaries. Party members rarely caucused, and party unity was so weak that members could not even be held together to vote for

speaker. Accordingly it was difficult for proponents of FEP legislation to resort to "embarrass the party" tactics, for there was neither a leadership nor a following through whom this might be done. There is today, however, considerable power in the hands of Jesse Unruh, Speaker of the House, and while he is sometimes in disagreement with Governor Edmund G. Brown, both can be persuasive with Democratic legislators. In 1959, just after Brown had been elected the first Democratic governor since the thirties, FEP was high on the legislative agenda, having been defeated repeatedly in earlier years. On January 27 the Democrats caucused and voted to push the FEP bill. The bill passed the Assembly, but in the Senate the president *pro tempore,* Hugh M. Burns, proposed limiting amendments to the bill which the Senate committee accepted. The Governor announced his intent to restore the bill to its original form, and with some effort he succeeded in doing so. Somewhat the same situation developed in 1963 when a minority of Democrats and several Republicans set out to defeat the Rumford Act on private housing. It passed the Assembly without much difficulty (44 Democrats and 3 Republicans voted yes; no Democrats and 11 Republicans said no), but in the Senate there was delay and serious doubt about whether the bill would survive. President *pro tempore* Burns disliked the bill and sent it to a Senate committee chaired by Senator Luther Gibson, who was not inclined to release it. Governor Brown summoned the state Democratic chairman, who with a delegation of twenty members of the party steering committee, made a call on Senator Gibson. Gibson was persuaded to bring the bill to a showdown vote in his committee, but before it came to the floor Unruh, the Governor, Assemblyman Rumford and many others were involved in lengthy negotiations which required some concessions in the language of the bill before it could get out of committee. In the final vote during the last hours of the session 22 Senate Democrats voted for it, and 11 Republicans and two Democrats voted against it.

Although there are many Republicans in state and local politics who have risked much and contributed greatly to the civil rights fight, the evidence presented above indicates the reluctance of Republican legislators to accept limitations on employers' freedom to hire whom they like, or restraints on property owners'

desire to discriminate. It is suggestive that in California and Ohio all campaigns for FEP were unsuccessful for more than a decade, but laws were finally passed in both states in 1959 after Democratic governors with Democratic legislatures came into office. In Pennsylvania FEP became a law following the election of a Democratic governor in 1954 along with a Democratic House and a Senate lacking only two votes for a Democratic majority, whereas it had failed consistently before Republican legislators and Republican governors.

In an attempt to gauge the effect of party on civil rights voting in legislatures, I analyzed several roll calls in Ohio, which has clear party identification but not enough party discipline to erase variations in voting (as a highly disciplined system tends to do). In order to check the effect of party I analyzed roll calls first according to party affiliation and then compared party voting with characteristics of legislators' constituencies, specifically the percentage of Negro population, geographic location (Northern or Southern Ohio), and rural or urban. In Ohio as in other states, Democrats favor civil rights legislation more than Republicans. In 1949, when FEP almost made it, and in 1959, when it finally passed, the party splits in the House of Representatives were as follows:

	Democrats		*Republicans*	
	Yes	*No*	*Yes*	*No*
1949	62	7	8	54
1959	74	1	24	30

This conceivably might not, however, indicate the influence of party, if there were other factors that were common in the constituencies of legislators for or against the bill. So I checked the votes of legislators from the 19 (out of 86) counties with more than 5 per cent Negro population against those of legislators from the remaining counties. Sixty-three members of the 135 member house came from the counties with high Negro population in 1949, and their vote was split 53-10 in favor of the bill. This suggests that the constituency had something to do with their vote, but on further examination one finds that those 63 legislators split their vote this way in terms of party: 48 Democrats said yes and three said no, while five Republicans

said yes and seven said no. Legislators from counties with little Negro population voted 16-51 against the bill, but again significantly 13 of the favorable votes came from Democrats and 47 of the negative ones from Republicans.

Then I checked to see whether voting for civil rights legislation was correlated with urban as opposed to rural constituencies. Again there was a positive correlation on the 1949 final vote on FEP:[42]

	1949	
	Yes	*No*
Urban	53	19
Rural	18	53

But the correlation proved less impressive when the voting was broken along party and urban-rural lines:

	1949	
	Yes	*No*
Urban Republicans	4	5
Rural Republicans	4	49
Urban Democrats	49	14
Rural Democrats	14	4

Pretty much the same pattern prevailed in the 1959 vote on final passage of FEP:

	1959	
	Yes	*No*
Urban Republicans	10	3
Rural Republicans	14	27
Urban Democrats	52	0
Rural Democrats	21	1

Nor were the results of an analysis of voting by geographical area any more significant. Making the assumption that the more industrial northern area might be more sympathetic to civil rights and the southern half perhaps more influenced by the South and adjacent border states, I drew a line midway through the state and examined the votes of the two groups of legislators. There was a slight correlation between region and civil rights voting in 1949, but less in 1959:

	1949		1959	
	Yes	*No*	*Yes*	*No*
Northern Area	50	32	56	22
Southern Area	18	33	42	9

But again, when reexamined in terms of party affiliation, the correlations were proved weaker than they appeared.

	1949		1959	
	Yes	*No*	*Yes*	*No*
Northern Republicans)	2	6	10	21
Southern Republicans)	29	29	14	9
Northern Democrats)	48	12	46	1
Southern Democrats)	3	4	28	0

If the party system is an important factor, no less so is the chief executive whose support is almost indispensable to the success of a civil rights law. A governor can focus attention on an issue in a way that no other public official can, and he can influence legislators with the threat of sanctions. It is true that governors often play a make-believe game in which they claim that they do not get involved in the details of the legislative process, as if separation of powers somehow barred them from doing more than announcing the need for legislation and signing it when it comes to their desk. This attempt to fend off those who constantly petition for his intervention does not negate the facts of the matter, however. In 1945, when New Jersey's legislature was considering FEP, the head of Newark's Council of Jewish Agencies sent a telegram to Governor Edge pleading for his help. He got a reply from the Secretary to the Governor saying, "The Governor does not interfere with the mechanics and details of bills in the course of passage through the Legislature. I would suggest that you submit your proposals to Assemblyman James O. Hill." This must have provided a laugh, for although Assemblyman Hill's name was on the bill he was among the least important people involved in the struggle. Ultimately Governor Edge decided to push the bill, and his commitment to the issue unquestionably was a major reason for its enactment. Indeed, in all the campaigns I investigated, only one resulted in a law when the governor was not an active proponent: the 1965 Indiana fair housing law. Governor Branigan did not publicly oppose the bill, but privately he let it be known he did not want an enforceable law. Despite his reluctance, he signed the bill after it had been maneuvered through the legislature.

It is unnecessary to repeat the details of the innumerable cases of gubernatorial intervention—and of refusals to intervene—on behalf of antidiscrimination laws. Suffice it to say that the governor's or the mayor's role in civil rights campaigns varies directly with the strength of the office and the weakness of the legislative body. In New York state, where the governor's office is a place of great power, the governor's endorsement of a bill is a necessary first step in a campaign; if beyond endorsement a governor becomes committed to the issue and ready to invest some of his political capital in it, then the battle is at least two-thirds won. This is even more strikingly true of certain large cities where the mayor's authority towers high over that of the city council. In New York City, the campaign in 1957 for an ordinance on private housing was largely a matter of the advocates maneuvering to get Mayor Wagner committed to the issue and keeping him there. Mayors Joseph Clark and Richardson Dilworth in Philadelphia were less in complete command than Wagner, but both had their way on civil rights issues.

It goes without saying that many governors are cool to the idea of civil rights legislation, including some who publicly propose such laws. It is also true that other governors who are deeply committed and willing to exert themselves can achieve little because they lack political muscle. This is especially true of the "minority" governor who comes to office facing a hostile legislature of the opposite party. Partisan appeals get him nowhere, and often the legislature wants to prevent him from achieving much so that he may be beaten in the next election. Then the main tool of a governor is publicity, with which governors like G. Mennen Williams of Michigan, facing an opposition controlled legislature, contributed much support for civil rights bills.

Finally, with regard to proponents of antidiscrimination bills, there are other groups with varying degrees of importance. In a number of states and cities the League of Women Voters have contributed much to campaigns. The League is often unsettling to legislators because it seems not to conform to any of the rules of politics they know: it is not partisan, it has no economic motivations, and seeks no patronage reward. In its mixture of amateur enthusiasm and skilled professional comprehension, it

is a unique force. The League has never, to my knowledge, been the key factor in pushing through a civil rights bill—as it has been in some states on other issues such as governmental reforms—but as an additional force it is often important. Newspapers are likewise a factor of some importance. Although there is no way of gauging the effect of newspaper support or opposition, civil rights forces make the most of editorial endorsements of their bills. These come more frequently now than they did in the past, for during the early campaigns it was common for newspapers to repeat the old argument that the goal was good but that laws could never solve anything and that only an educational approach would work. Campaigners in Rhode Island were delighted when the Providence *Journal* and the *Bulletin* supported their drive in 1964 and 1965, and in Ohio, Minnesota, and other states *ad hoc* committees duplicated and widely distributed editorials in support of the cause.

IV.

Opponents of antidiscrimination legislation are easily caricatured. They are often forced into inconsistencies and contradictions by the understandable but compromised position they have to take. In order not to appear to be racists at a time when racism is verbally rejected even by Dixiecrats, northern civil rights opponents claim not to be prejudiced toward Negroes. Even more open to damaging caricature are the few opponents who are thoroughly disreputable types of the fascist stripe or are openly racist in their appeals. Opposition arguments are often more emotional than rational. Emotion is not the weapon of the opponents alone, of course, but because theirs is an emotion usually rooted in deep fear and frequently in profound ignorance, it is paradoxically easy to ridicule but often highly effective. Opponents also have some advantage in that they defend a status quo which white America has lived with comfortably for a long time.

The opposition appears to have three fundamental roots: prejudice, fear, and cupidity.[43] Some of the more outspoken opponents of antidiscrimination laws are second and third generation offspring of immigrants who constantly draw a parallel between

their own background and that of the Negro. They and their fathers and grandfathers were given no special help to overcome prejudice and poverty, so why should the Negro have it? William Lee Miller calls it the "Comparative Grandfathers" theme: "Now when *my* grandfather came over from the old country. . . ."[44] Although the Negro always wins the "who had it worse" contest, that does not impress the ethnic white who feels threatened by the Negro advance and falls easily into rationalization to justify his objections. He feels threatened by the chance the Negro may take his job; endangered by the possible entry into his neighborhood of undesirable, unclean, and dangerous persons; and frightened by the possibility that his life's savings, invested in his home, may be lost. He therefore argues that preferential treatment for Negroes is inherently unfair, as did two legislators in opposing a fair housing law in Connecticut:

"There are now no laws on the books in the state of Connecticut which prohibit the Negro from doing whatever any other citizen can do. Likewise there should be no law which gives the Negro special privileges either, and that's just what this proposed legislation does. You cannot improve the lot of a minority group by taking away the rights of the majority. . . ."

"If you vote for a law such as this, you are not giving the Negro equal rights, you're giving them special rights, and you are in effect saying you are a second class citizen and we intend that you stay a second class citizen because we are going to take care of you forever and ever."[45]

Working class families sometimes resent the liberals and wealthy few who promote integration, saying these people will not have to bear the effect of integration since they live in suburbia and do not have to rub shoulders with lower class Negroes. To quote William Lee Miller again, ". . . it seemed that well-fixed private-school liberals, with good jobs and big houses in lily-white suburbs or in fancy parts of town, are bravely summoning the public-school workingmen on two-family house streets please to face the moral crisis of our time."[46] But it is not that kind of fear that motivates many opponents, for they too live in suburbia or in rural areas; their opposition is not born of fear of social contact, but of economic concerns and ideological objection to government regulation. One well-to-do California lawyer who

was a leader in the drive to pass the anti-Rumford Act constitutional amendment told me that the basic question was not one of color. "It is a basic and fundamental right of the individual to choose where he wants to live. . . . Our purpose is not to deny anybody anything but to retain the inalienable property rights our people have always treasured. We are putting on this fight for the little property owner not in behalf of real estate men, for real estate men will make their fees regardless of who buys and sells to whom." Nevertheless the drive against the Rumford Act was spearheaded by the California Real Estate Association through a special organization, the "Committee for Home Protection," which it helped to finance. One may doubt whether pure altruism motivated the real estate industry in spending huge sums of money to defeat a fair housing law. In any event, their campaign literature stressed the danger to property values, and in land-boom California particularly the real estate business is deeply involved in speculative property operations.

Opposition strategy has varied greatly from state to state and also over time within the states. In most states there was early opposition to the enactment of FEP legislation from business and employer groups, but that opposition subsequently declined. In New York the early opposition from the business community was open, intense, and extensive. In Ohio, Pennsylvania, California, and many other states business was much opposed. In Cleveland the Chamber of Commerce opposed FEP in 1948 and persuaded city leaders not to act for a year, permitting a voluntary program to be undertaken by the Chamber in the interim. After experiencing little success with this program, the Chamber backed a limited FEP ordinance, and one was enacted in January 1950. In Connecticut no formal opposition was registered at a public hearing on FEP in 1947, nor was there much opposition in Massachusetts, where the only opponent in a public hearing in 1946 represented the Associated Industries of Massachusetts. Revision of FEP laws in most states has occasioned relatively little business opposition, presumably in part because it has not been difficult for most employers to comply with (or evade) the laws.

Many newspapers in the early years of the campaign were outspoken in their opposition. In 1947 the Hartford *Courant* said about an FEP bill, "There are no short-cuts through the medium

of the law to hasten the process [of eliminating discrimination]. A great many matters are far better left to education and the growth of moral virtues than to legislation and this particular matter is one of them."[47] The New York *Times* opposed a fair housing law for New York City in 1957 saying that "the method of compulsion is a dubious substitution for education and the admittedly gradual spread of understanding that can be the only sound foundation of complete neighborliness. . . . We believe the difficulties of enforcement are enormous, that nuisance cases would be innumerable and that intolerance might be aggravated rather than diminished. So, with deepest regret, we oppose this bill as being the wrong way to a right end."[48] But the *Times* had changed its position on the matter by the time the state got around to considering similar legislation and said the city law "has had no discernible ill effect as administered here and has instead been beneficial. It has not produced a revolutionary change, but it has been accepted generally by the public as an expression, a codification of the democratic principles held by the people of New York City regarding equal rights in housing."[49] Other newspapers have gone through similar changes of heart as experience with laws diminishes the timidity about social innovation that characterizes most editorial writers, not to mention investment-minded publishers.

Opposition to public accommodation laws has not been intense in most states, although there are invariably some elements of the hotel and restaurant industry who resist, and not infrequently they have been successful in preventing the extension of antidiscrimination agency authority to cover public accommodations. As noted earlier, there are 19 states whose laws against discrimination in public accommodations are carried out by antidiscrimination agencies, but another 14 states with laws against such discrimination omit administrative enforcement machinery. In Minnesota resort operators long resisted the granting of jurisdiction over public accommodations to the State Commission Against Discrimination (though coverage was finally extended in 1965), and they did the same in Ohio, where the Restaurant and Hotel Owners Association opposed such a bill in 1961, although they did not send anyone to testify against it (and it passed the House by a vote of 125-2).

But when it comes to housing legislation there is always opposition, much more of it covert than overt, but never lacking entirely. If as in Massachusetts in 1963 there is no appearance at public hearings to testify against a bill, there is sure to be action in the back corridors and anterooms of the legislature. This is presumably because housing legislation involves sensitive social relationships and even more importantly the economic sensibilities of some very powerful interests—the real estate men, landlords (and slum lords), builders, bankers, and home owners.

The most vocal and active elements are the real estate operators. Before fair housing laws existed, real estate dealers simply refused to show housing to the "wrong" persons, and the banks backed them up by refusing to loan money in certain locations to the "wrong" persons on the ground that it would be a bad risk. The only violators of this general rule were the unscrupulous "blockbusters" who introduced one or two Negro families into a block in order to make bloated profits when the whites fled selling under market value and Negroes entered, buying at inflated prices, because they desperately needed housing. Thus the real estate industry has the most intimate connection with race discrimination in housing, and it also has the most subtle ways of achieving its ends—as indeed it still has even in states where discrimination in private housing is supposed to be against the law. In the firm belief that interracial housing would mean financial disaster, real estate men and builders reacted in horror to the first proposals of fair housing laws. The chairman of the board of the Metropolitan Life Insurance Company expressed the convictions of real estate investors when he explained in 1943 the reason why his company would refuse to permit Negroes to live in Stuyvesant Town, a publicly assisted housing project in New York City. Said Mr. Frederick Ecker,[50] "Negroes and whites don't mix. A hundred years from now maybe they will." He gave a simple and concise reason why the Metropolitan was not going to provide schools or playgrounds in the project: "Negro children might attend."

But Stuyvesant Town was to play a significant role in the process of integrating housing, contrary to Mr. Ecker's expectations. The City of New York had supported the Metropolitan's housing project by turning over public streets, granting a 25-year tax

exemption, condemning land, etc. There was an outcry over the inclusion in the contract with the city of a clause permitting the company full discretion in tenant selection, but the contract was nevertheless approved. Subsequently the state's highest court held that the contract and the resultant exclusion of Negroes did not constitute a breach of equal protection of the law under the Fourteenth Amendment even though the project was in part publicly financed.[51] The court suggested an alternative remedy, however—legislation. Then began a series of campaigns that led first to laws against discrimination in publicly assisted housing and then to the Sharkey-Brown-Isaacs law which in 1957 forbade discrimination in private housing in New York City.

The feverish reaction of real estate operators to the spread of these laws is well illustrated in this message from the leaders of the New Jersey Association of Real Estate Boards to their members:

> On Monday . . .the Assembly passed by a 50 to 2 vote, the 1963 version of the Anti-Discrimination House Bill (A-314). We must ACT IMMEDIATELY to block passage of A-314 in the Senate. Here is what YOU, YOUR ASSOCIATES and FRIENDS should do *NOW!*
>
> CONTACT YOUR SENATOR AND URGE HIM TO *OPPOSE* A-314. We recommend either a telephone call, personal visit, telegram, or if this is not possible, a letter.
>
> Your Senator should be made aware that A-314 is another step along the path of the destruction of our property rights through legislation. Emphasize the fact that the property owners of New Jersey do not want this "THOUGHT CONTROL-POLICE STATE" type of legislation which denies them their constitutional right of enjoying and disposing of their property in the American tradition. Remind him that we, as Realtors, are against discrimination and are for integration, but by education and not legislation. . . .
>
> IMMEDIATE ACTION is required at once, if you wish to continue operating your business and if the property owners of New Jersey are to enjoy their rights in the American tradition.[52]

The call no doubt produced some appeals to legislators and may have contributed something toward the killing of the bill in the Senate.

Another standard tactic is the use of real estate men in the legislature as inside lobbyists against housing laws. Real estate and insurance men, like lawyers, are numerous in state legislatures both because their businesses allow them to absent themselves for part-time legislative duty and because the publicity of

holding office is assumed to help business. In Rhode Island a dozen real estate men who were members of the lower house of the legislature were leaders in the movement to defeat the 1964 housing law.[53] This is not a practice unique to the real estate profession, but they are in a position to make the tactic pay off, since they are relatively "overrepresented" in state legislatures, in comparison with most other occupations.

Not all the real estate industry concurs in the opposition to these laws, however. A minority supports them and others are neutral. An element of the California real estate profession refused to go along with their state organization's opposition to the Rumford Act, and some local real estate boards openly supported it. In Minnesota the Minneapolis Real Estate Board "did not take any clearly visible role for or against" the 1961 fair housing law, and the St. Paul Board offered only token resistance.[54] Home builders are a less active opposition group than real estate men, although in some states the builders are in the forefront of the battle as opponents. Nevertheless, in Massachusetts a home builder was a leading protagonist of the inclusion of all housing in the law. This happened because he suffered and his competitors did not from the rule which included projects with more than 10 units but excluded smaller ones. The builder, Alfred W. Halper, drafted a bill and brought it to the American Jewish Congress, with whose lawyers he subsequently revised the bill to the form in which it was filed to become the 1963 Massachusetts housing law.

Like the proponents of antidiscrimination laws, opponents also frequently establish *ad hoc* committees to coordinate their campaigns. These usually include home owner organizations, apartment owner associations, builders, and real estate groups. The campaign against the Sharkey-Brown-Isaacs law in New York City illustrates well the temper and character of *ad hoc* group opposition to housing laws, although there the Real Estate Board was the center of operations with the *ad hoc* group as an adjunct. The Real Estate Board of New York was joined by the Associated Builders of New York, the Broadway Association (mainly department stores), the Commerce and Industry Association, and the Tenant-Owner Apartment Association. The leading spokesman for the opposition was Colonel James Andrews, a veteran of

both World Wars, a real estate broker, and a member of what he believes to be the smallest minority in the nation: "Native born, Revolutionary-ancestry American." Commended by the Real Estate Board for his "gallant campaign" against the bill, the Colonel faced difficulty in achieving what the Board thought he had done well—to make it "plain that the Board was itself in favor, as an American principle, of the integration of our people of all races. . . ."[55] In the real estate version of the old story about the dancing elephant saying to the chickens in the barnyard, "Every man for himself," the Colonel said that if anyone "doesn't want me for a neighbor or for a tenant because I am white, American, of Revolutionary ancestry . . . he has a perfect right to reject me, however ill-advised that may seem." Besides expressing the opinion that the law was "immoral" and "unenforceable" and that it would be evaded, he also expressed fear that "if the minorities succeed in getting into [new] buildings" it would lead to a halt in construction, a flight of tenants and "the better elements" from the city, and "a deleterious effect on the mortgage market in the City."[56]

The Real Estate Board continued its campaign with newspaper advertisements, 100,000 flyers distributed to tenants, speeches, pamphlets, and a major effort to solicit opposition letters to city leaders. By September the mail arriving at the Mayor's office on the proposal stood at 14,000 opposed and 5,300 in favor; eventually the mail was to reach a two-to-one ratio in favor of the bill, following a counter campaign for letters, but the volume of anti-mail and a boisterous five hour public hearing had much to do with the decision to postpone the vote on the bill until after the 1957 election.[57] The New York City campaign was a long and weary one, lasting from the spring of 1957 until the beginning of 1958, due to the decision to postpone until after the election, and as the months wore on the accusations became more reckless. Charges that the housing law was "Communist" and "Russian inspired" were paired off with allegations of racism and bigotry.

Such wild charges are usually not issued by the main organizations in opposition, but the campaigns always bring forth a "know-nothing" element which professes to see the hand of the Kremlin in the civil rights glove. The Saint Paul Rental Property Owners' Association denounced the state's fair housing bill as

being "sponsored by communistic groups." Some of the choicest of diatribe in opposition comes, oddly enough, from ministers, and this is especially true in California, where radio preachers have fulminated on the subject. A group known as the "American Council of Christian Churches of California" staunchly opposed the Rumford Act and backed the 1964 referendum. The name of the organization was presumably chosen so as to lead to confusion with the National Council of Churches, which supports such legislation. Quoting scripture and following the standard *laissez-faire* argument, the American Council published and distributed broadsides saying among other things that "The Bible strongly supports the rights of private property. The Commandment 'Thou Shalt Not Steal' is a complete defense of the private property rights of the individual." A minister in Burbank wrote and distributed a pamphlet under the title, "The Rumford Act Communist or Christian Inspired?" William S. McBirnie, a Glendale minister who is also the central figure in the "VOICE OF AMERICANISM Radio Network," heard on thirteen California stations in regular daily broadcasts, was warmly congratulated by the chief lobbyist for the California Real Estate Association for the excellence of a pamphlet the Voice of Americanism distributed. The pamphlet, "What You Need To Know About THAT RUMFORD ACT!" is indeed quite a document. Labelling the Rumford Act as "a giant step into Socialism," McBirnie claimed the Act was a deception "enveloped in a smoke screen of racial tension and supposed betterment of minority groups." But it was not for the benefit of minorities at all, it seems, but a smoke screen for the weakening of the nation and the introduction of socialism. The inside back cover completes the distorted picture presented in the remainder of the booklet. It shows a drawing of Assemblyman Rumford, presumably to make it clear that he is a Negro, and in the background of the picture are doors and windows of houses with signs on them saying "for rent," "no vacancy," "to let," vaguely suggesting a housing panic.

The white community in California responded to these appeals by a better than two-to-one vote in favor of the amendment to repeal the Rumford Act. The proponents of the amendment, pleased with their success, expressed the hope that housing discrimination "can be alleviated by education and by cooperation

among civic groups, without intimidation by the State." Simultaneously, certain Negro leaders promised a major campaign to test the sincerity of the real estate men who claimed they favored housing integration. Elsewhere in the nation antagonists of fair housing laws took encouragement from the California vote. The president of the national real estate organization disclaimed any intention of sponsoring a general campaign against fair housing laws. The opposition must be local, said Edward Mendenhall of High Point, N.C., but resort to the referendum was recommended. "Our biggest interest is in seeing that wherever the issue comes up it is submitted to the voters, not forced upon them by legislators."[58]

V.

Opponents are convinced that civil rights laws are wheedled out of frightened or misguided legislators and that a majority of the public disapproves. If the record of public referenda on anti-discrimination laws is any guide, there is at least some truth in their claim that majorities do not approve. Referendum victories have been sparse in appeals to the white majority of the voters. Still the issue is not that simple; civil rights legislation is not thereby to be condemned as inherently minority legislation any more than most other legislative measures. Virtually all bills are sponsored by minorities for the obvious reason that only a minority of the people are aware of the issue and interested enough to conduct a legislative campaign. Campaigns to reform government, proposals to limit public welfare or expand it, programs to aid business or to regulate it—all are the products of activity by interested minorities. Is a bill to establish an educational program in a state—a medical school tuition plan, for example—a majority backed bill? It is not, because most voters are never aware of its existence before, during, or after its passage. Indeed, on most referenda a majority of the voters do not even participate. Only a few bills are challenged and brought to a referendum, and many of them are defeated—educational budgets at the local level as a foremost example. That education budgets are often rejected does not make such policies any more or less "minority" action

than any other law. The difference is that this subject, like civil rights, often involves an innovation (school tax rises where population expands), a challenge to existing practices and beliefs and therefore arouses strong feelings.

The "no" side seems to have some advantage in referendum balloting, possibly because this offers the "little man" a chance to retaliate against his governors whom he cannot reach any other way.[59] Civil rights legislation offers a perfect opportunity for the "angry" vote. Not only do the anti-elements feel deeply about the issue and get their voters to the polls, often on occasions when no other important issues are involved, but the civil rights advocates also face some serious problems in getting their voting potential fully mobilized. In the first place, Negroes are registered in proportionally smaller numbers than whites even where there are no restrictions placed on registering. More Negroes are poverty stricken, and the poor whether white or black do not register or vote in anything like the proportions of other citizens. The reason is obvious; they are placed outside the culture by their poverty; they do not read newspapers, hear political commentary, or feel personally involved in political decision-making. The poor person is more likely, as a newspaper man quoted by Nat Hentoff commented, to be concerned about the "people who really run his life—the owner of the plant, the landlord, the cop on the beat, and the wealthy folk who supply the muscle to keep him in his place" and who "never run for office and so can't be voted in or out."[60] Negro voting is also restricted by the literacy test, since Negroes are also disproportionately illiterate, and some who may be able to cope with the written word lack confidence and are apprehensive about the possible embarrassment of failing the test.

Another source of limitation of Negro participation is found in the sentiment often expressed by the more aggressive Negro leaders—a protest at having to vote to secure rights which they believe are inherently theirs. This has at times been the cause of the loss of referenda, and was the primary reason that a referendum in Cambridge, Maryland, failed. There after weeks of violence and the arrival of National Guard troops to patrol the streets, the city council passed a public accommodations ordinance. It was challenged in a referendum and was defeated in October 1963. Mrs. Gloria H. Richardson, a local leader of extraordi-

nary ability who is both aggressive and stubborn in her campaign for equal rights in that Maryland Eastern Shore town, broke with the leaders of established Negro organizations and counseled her followers to refuse to vote. She claimed it was wrong to submit "the constitutional rights of our people to the whim of a popular majority." Although the local Negro clergy and officials of the NAACP tried to reverse the effect of her boycott of the election, they did not succeed, and Negro abstention from the polls defeated the measure. The white community turned out in greater numbers than ever before in any election. All the white wards had majorities in opposition, but the vote was surprisingly close: 1720 for and 1994 against. The most affluent section of town was split almost evenly, but one ward with blue collar workers opposed by 670 to 157. Moderate white leaders had hoped for 800 to 1,000 Negro votes in favor, but the ghetto ward cast only 587 votes for (and 32 against) the ordinance. Less than half the registered Negroes participated.

Mrs. Richardson's objection to the submission of a civil right to a vote is understandable but hardly defensible. Whether the referendum is a wise institution or not, it is very much a part of American political life, and to challenge what is inevitably defended as a democratic device is to place an additional handicap on already overburdened petitioners for equality. Would those who refuse popular votes on civil rights never consent to such a vote? If so, how are constitutions to be ratified when they contain new civil rights guarantees as did the New Jersey and Michigan state constitutions of recent years? Civil rights like other rights exist in two realms: the abstract guarantee and the concrete protection. A Negro in Mississippi has an abstract guarantee of equal protection of the law, but for too many decades that guarantee has been a matter of no moment whatever; the *achievement* of equal protection is a far cry from its abstract existence. To move from the abstraction to the achievement requires many different kinds of tactics, strategy, sacrifices, patience, and occasionally compromise. If the only recourse ever open were the ballot in a referendum, a refusal to submit to a vote on civil rights would make sense, but there are other avenues, other courts of appeal where the battle is fought. To reject voting participation—at least where victory was a reasonable hope, as it turned out in Cambridge—is poor strategy.

Refusal to vote does not make sense even when, as with California's initiative constitutional amendment to repeal the Rumford Act, the proposal may ultimately be found unconstitutional, for any contribution to a more resounding defeat of civil rights will hardly make future campaigns easier to win. In California a good case can be made for the proposition that the proposed initiative is unconstitutional, and the NAACP challenged the placing of the issue on the ballot on the ground that it was in violation of the Fourteenth Amendment. The critical language of the amendment is contained in its first section:[61]

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses.

Legal counsel for NAACP contended that the sweeping language of this section constituted state protection for discriminatory practices. The legal brief presented by the NAACP in the Superior Court of Sacramento County said, "Thus it is clear that by this initiative amendment the State of California would be conferring upon private persons an absolute right to discriminate against persons because of race or color in the use of real property. In a legal sense, it is quite elementary that the thrust of the prohibition contained in the Fourteenth Amendment was aimed at just such state schemes of racial discrimination. If the state itself . . . cannot discriminate, is it not a crass exhibition of 'absolute' simplemindedness for anyone to claim that the state could nevertheless erect a constitutionally sheltered arena in which private persons may so discriminate in their 'absolute' discretion?"[62]

But the Superior Court rejected the plea to withdraw the issue from the November 1964 ballot, even though the judge found merit in the argument of the NAACP. Later the State Supreme Court likewise recognized "grave questions" as to the constitutionality of the initiative, but refused to rule on the point before the referendum. "It would be more appropriate," said the opinion, "to pass on these questions after the election . . . than interfere with the power of the people to propose laws and amendments to the constitution and to adopt or reject the same at the polls."[63] The campaign on the issue did much to heighten

racial tension and sharpen racial conflict in the state, but the court did not feel justified in preventing that by an injunction to suspend operation of the constitutionally provided initiative process. The high court of Michigan followed a similar path. In Detroit in 1964 a lower court granted an injunction against a referendum on a "homeowners' ordinance" which would recognize the right of a property owner or resident "to choose his own friends and associates and to own, occupy, and enjoy his property in any lawful fashion according to his dictates." But the Michigan Supreme Court in a 5 to 3 decision[64] reversed the lower court without ruling on the constitutionality of the issue but asserting that doubts about constitutionality were insufficient to keep the question off the ballot. That ordinance was approved in a close vote (138,000 to 115,000) in September 1964, and was at once challenged as to its constitutionality.

The chief reason civil rights advocates oppose the referendum is obvious: they do not trust the white majority to impose a restraint on discriminatory practices that that same majority routinely, indeed almost without a thought, perpetrate. Public accommodations laws fare better in referenda than housing laws. (Portland, Oregon (1950), St. Josephs, Mo. (1963), Kansas City, Mo. (1964), and the State of Maryland (1964) approved public accommodations laws in referenda.) But this is not much of a counterbalance for the rejections of housing acts by Berkeley, Seattle, and Tacoma in 1963, and by Detroit, Akron, and the State of California in 1964. The wild and irrational appeals of referendum campaigns do not make the process seem a particularly sound way to make public policy. During the campaign on the anti-Rumford Act constitutional amendment in California, the proponents of the Amendment used billboard advertisements featuring a huge American flag, and the opponents featured pictures of Presidents Lincoln and Kennedy with the words, "Do Not Legalize Hate."

There is a possibility, however, that challenge by referendum will become increasingly common in the 21 states where by popular initiative (via petition signatures) a referendum can be placed on the ballot. Certainly the sweeping victory in California is encouragement. Where a legislature must act to allow a referendum there is hope; in Rhode Island in 1965 a referendum

proposal on housing was beaten back in the legislature, as it has been in some other states. But once the initiative places the issue on a ballot—especially a housing law—the augury for defeat of equal protection in some areas is good. Unless the courts hold that the use of the initiative-referendum to legitimize and sustain private discrimination violates the Fourteenth Amendment, the referendum, provoking in its wake another and more sweeping realignment of federal-state responsibilities in the area of civil rights, may constitute the gravest challenge that state and local antidiscrimination laws have yet faced.

NOTES

1. By means of this law the legislature reversed the often-cited decision in Roberts v. Boston, 59 Mass. 198 (1849), which first stated the separate-but-equal doctrine for schools.
2. 18 Stat. 335.
3. For a summary of the legislative history of the 1875 Act, see KONVITZ, A CENTURY OF CIVIL RIGHTS ch. 3 (1961).
4. 109 U.S. 3 (1883).
5. For a review of these laws and their enforcement, see KONVITZ, *op. cit. supra* note 3, ch. 6 (Theodore Leskes).
6. Almost half of the states with public accommodations laws today have only civil or criminal remedies.
7. Quoted in GARFINKEL, WHEN NEGROES MARCH 54 (1959).
8. GARFINKEL, *op. cit. supra* note 3, at 59-60.
9. Quoted in BERGER, EQUALITY BY STATUTE 24 (1950).
10. 1962 CHICAGO COMMISSION ON HUMAN RELATIONS ANNUAL REP. 3.
11. COMMUNITY RELATIONS SERVICE OF THE U.S. CONFERENCE OF MAYORS, OFFICIAL COMMUNITY RELATIONS COMMISSIONS 1 (1964).
12. N.Y. Times, March 27, 1944, p. 19, col. 1.
13. Its budget was minimal ($4000-$5000) and most of its manpower volunteer. Promotion of national unity and patriotism became a major part of its program during the War. See 1941-44 GOODWILL COMMISSION ANNUAL REPORTS.
14. A JERSEYMAN'S JOURNAL 292 (1948).
15. That figure is the net "out-migration," which allows for those who returned or migrated to Mississippi. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 39 (84th ed. 1963).
16. That is, the states of New Jersey, New York, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Wisconsin, California, Oregon, Washington.
17. See Del. Code Ann. tit. 6, §§ 4501-16 (Supp. 1964), Del. Code Ann. tit. 19, §§ 710-13 (1964), Md. Ann. Code art. 49B, §§ 1-16 (1957, Supp. 1964); N.J. Stat. Ann. §§ 10:1-1 to -12, N.J. Stat. Ann. §§ 18:25-1 to -28 (Supp. 1964), N.J. Stat. Ann. § 46:3-23 (Supp. June 23 1965); N.Y. Civil Rights Law §§ 40-45, N.Y. Executive Law §§ 290-301, N.Y. Lab. Law § 220-e; Ohio Rev. Code Ann. § 2901.35 (Page 1954), Ohio Rev. Code Ann. §§ 4112.01 to .08 (Page 1965, Am. Sub. Senate Bill No. 189, 106th Sess., (July 30, 1965)); Pa. Stat. Ann. tit. 18, § 4654 (1963), Pa. Stat. Ann. tit. 35, § 1711 (1964), Pa. Stat. Ann. tit. 43, § 951-63 (1964).
18. Mo. Ann. Stat. §§ 296.010 to .070 (1965, Supp. August 1965); Ill. Ann. Stat. ch. 48, §§ 851-67 (Smith-Hurd 1964). After this was written Missouri enacted a somewhat limited public accommodations law, Mo. Ann. Stat. §§ 314.010 to .080 (Supp. August 1965).

19. See note 17 *supra.*

20. See Ore. Rev. Stat. §§ 659.010 to .115 (1963); Minn. Stat. Ann. § 327.09 (1947, Supp. 1965), Minn. Stat. Ann. §§ 363.01 to .13 (1957, Supp. 1965).

21. See Colo. Rev. Stat. Ann. §§ 25-1-1 to -1-5, Colo. Rev. Stat. Ann. §§ 69-7-1 to -7-7, Colo. Rev. Stat. Ann. §§ 80-21-1 to -21-8 (1963); Mass. Gen. Laws Ann. ch. 121, § 26FF (Supp. 1964), Mass. Gen. Laws Ann. ch. 140, §§ 5, 8 (1957), Mass. Gen. Laws Ann. ch. 151B, §§ 1-10 (1958, Supp. 1964), ch. 151C, §§ 1-5 (1958), Mass. Gen. Laws Ann. ch 272, §§ 92A, 98B (1959); N.M. Stat. Ann. §§ 49-8-1 to -8-7 (Supp. 1963), N.M. Stat. Ann. §§ 59-4-1 to -4-14 (1953); R.I. Gen. Laws Ann. §§ 28-5-1 to -5-39 (1956, Supp. 1964), Public Laws 1965, ch. 27; Wash. Rev. Code § 9.91.010 (1961), Wash. Rev. Code Ann. § 35.81.170 (1964), Wash. Rev. Code Ann. §§ 49.60.010 to .320 (1962); Wis. Stat. Ann. §§ 15.85, 15.855 (1957), Wis. Stat. Ann. §§ 66.40, 66. 431, 111.31 to .37 (1957, Supp. 1965).

22. See Arizona Rev. Stat. §§ 41-1401 to -1485 (Supp. May 1965); Nebraska Legislative Bill No. 656, 75th Sess. (August 3, 1965); Nevada 1965 Public Laws, ch. 332.

23. Pub. L. 88-352, 78 Stat. 241.

24. Interview, May 18, 1964.

25. Interview, June 6, 1964.

26. CALIFORNIA RESEARCH FOUNDATION, FAIR HOUSING, A POST ELECTION SURVEY IN BERKELEY, CALIFORNIA, APRIL 2, 1963 at 10 (mimeo. 1963).

27. Samuel Scheiner to Joseph Robison, April 27, 1961.

28. OHIO COMMITTEE FOR CIVIL RIGHTS NEWS BULLETIN (June 10, 1963). This mimeographed bulletin was widely distributed throughout the state during the legislative session.

29. Interview, April 1, 1964.

30. N.Y. Times, February 7, 1945, p. 19, col 1.

31. Boston Daily Globe, May 15, 1946, p. 14, col. 4.

32. N.Y. Times, March 21, 1964, p. 1, col. 1.

33. *Id.,* March 22, 1964, p. 58, cols. 3,4.

34. *Id.,* March 26, 1964, p. 31, col. 5.

35. COMMITTEE ON EDUCATION, TRAINING, AND RESEARCH IN RACE RELATIONS OF THE UNIVERSITY OF CHICAGO, THE DYNAMICS OF STATE CAMPAIGNS FOR FAIR EMPLOYMENT PRACTICES LEGISLATION (mimeo. 1950). The very low incidence of success in completely Democratically-controlled legislatures is due in part to the fact that few such legislatures existed in the period 1944-49.

36. The roll calls included some key amendments as well as the bills themselves in California, Connecticut, Massachusetts, Minnesota (using the "Liberal" and "Conservative" labels for "Democrat" and "Republican" common to that state's legislature), New York, Ohio, Pennsylvania, and Rhode Island.

37. Leslie G. Ainley in the Boston Daily Globe, June 24, 1945, p. 8, col. 2.

38. Boston Sunday Globe, June 27, 1945, p. 9, col. 6.

39. Hartford Times, May 8, 1963, p. 17, col. 6.

40. Interview, September 10, 1963.

41. N.Y. Times, April 1, 1960, p. 18, col. 4.

42. The constituencies are classified by Thomas Flinn, using the 1950 Census as his measure, but not employing the usual urban-rural standard; instead he calls urban those counties within standard metropolitan areas or parts thereof. Flinn, *Party Responsibility in the States: Some Causal Factors,* AM. POL. SCI. REV. at 60-71 (March 1964). I am grateful to Mr. Flinn for supplying this and other information on Ohio politics.

43. Perhaps the best evidence for this is a book entitled OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT (1963), edited by Alfred Avins. This symposium on fair housing laws contains a paper by Charles Abrams, famed as a proponent of such legislation and former Chairman of the New York State Commission Against Discrimination, which seems most out of place among other papers which echo fears of a "police state" and "totalitarianism," and which pursue such topics as the "The Right to Choose Customers," "Compulsory Integration and Freedom of Choice". It also contains some dubious research papers which purport to show the evil consequences of housing laws. See especially the note on the New Jersey and Pennsylvania Levittowns which attempts to show that New Jersey's antidiscrimination law made the Levittown in that state unattractive to

buyers. At 294-99. The evidence adduced by no means supports the conclusion, and, in fact, some of it runs to the contrary.

44. N.Y. Times, August 23, 1964, § 6 (Magazine), p. 27.

45. TRANSCRIPT OF CONNECTICUT HOUSE OF REPRESENTATIVES DEBATES 295, 309-10 (for May 31, 1961).

46. *Op. cit. supra* note 44.

47. Hartford Courant, March 18, 1945, § A, p. 2, col. 2.

48. June 15, 1957, p. 16., cols. 3, 4.

49. March 19, 1960, p. 20, col. 1.

50. ABRAMS, FORBIDDEN NEIGHBORS at 174, 252 (1955). See also Record on Appeal, Dorsey v. Stuyvesant Town Corporation, 299 N.Y. 512, 87 N.E. 2d 541 (1949), and 339 U.S. 981 (1950).

51. Dorsey v. Stuyvesant Town Corporation, 299 N.Y. 512, 87 N.E. 2d 541 (1949), *cert. denied,* 339 U.S. 981 (1950).

52. NEW JERSEY ASSOCIATION OF REAL ESTATE BOARDS LEGISLATIVE BULLETIN (February 1, 1963).

53. This information and some of the other data concerning Rhode Island was obtained from an unpublished paper by Alfred B. Sullivan which he kindly put at my disposal.

54. Minneapolis Spokesman, April 21, 1963.

55. THE REAL ESTATE BOARD FORUM (March, 1958).

56. N.Y. Times, July 21, 1957, § 6 (Magazine), p. 13, at 52, 54.

57. Some of this information comes from an unpublished Honors Paper at Bryn Mawr College, Miss Lynne Kaplan, *Politics, Pressure Groups and the Public: A Study of the 1957 Fair Housing Practices Law of New York City,* which was kindly made available to me.

58. N.Y. Times, Nov. 9, 1964, p. 23, col. 1.

59. See the longer discussion of the problems of referendum voting in LOCKARD, THE POLITICS OF STATE AND LOCAL GOVERNMENT 263-70 (1963).

60. HENTOFF, THE NEW EQUALITY 57 (1964).

61. Cal. Const., art. I, § 26 (Cum. Cal. Codes Supp. March 1965).

62. Mr. Nathaniel S. Colley, co-counsel for the NAACP, kindly provided me with copies of this brief; the quotation comes from the "Abstract of Points . . . ," p. 5.

63. The constitutionality of the now-approved amendment is currently before the California courts and will probably be appealed to the U.S. Supreme Court. The cases pending before the California Supreme Court involving "Proposition 14" are: Mulkey v. Reitman, L.A. 28360; Hill v. Miller, Sac. 7657; Peyton v. Barrington Plaza, L.A. 28449; Thomas v. Goulis, S.F. 22019; Grogan v. Meyer, S.F. 22020; Prendergast v. Snyder, L.A. 28422; Redevelopment Agency of Fresno v. Buckman, S.F. 22017.

64. Greater Detroit Homeowners Council v. Moynihan, Circuit Judge, No. 508191/2, May 5, 1964, *reversing* Turner v. Leadbetter, Civil Action No. 13734, Wayne County, Feb. 13, 1964.

A Proposed Model State Civil Rights Act

The federal Civil Rights Act of 1964 has made available federal remedies in cases involving discrimination where no effective state remedy is provided. This possibility of federal intervention has in turn placed a premium on the enactment by state legislatures of their own state civil rights laws. By providing state and local machinery for the rectification or elimination of discrimination which is declared by federal statute to be unlawful, the states can handle their problems themselves instead of waiting for the federal government to do the job for them. This proposed statute is designed to provide the requisite effective state remedies. Moreover, in the case of some provisions, many of which are optional, the proposed statute goes beyond the minimum federal standards. This approach is founded upon the experience and legislative reactions of some of the more progressive states.

AN ACT

To promote and protect the welfare of the people of this State by prevention and elimination of practices and policies of discrimination on account of race, color, [sex,] religion, ancestry, or national origin; to create a state civil rights commission, defining its functions, powers and duties; and for other purposes.

PART I. SHORT TITLE; DECLARATION OF POLICY

SECTION 101. *Short title.*

This act shall be known, and may be cited, as the "[State] Civil Rights Act."

SECTION 102. *Declaration of Policy.*

It is the public policy of this State to protect the civil rights of all persons within the jurisdiction of this State and to guarantee their freedom from unlawful practices relating thereto.

It is recognized that practices of discrimination on account of race, color, [sex,] religion, ancestry, or national origin constitute an invasion of an individual's interest in personal dignity, self-respect, and freedom from humiliation, menace the institutions and foundations of a democratic state, foment domestic strife and unrest, deprive the State of the fullest utilization of its capacities for development and progress, and substantially and adversely affect the interests, rights, and privileges of all persons within the jurisdiction of this State.

Therefore, subject only to the conditions and limitations established by

law and applicable alike to all persons, no person within the jurisdiction of this State shall be denied the opportunity on account of race, color, [sex,] religion, ancestry, or national origin to obtain and hold employment for which he is qualified, to obtain full use and enjoyment, and all the services or merchandise, of any public accommodation, to secure the purchase or lease of any multiple dwelling, contiguously located, or publicly assisted housing accommodation, or to obtain admission to, and to obtain all the advantages of, any educational institution. This opportunity is hereby recognized as, and declared to be, a civil right.

SECTION 103. *Broad construction.*

The provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof, with due regard to the interests of all parties.

PART II. DEFINITIONS

SECTION 201. *Terms used in this Act.*

(a) "Person" includes one or more individuals, partnerships, associations, corporations, labor unions, trustees in bankruptcy, receivers or other fiduciaries, or their agents, legal representatives or employees, and the State, any of its political or civil subdivisions, or any agency thereof.

(b) "Employer" means any person employing eight (8) or more employees within the State or any persons acting directly or indirectly in the interest of a person employing eight (8) or more employees within the State.

(c) "Employment agency" means any person undertaking with or without compensation to procure employment opportunities for individuals, or to procure, recruit, refer, or place individuals as employees.

(d) "Labor organization" means any organization which exists for the purpose, in whole or in part, of representing employees in collective bargaining. "Collective bargaining" includes any negotiation or dealing with employers concerning grievances, terms or conditions of employment, or other aid or protection for one or more employees.

(e) (1) "Public accommodation" means any place of business, accommodation, refreshment, entertainment or recreation, or any conveyance of every kind whatsoever, whether licensed or not, which extends, offers, sells or otherwise makes available its accommodations, advantages, facilities, benefits, privileges, services, or merchandise to, or which is open to, accepts, or solicits the patronage of, the general public.

(2) Without restricting the scope of the foregoing, "public accommodation" includes:

(i) any inn, hotel, motel, camp or court, park, lodge, resort, wheth-

er conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest;

(ii) any restaurant or eating house, saloon, tavern or barroom, or any other place or enclosure where prepared food or beverages, including spirituous or malt liquors, are sold for consumption on or off the premises;

(iii) any theatre, motion picture house or drive-in theatre, auditorium, public library, public hall, stadium, arena, music hall, dance hall, boardwalk, seashore or lakeside accommodation, swimming pool, bowling alley, skating rink, golf course, amusement or recreation park, fair, carnival, circus, or rodeo;

(iv) any public conveyance operated on land or water, or in the air, and stations or terminals thereof; any ticket office, travel or tour advisory service, agency, or bureau;

(v) any retail store or other retail outlet, wholesale or discount house, warehouse, auction, service establishment, parking lot, garage, service station, and any other enterprise engaged in the sale, lease, rental, repair or servicing of merchandise, clothes, equipment, food or other goods, whether on the business premises or not;

(vi) any barber shop, beauty parlor, bathhouse, gymnasium, reducing salon, or any other establishment conducted to improve the health, appearance, or physical condition of individuals;

(vii) any comfort station, any dispensary, clinic, hospital, convalescent home, or other institution for the physically infirm; any mortuary or undertaking parlor, cemetery, crematorium, or any other place of burial of the dead.

(3) Any advertisement, or any written, printed, oral, or visual communication, or any other form of publicity, by any business establishment or enterprise concerning its accommodations, advantages, facilities, benefits, privileges, services, or merchandise shall be presumptive evidence that it is a public accommodation.

(4) "Public accommodation" shall not include those clubs, associations, corporations, or other organizations which prove that:

(i) they are organized by and for a regular dues-paying membership;

(ii) they are formed for non-commercial, non-profit purposes which include social relations;

(iii) their policies are determined by their members; and

(iv) their facilities and services are available only to their members and their bona fide guests.

(f) "Housing accommodation" includes any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home, residence, or sleeping place of one or more individuals.

(g) "Multiple dwelling" means any building or structure of five (5) or more units which is used or occupied, or is intended, arranged, or de-

signed to be used or occupied, as the home, residence, or sleeping place of five (5) or more families or households living independently of each other.

(h) "Publicly assisted housing accommodation" includes any housing accommodation within the State:

(1) which is constructed, or to be constructed, owned or operated, in whole or in part, by the federal government or any agency thereof, or the State or any of its political subdivisions, or any agency thereof;

(2) which, at the time of any alleged unlawful practice under this Act, is granted exemption, in whole or in part, from taxes levied by the State or any of its political subdivisions, or any agency thereof, unless the tax exemption is granted solely because the owner is a religious, denominational, educational or other charitable association, corporation or organization;

(3) which is constructed, or to be constructed, on land sold below cost by the State or any of its political subdivisions, or any agency thereof, pursuant to the provisions of the Federal Housing Act of 1949;

(4) which is constructed, or to be constructed, in whole or in part, on land acquired or assembled by the State or any of its political subdivisions, or any agency thereof through the power of condemnation, eminent domain, or otherwise, or which is sold, leased, rented, rehabilitated, repaired, maintained, or improved, as a part of any community redevelopment or urban renewal project;

(5) which is acquired, constructed, rehabilitated, repaired, maintained, or improved with funds or any other form of financial assistance granted by the State or any of its political subdivisions, or any agency thereof; or

(6) which is offered for sale, lease, rental, assignment, or sublease if (i) the acquisition, construction, rehabilitation, repair, maintenance, or improvement of such housing accommodation is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, provided that such housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance, or (ii) a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodation may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the State or any of its political subdivisions, or any agency thereof.

(*i*) "Contiguously located housing accommodation" means (1) a housing accommodation which is offered for sale, lease, rental, assignment, or sublease by a person who owns or at any time has owned, or who otherwise controls or at any time has controlled, the sale of [five (5)] or more housing accommodations located on land that is contiguous, exclusive of public streets; or (2) a housing accommodation which is offered for sale,

lease, rental, assignment, or sublease and which at anytime was one of [five (5)] or more lots of a tract or subdivision whose plan has been submitted to the State, or any of its political or civil subdivisions, or any agency thereof, as required by law.

(j) "Owner" includes the lessee, sublessee, assignee, trustee, trustor, beneficiary, mortgagee, mortgagor, or any person having any legal or equitable right of ownership or possession or the right to lease, rent, or assign any multiple dwelling, contiguously located, or publicly assisted housing accommodation, or any agent, employee or legal representative thereof, and the State or any of its political subdivisions, or any agency thereof.

(k) "Real estate broker" means any person, firm, or corporation who, for another and for a fee, commission or other valuable consideration, lists for sale, sells at auction or otherwise, exchanges, buys, or rents, or offers or attempts to negotiate a sale at auction or otherwise, exchange, purchase, or rental of an estate or interest in real estate, or collects, or offers or attempts to collect rent for the use of real estate, or negotiates, or offers or attempts to negotiate, a loan secured or to be secured by a mortgage or other incumbrance upon, or transfer of, real estate.

(l) "Real estate salesman" means a person employed by a licensed real estate broker to list for sale, sell or offer for sale, at auction or otherwise, to buy, or offer to buy, or to negotiate the purchase, or sale, or exchange of real estate, or to negotiate a loan on real estate, or to lease or rent, or offer to lease, rent, or place for rent, any real estate, or who collects, or offers, or attempts to collect, rent for the use of real estate for, or in behalf of, such real estate broker.

(m) "Educational institution" includes any nursery, kindergarten, elementary or secondary school, academy, college, university, extension course, any nursing, secretarial, business, vocational, technical, trade or professional school, or any agent, employee, or legal representative thereof.

(n) "Commission" means the [State] Civil Rights Commission.

(o) "Discrimination" means any direct or indirect act or practice of exclusion, distinction, restriction, segregation, separation, limitation, refusal, denial or any other act or practice of differentiation or preference in the treatment of persons on account of their race, color, [sex,] religion, ancestry, or national origin, or the aiding, abetting, inciting, coercing or compelling thereof.

PART III. DISCRIMINATION PROHIBITED IN EMPLOYMENT

SECTION 301. *Equal Employment Opportunity.*

It shall be unlawful:

(a) for any employer to refuse to hire or otherwise to discriminate against any individual with respect to hire, tenure, terms, conditions or privileges of employment, or any matter related to employment, on account of the race, color, sex, religion, ancestry, or national origin of the individual;

(b) for any employment agency to fail or to refuse to classify properly, procure, recruit, refer or place for employment, or otherwise to discriminate against any individual on account of the race, color, sex, religion, ancestry, or national origin of the individual;

(c) for any labor organization to discriminate against any individual or to limit, separate or qualify its membership in any way which would deprive, or tend to deprive, the individual of employment opportunities, or would limit his employment opportunities or otherwise affect adversely his status as an employee or as an applicant for employment, or would affect adversely his wages, hours, or employment conditions, on account of the race, color, sex, religion, ancestry, or national origin of the individual;

(d) for any employer, employment agency, or labor organization, prior to employment or admission to membership:

(1) to request, or cause to be requested, any information concerning the race, color, sex, religion, ancestry, or national origin of any applicant for employment or membership;

(2) to make or keep, or cause to be made or kept, any written or oral inquiry concerning, or any record of, the race, color, sex, religion, ancestry, or national origin of any applicant for employment or membership;

(3) to use, or cause to be used, any form of application for employment or membership which elicits, or tries to elicit, any information regarding the race, color, sex, religion, ancestry, or national origin of any applicant for employment or membership;

(4) to publish, circulate, or display, or cause to be published, circulated, or displayed, any written, printed, oral, or visual communication, or advertisement, or any other form of publicity, which expresses or implies any preference, limitation, specification, or discrimination based upon the race, color, sex, religion, ancestry, or national origin of the individual;

(5) to establish, announce or follow, or cause to be established,announced or followed, a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group on account of the race, color, sex, religion, ancestry, or national origin of any group;

(6) to utilize, or cause to be utilized, in the recruitment or hiring of individuals, any employment agency or labor organization known by the employer, employment or labor organization to discriminate against individuals on account of their race, color, sex, religion, ancestry, or national origin; or

(e) for any individual seeking employment to publish, or cause to be

published, any advertisement which specifies, or in any manner shows, his race, color, sex, religion, ancestry, or national origin, or expresses or implies a limitation or preference as to the race, color, sex, religion, ancestry, or national origin of any prospective employer.

SECTION 302. *Bona fide occupational qualification.*

Notwithstanding the provisions of subsections (a), (c), and (d) of section 301, it shall not be unlawful for an employer to hire, for a labor union to classify its membership or refer an individual for employment, or for an employer or an employment agency to request information on the basis of sex, religion, or national origin in those special instances when sex, religion, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

SECTION 303. *Religious organizations.*

Nothing herein contained shall be construed to prohibit a religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious or denominational organization or group, from limiting employment or membership, or giving preference to applicants for employment or membership of the same religion or denomination, or from making a selection of employees or members that is reasonably calculated to promote the religious principles for which it is established or maintained.

SECTION 304. *Relations and domestics.*

(a) For the purposes of this part, "employee" does not include any individual employed by his parents, spouse, or child, or employed in the domestic service of any person.

(b) For the purposes of this part, "individual" does not include any individual employed or seeking employment by his parents, spouse, or child, or employed or seeking employment in the domestic service of any person.

PART IV. DISCRIMINATION PROHIBITED IN PUBLIC ACCOMMODATIONS

SECTION 401. *In general.*

It shall be unlawful for any person:

(a) to refuse, withhold from, or deny to any person any of the accommodations, advantages, facilities, benefits, privileges, services, or merchan-

dise of any public accommodation, or to vary the prices or charges therefor, on account of his race, color, [sex,] religion, ancestry, or national origin;

(b) to publish, circulate or display, or cause to be published, circulated, or displayed any written, printed, oral, or visual communication, or advertisement, or any other form of publicity which expresses or implies that any of the accommodations, advantages, facilities, benefits, privileges, services, or merchandise of any public accommodation will be denied to any person on account of his race, color, [sex,] religion, ancestry, or national origin, or that the patronage of, or presence at, any public accommodation of any person, on account of his race, color, [sex,] religion, ancestry, or national origin is objectionable, unwelcome, unacceptable, undesirable, or unsolicited;

(c) to make or keep, or cause to be made or kept, any written or oral inquiry concerning, or any record of, the race, color, [sex,] religion, ancestry, or national origin of any person in connection with the solicitation, reservation, booking, sale, or dispensation of any of the accommodations, advantages, facilities, benefits, privileges, services, or merchandise of any public accommodation.

SECTION 402. *Religious organizations.*

Nothing herein contained shall be construed to prohibit a religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious or denominational organization or group, from limiting admission to, or giving preference in, its accommodations, advantages, facilities, benefits, privileges, services, or merchandise to persons of the same religion or denomination, or from making a selection of persons with respect thereto that is reasonably calculated to promote the religious principles for which it is established or maintained.

PART V. DISCRIMINATION PROHIBITED IN MULTIPLE DWELLINGS, AND HOUSING ACCOMMODATIONS WHICH ARE CONTIGUOUSLY LOCATED, OR PUBLICLY ASSISTED

SECTION 501. *In general.*

It shall be unlawful:

(a) for the owner of a multiple dwelling, or contiguously located, or publicly asisted housing accommodation:

(1) to refuse to sell, lease, rent, assign, sublease, or otherwise deny to or withhold from any person any such dwelling or housing accommodation on account of his race, color, [sex,] religion, ancestry, or national origin;

(2) to discriminate against any person in the terms, conditions or privileges of the sale, lease, rental, assignment, or sublease of any such dwelling or housing accommodation, or in the furnishing of facilities or services thereto, on account of his race, color, [sex,] religion, ancestry, or national origin;

(3) to refuse to receive or transmit any bona fide offer to purchase, lease, rent, assign, or sublease any such dwelling or housing accommodation from any person on account of his race, color, [sex,] religion, ancestry, or national origin;

(4) to refuse to negotiate for the sale, lease, rental, assignment, or sublease of any such dwelling or accommodation with any person on account of his race, color, [sex,] religion, ancestry, or national origin;

(5) to represent to any person that any such dwelling or housing accommodation, or facilities or services thereof, is not available for inspection, sale, lease, rental, assignment, or sublease, when in fact it is available, or to refuse to permit any person to inspect any such dwelling or housing accommodation, or facilities or services thereof, on account of his race, color, [sex,] religion, ancestry, or national origin;

(6) to establish, announce or follow, or cause to be established, announced or followed, a policy of denying or limiting, through a quota system or otherwise, the sale, lease, rental, assignment, or sublease of any such dwelling or housing accommodation, or facilities or services thereof, to any person or group on account of their race, color, [sex,] religion, ancestry, or national origin; or

(b) for any real estate broker, real estate salesman, or agent, employee or legal representative thereof, with respect to a multiple dwelling, or a contiguously located, or publicly assisted housing accommodation:

(1) to commit any of the acts which, if committed by an owner, would be unlawful under subsection (a) of this section;

(2) to solicit, accept or retain a listing of any such housing accommodation for sale, lease, rental, assignment, or sublease with the understanding that a person may or will be discriminated against in the sale, lease, rental, assignment, or sublease of any such housing accommodation, or in the furnishing of facilities or services thereto on account of his race, color, [sex,] religion, ancestry, or national origin.

SECTION 502. *Potentially discriminatory requests for information, records, applications, advertisements forbidden.*

It shall be unlawful for the owner, or for any real estate broker, real estate salesman, or agent, employee or legal representative thereof, in connection with the sale, lease, rental, assignment, or sublease of any multiple dwelling, contiguously located, or publicly assisted housing accommodation, or in the furnishing of facilities or services thereto:

(a) to request, or cause to be requested, any information concerning the

race, color, [sex,] religion, ancestry, or national origin of any person or any present or prospective owner, occupant or tenant of any such dwelling or housing accommodation;

(b) to make or keep, or cause to be made or kept, any written or oral inquiry concerning, or any record of, the race, color, [sex,] religion, ancestry, or national origin of any person or any present or prospective owner, occupant or tenant of any such dwelling or housing accommodation;

(c) to use, or cause to be used, any form of application, contract, or any other document, in the sale, lease, rental, assignment, or sublease of any such housing accommodation, or in the furnishing of facilities and services thereto, which elicits, or tries to elicit, any information regarding the race, color, [sex,] religion, ancestry, or national origin of any person or any present or prospective owner, occupant or tenant of any such dwelling or housing accommodation; or

(d) to publish, circulate, or display, or cause to be published, circulated, or displayed, any written, printed, oral, or visual communication, advertisement or any other form of publicity, which expresses or implies any preference, limitation, specification, or discrimination on account of the race, color, [sex,] religion, ancestry, or national origin of any person or any present or prospective owner, occupant or tenant of any such housing accommodation.

SECTION 503. *Financial assistance: Discrimination prohibited.*

It shall be unlawful for any person, bank, trust company, private banker, savings bank, industrial bank, savings and loan association, credit union, investment company, mortgage company, insurance company, or any other financial institution or lender, doing business in the State, or any officer, agent, employee or legal representative thereof, to whom application is made for financial assistance for the purchase, acquisition, construction, rehabilitation, repair, maintenance, or improvement of any multiple dwelling, contiguously located, or publicly assisted housing accommodation, or of the facilities or services in connection therewith, with knowledge of the assistance in the case of publicly assisted housing:

(a) to discriminate against any applicant or applicants on account of their race, color, [sex,] religion, ancestry, or national origin, in the granting, withholding, extending, modifying or renewing, or in the fixing of the rates, terms, conditions or provisions of the financial assistance, or in the extending of services in connection therewith; or

(b) to use, or cause to be used, any form of application or contract for such assistance, or to make or keep, or cause to be made or kept, any record or any written or oral inquiry in connection with applications for financial assistance which expresses or implies any limitation, specification, or discrimination concerning the race, color, [sex,] religion, ancestry, or national

origin of such applicant or applicants, or any intent to make any such limitation, specification, or discrimination.

[SECTION 504. *Prohibition of restrictive sale.*

Community redevelopment and urban renewal agencies shall obligate purchasers, lessees, and other transferees of real property acquired in redevelopment or urban renewal projects, and owners of property improved as a part of a redevelopment or urban renewal project to refrain from restricting the sale, lease, rental, assignment, or sublease of the property on the basis of the race, color, [sex,] religion, ancestry, or national origin of any person.

SECTION 505. *Restrictive covenants.*

Every community redevelopment or urban renewal plan, prior to its submission for general approval to the legislative body or agency having jurisdiction, shall contain a provision requiring the submission of all deeds, leases, assignments, subleases, contracts, or other instruments for the sale, lease, rental, assignment, sublease, or other transfer of any real property, whether improved or unimproved, in a community redevelopment or urban renewal project to the community redevelopment or urban renewal agency for approval, and such deeds, leases, assignments, subleases, contracts, or other instruments shall contain nondiscrimination clauses as hereinafter provided, and without which they shall not be approved by any community redevelopment or urban renewal agency:

(a) In deeds the following language shall appear—"The grantee herein covenants by and for himself, his heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against, or segregation of, any person or group of persons on account of race, color, [sex,] religion, ancestry, or national origin in the sale, lease, rental, assignment, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee himself or any person claiming under or through him establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, assignees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land."

(b) In leases the following language shall appear—"The lessee herein covenants by and for himself, his heirs, executors, administrators, and assigns, and all persons claiming under or through them, and this lease is made and accepted upon, and subject to, the following conditions:

that there shall be no discrimination against or segregation of any person or group of persons, on account of race, color, [sex,] religion, ancestry, or national origin, in the leasing, subleasing, assigning, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased, nor shall the lessee himself, or any person claiming under or through him,

establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy, of tenants, lessees, sublessees, assignees, subtenants, or vendees in the premises herein leased."

(c) In contracts entered into by the agency relating to the sale, assignment, transfer, or leasing of land or any interest therein acquired by the agency within any community redevelopment or urban renewal area or project, the foregoing provisions shall be included and such contracts shall be binding upon and shall obligate the contracting party or parties and any subcontracting party or parties, or other transferees under the instrument.

(d) Breach of the foregoing covenants constitutes a material breach of the contract or other instrument.

SECTION 506. *Deeds, leases, and contracts by the State.*

In deeds, leases, contracts, or other instruments entered into by the State or any of its political subdivisions, or any agency thereof relating to the sale, lease, rental, assignment, sublease, or transfer of any multiple dwelling, contiguously located, or publicly assisted housing accommodation the relevant provisions set forth in section 505 shall be included and such deeds, leases, contracts, or other instruments shall be binding upon and shall obligate the contracting party or parties and subcontracting party or parties, or other transferees under the instrument.]

SECTION 507. *Protection of bona fide purchaser.*

Nothing herein contained shall be construed to affect the title or other interest of a person who purchases, leases, rents, or takes an encumbrance on any multiple dwelling, contiguously located, or publicly assisted housing accommodation, or part or portion or facilities or services thereof, or on any land, whether improved or unimproved, within a community redevelopment or urban renewal area or project, in good faith and without knowledge that the owner of the multiple dwelling, contiguously located, or publicly assisted housing accommodation, or facilities or services thereof, or of any land, whether improved or unimproved, within a community redevelopment or urban renewal area or project, or the real estate broker, real estate salesman, or agent, employee or legal representative thereof, has violated any provision of this Act.

SECTION 508. *Religious organizations.*

Nothing herein contained shall be construed to prohibit a religious or denominational institution, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious or denominational organization or group, from

limiting, or giving preference in, the sale, lease, rental, assignment, or sublease of housing accommodations to persons of the same religion or denomination, or from making a selection of buyers, tenants, lessees, assignees, or sublessees that is reasonably calculated to promote the religious principles for which it is established or maintained.

PART VI. DISCRIMINATION PROHIBITED IN EDUCATIONAL INSTITUTIONS

SECTION 601. *In general.*

It shall be unlawful for any educational institution to refuse to admit, or otherwise to discriminate against any individual with respect to terms, conditions, accommodations, advantages, facilities, benefits, privileges, or services of the educational institution on account of his race, color, religion, ancestry, or national origin.

SECTION 602. *Specific prohibitions.*

Without restricting the scope of the foregoing, it shall be unlawful for any educational institution, prior to admission of any applicant:

(a) to make or keep, or cause to be made or kept, any written or oral inquiry, or any record, concerning the race, color, religion, ancestry, or national origin of any applicant for admission;

(b) to use, or cause to be used, any form of application for admission which elicits, or tries to elicit, any information regarding the race, color, religion, ancestry, or national origin of any applicant for admission;

(c) to require, or cause to be required, that a photograph of any applicant be submitted with any form of application for admission;

(d) to publish, circulate, or display, or cause to be published, circulated, or displayed, any written, printed, oral, or visual communication, advertisement, catalogue, or any other form of publicity relating to admission, which expresses or implies any preference, limitation, specification, or discrimination on account of the race, color, religion, ancestry, or national origin of any applicant for admission;

(e) to establish, announce or follow, or cause to be established, announced or followed, a policy of denial or limitation, through a quota system or otherwise, of educational opportunities of any group on account of its race, color, religion, ancestry, or national origin; or

(f) to use, or cause to be used, in the recruitment of potential applicants for admission, any service or agency known by the educational institution to discriminate against individuals on account of their race, color, religion, ancestry, or national origin.

SECTION 603. *Separate educational institutions prohibited.*

It shall be unlawful for any person to establish or maintain for any individual or individuals a separate educational institution based upon the race, color, ancestry, or national origin of such individual or individuals. However, nothing in this part shall be construed to prohibit, in any educational institution, the establishment or maintenance of reasonable qualifications for admission of applicants based upon geographical distribution, sex, aptitude or achievement.

SECTION 604. *Religious organizations.*

(a) Nothing herein contained shall be construed to prohibit a religious or denominational educational institution, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious or denominational organization or group, from limiting admission, or giving preference to applicants of the same religion or denomination, or from making a selection of applicants that is reasonably calculated to promote the religious principles for which it is established or maintained.

(b) For the purposes of this part, "religious or denominational educational institution" means an educational institution which is:

(1) operated, supervised, controlled, or sustained primarily by a religious or denominational organization or group, or

(2) stated by the parent church body to be, and is in fact, officially related to that church, whether or not it is represented on the governing body of, or provides substantial financial assistance to, the educational institution.

PART VII. [STATE] CIVIL RIGHTS COMMISSION; POWERS OF ENFORCEMENT

SECTION 701. *Establishment of Civil Rights Commission.*

There is hereby created the [State] Civil Rights Commission, to consist of seven members to be appointed by the Governor by and with the advice and consent of the [Senate]. Not more than four of the commissioners shall be members of the same political party. The Commission shall annually elect a chairman from among its own membership.

SECTION 702. *Commissioners' terms of office.*

Members of the Commission shall hold office for terms of [four] years, and until the appointment and qualification of their successors. Of those commissioners first appointed two shall be appointed for a term of one year, two for a term of two years, two for a term of three years, and one for a term of four years. Any individual appointed to fill a vacancy shall

be appointed only for the unexpired term of the commissioner whom he shall succeed.

SECTION 703. *Quorum.*

Four members of the Commission shall constitute a quorum. A vacancy, or vacancies, in the Commission shall not prevent the remaining members from exercising all the powers of the Commission.

SECTION 704. *Removal from office.*

Any commissioner may be removed by the Governor for neglect of duty or malfeasance in office after being given a written statement of the charges against him, and an opportunity to be heard thereon, in accordance with [the laws of this State].

SECTION 705. *No other employment; salary.*

No commissioner shall engage in any other business or employment. Each commissioner shall receive a salary of [ ] a year, and shall be compensated for all expenses actually and necessarily incurred by him in the performance of his duties. All salaries and expenses authorized under this act shall be paid out of the appropriations made by the legislature for this purpose.

SECTION 706. *Functions, powers, and duties.*

The Commission shall have the following functions, powers, and duties:

(a) To establish and maintain an office in the City of [ ], and such other offices within the State as it may deem necessary.

(b) To meet and function at any place within the State.

(c) To appoint attorneys, hearing examiners and other employees and agents as it may deem necessary. The Commission shall have authority to fix the compensation of the attorneys, hearing examiners and other employees and agents. Except for attorneys and any special experts and examiners that the Commission may consider necessary for the conduct of its work, all employees of the Commission shall be part of the classified State civil service. The Commission shall have authority to use voluntary and uncompensated services of private persons as may from time to time be offered and needed to perform the functions and duties described in subsections (g), (h), (i), and (j) of this section.

(d) To adopt, promulgate, amend and rescind rules and regulations in order to carry out the provisions and purposes of this Act, and the policies and practices of the Commission in connection therewith. The Commission may make recommendations to agencies and offices of the State government to further such policies and purposes.

(e) To receive, initiate, investigate, and act upon complaints of unlawful practices, as herein provided.

(f) To hold hearings, administer oaths, and take testimony under oath. The Commission and any person under investigation shall have the right to request in writing the appearance and testimony of witnesses, and the production of books and records. Upon the refusal of witnesses to appear or testify, or upon the refusal of any person to submit books or records after request therefore, the Commission shall have authority to subpoena witnesses and compel testimony, and to compel the production for examination of any books or records relating to any matter under investigation by the Commission. Refusal to obey a subpoena or an order to testify or an order to produce books or records shall constitute contempt punishable, upon application by the Commission, by the circuit court of the county within which the witness or person resides, transacts business, or is found.

(g) To create local or statewide advisory agencies that will aid in carrying out the purposes of this Act. The commission may itself recommend formal or informal programs of education, or it may empower these agencies to:

(1) study the problems of discrimination on account of race, color, sex, religion, ancestry, or national origin in any field of human relationships; and

(2) foster through community effort or otherwise good will among the groups and elements of the population of the State. The agencies may make recommendations to the Commission for the development of policies and practices that will aid in effectuating the purposes of this Act.

(h) To issue any publications and results of investigation and research as, in its judgement, will tend to promote good will and prevent or eliminate discrimination on account of race, color, sex, religion, ancestry, or national origin.

(i) To make at least annually a survey of the extent of discrimination on account of race, color, sex, religion, ancestry, or national origin and of its effect on the enjoyment of civil rights by persons within the State.

(j) To report to the legislature and to the Governor, at least annually, describing the investigations, proceedings, and hearings it has conducted and their outcome, the decisions it has rendered, and other work it has performed. The report shall include a copy of the survey prescribed in subsection (i) of this section, and shall include the recommendations of the Commission as to remedial action, by legislation or by other means.

SECTION 707. *Remedial powers.*

The Commission shall have the power, function, and duty as hereinafter provided to prevent any person from engaging in unlawful practices:

(a) Any individual claiming to be aggrieved by an unlawful practice may, by himself or by his agent, or by the Attorney General of the State

or by any organization existing for the purpose of preventing discrimination, within six months after the alleged unlawful practice, file a verified complaint in writing with the Commission which shall state the name and address of the person alleged to have engaged in the unlawful practice complained of, and which shall set forth the particulars of that practice and shall contain other information that the Commission may require. [Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this Act, may file with the Commission a verified complaint asking for assistance by conciliation or other remedial action.]

(b) After the filing of a complaint, or upon the initiation of a complaint by the Commission, the chairman of the Commission shall designate one or more of the Commission's members to investigate, with the assistance of the Commission's staff, the allegations of unlawful practices set forth in the complaint. If the member or members conclude, after an investigation, that facts exist which tend to substantiate the allegations of the complaint, he or they shall try to eliminate the unlawful practices by conference, conciliation, and persuasion. The members of the Commission and its staff shall not disclose the nature and result of any investigation or endeavor.

(c) Whenever an allegation has been made that any person, hereinafter referred to as the "respondent", has engaged in or is engaging in unlawful practices, the Commission, after having complied with subsection (b) of this section, shall have the power to issue and cause to be served upon the respondent (1) a complaint stating the allegations concerning the unlawful practices, and (2) a notice of hearing before the Commission, or one or more of its members, or before one of its hearing examiners, at a place fixed in the notice, to be held not less than ten days after the service of the complaint and the notice.

(d) Any complaint may be amended by the Commission, by one or more of its members, or by one of its examiners conducting the hearing, or, if filed by an aggrieved party, by such party, at any time prior to the issuance of an order based upon the complaint. The respondent shall have the right to file an answer to the original and to each amended complaint and to appear at the hearing in person or by his attorney or agent, and to examine and cross-examine witnesses and the complainant. No order shall be issued which is based upon a complaint, or an amendment thereof, on which the respondent has not had a hearing.

(e) Where a complaint has been filed by an aggrieved person, such person shall be a party to the proceeding, and in the discretion of a member conducting the hearing, or of the Commission, any person may be allowed to intervene in the proceeding. The Attorney General of the State may intervene in any proceeding of the Commission.

(f) Testimony taken at a hearing shall be under oath and shall be reduced to writing and filed with the Commission.

(g) If, upon a preponderance of the evidence on the record considered

as a whole, the Commission determines that the respondent has engaged in or is engaging in unlawful practices, the Commission shall state its findings of fact and shall issue and cause to be served upon the respondent an order requiring the respondent to cease and desist from the unlawful practices. The Commission may require the respondent to take such further action as will carry out the purposes of this Act, including admission of any individual to a public accommodation or to an educational institution; the sale, lease, rental, assignment, or sublease of any multiple dwelling, contiguously located, or publicly assisted housing accommodations; the furnishing of facilities or services in connection therewith to any individual; the hiring, reinstatement or upgrading of employees with or without back pay; or the admission or restoration of individuals to union membership.

The Commission may order the respondent to pay the complainant damages for any injury on account of an unlawful practice, and up to $500 in addition thereto. The Commission may require the respondent to report as to the manner of his compliance. Upon receipt of reports of compliance, the Commission may issue a declaratory order stating that the respondent has ceased to engage in unlawful practices. In the event that any person violating this Act is operating by virtue of a license issued by the State, or by any of its political subdivisions, or any agency thereof, in addition to the penalty prescribed above, the Commission may suspend or revoke such license.

(h) If the member or members do not find that facts exist which tend to substantiate the allegations of the complaint, or if the Commission does not find upon a preponderance of the evidence on the record considered as a whole that the respondent has engaged in or is engaging in any unlawful practice, it shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the complaint. A copy of the order shall be delivered to the Attorney General, and to such other public officers as the Commission deems proper.

(i) Until a transcript of the record in a case is filed in a court, as provided in subsection (b) of section 708, the Commission, upon reasonable notice and in such manner as it deems proper, may modify or set aside in whole or in part any findings or order made by it.

SECTION 708. *Judicial review.*

(a) Any complainant, intervenor, or respondent, hereinafter referred to as a "party", aggrieved by a final order of the Commission, including a refusal to issue a complaint, may appeal to the circuit court of the county wherein the unlawful practice which is the subect of the Commission's order was committed, or wherein any respondent resides, transacts business, or is found.

(b) The appeal shall be initiated by the filing of a petition in the circuit court and the service of a copy of the petition upon the Commission

and upon all parties who appeared before the Commission. Thereupon, the Commission shall file a transcript of the record of the hearing before it. The court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant temporary relief or a restraining order as it considers just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in the transcript an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the Commission.

(c) An objection that has not been urged before the Commission shall not be considered by the court, unless the failure or neglect to urge the objection shall be excused because of reasonable grounds shown.

(d) Any party may move the court to remit the case to the Commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, if he shows reasonable grounds for the failure to adduce such evidence before the Commission at an earlier time.

(e) The jurisdiction of the court shall be exclusive and its judgment and order shall be final, subject to appellate review as provided by law.

(f) The Commission's copy of the testimony shall be available at all reasonable times to all parties without cost for examination, whether or not in connection with judicial review of the order of the Commission. The petition shall be heard on the transcript of the record without requirement of printing.

(g) The Commission may appear in court by any of its members or attorneys or by the Attorney General or such assistants of the Attorney General as may be assigned to the Commission.

(h) If no petition for judicial review is filed by a party within thirty days from the service of an order of the Commission, the Commission may obtain a decree of the court for the enforcement of an order issued under the provisions of subsection (g) of section 707 upon showing that the respondent is subject to the Commission's jurisdiction, and resides, or transacts business, or is found within the county in which the petition for enforcement is brought.

PART VIII. MISCELLANEOUS

SECTION 801. *Conspiracy; Aiding or abetting; Obstruction; Attempt.*

It shall be unlawful for any person, or for two or more persons to conspire:

(a) to engage in any reprisal, or to discriminate in any manner, against any other person because that person has opposed any act or practice declared unlawful under the provisions of this Act, or has filed a complaint,

testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under the provisions of this Act;

(b) intentionally to aid, abet, incite, compel, or coerce any other person to engage in any of the acts or practices declared unlawful by this Act;

(c) wilfully to obstruct or prevent any person from complying with the provisions of this Act or any order issued thereunder, or wilfully to resist, prevent, impede, or interfere with the Commission, or any of its members or representatives in the performance of duty under this Act; except that exercise of the right to review of the order shall not be construed as such wilful conduct; or

(d) to attempt, directly or indirectly, to commit any of the acts or practices declared unlawful by the provisions of this Act.

SECTION 802. *Presumptive evidence rule.*

The production of any written, printed, oral, or visual communication or advertisement, or any other form of publicity, or any written or oral inquiry, or record or other document declared unlawful under this Act purporting to have been made by any person shall be presumptive evidence that the same was authorized by that person.

SECTION 803. *Non-repealer.*

Except as expressly provided, nothing in this Act shall be construed to repeal any of the provisions of any other law of this State relating to discrimination on account of race, color, sex, religion, ancestry, or national origin.

PART IX. CRIMINAL SANCTIONS; ADMINISTRATIVE AND CIVIL REMEDIES

SECTION 901. *Criminal penalty.*

Any person who violates any of the provisions of this Act shall, for each and every such offense, be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than $500, or imprisoned for not more than six (6) months, or both.

SECTION 902. *Administrative and civil remedies.*

(a) Any person aggrieved by any act or practice of discrimination declared unlawful by the provisions of this Act may on his own behalf, or the Attorney General of the State on behalf of any person may, seek redress by the administrative procedure provided in part VII of this Act.

(b) Any person aggrieved under the provisions of this Act who has exhausted the administrative remedy provided in part VII of this Act may

maintain a civil action for damages or for injunctive relief, or for other equitable remedies or affirmative relief as may be necessary to undo or mitigate the effects of, or prevent the continuation of, any unlawful acts or practices.

(c) Any person who violates any of the provisions of this act shall be liable to the aggrieved party in damages sustained, and up to $500 in addition thereto.

SECTION 903. *Suspension or revocation of license.*

In the event that any person violating any of the provisions of this Act is operating by virtue of a license issued by the State, or by any of its political subdivisions, or any agency thereof, in addition to the penalties prescribed elsewhere in this part, the court may suspend or revoke such license.

SECTION 904. *One form of relief no bar to another.*

The pendency or final determination of a criminal proceeding is no bar to an administrative or civil proceeding arising from the same act or situation. Nor is the pendency or final determination of an administrative proceeding a bar to a criminal proceeding arising from the same act or situation.

Nothing herein contained shall prohibit, bar, exclude or otherwise affect any right of action, administrative, criminal, or civil, which may exist independently of any right to redress or specific relief from an act or practice declared unlawful by the provisions of this Act.

PART X. SEVERABILITY

SECTION 1001. *Partial invalidity not to impair other provisions.*

If any provisions of this Act or the application thereof to any person or circumstance is held invalid, invalidity shall not affect, impair, or invalidate other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

COMMENT

Professor Duane Lockard has pointed out[1] that a number of states had enacted civil rights laws prior to the Civil Rights Act passed by Congress in 1964. These earlier laws included fair housing acts, fair employment practice acts, and statutes prohibiting discrimination in places of public accommodation. Of course

[1]Lockard, *The Politics of Antidiscrimination Legislation, ante,* at 10-11.

many states did not have such laws, and still do not. Other states have comparatively weak or scattered laws in the field of civil rights, and many do not strictly enforce such statutory provisions as they have.

In the Civil Rights Act of 1964, as in the Voting Rights Act of 1965, Congress did not pre-empt the field of civil rights legislation. On the contrary, the Civil Rights Act of 1964 is, in part, a directive to the states that either they take steps to eliminate discrimination based on race, color, religion, or national origin (and sex, where employment is involved), or else the federal authorities will make available to victims of discrimination the federal remedies provided for in that act. Thus in section 204 (c) of the Civil Rights Act of 1964, 78 Stat. 244, 42 U.S.C.A. § 2000a-3, it is provided that where the alleged violation of that act is also a violation of a state law, no federal action may be commenced until the expiration of thirty days after notice has been given to the appropriate state or local authorities. Section 207 (b), 78 Stat. 245, 42 U.S.C.A. § 2000a-6, specifically makes allowance for state public accommodation laws. Section 407 (a), 78 Stat. 248, 42 U.S.C.A. § 2000c-6, envisions the resolution on the state or local level of school discrimination problems. Section 706 (b), (c), and (d), 78 Stat. 259, 42 U.S.C.A. § 2000 e-5, provides that state or local authorities are given sixty days' notice in which to remedy discriminatory employment practices made unlawful by federal law before the federal remedies become available, while section 708, 78 Stat. 262, 42 U.S.C.A. § 2000e-7, declares that the federal law in no way supersedes or exempts one from liability under any state or local law. Finally section 1104, 78 Stat. 268, 42 U.S.C.A. § 2000h-4, authorizes any state civil rights laws not inconsistent with the federal act.

The immediate result of this federal legislation is that many states are prepared to enact their own civil rights laws, thereby providing their own machinery for the remedying of discriminatory practices instead of leaving such remedial activity to the federal courts. Such an objective requires the enactment of a state civil rights statute with provisions and standards coextensive, at least, with those of the federal statute. The proposed Model State Civil Rights Act, an earlier version of which was drafted for the Governor of Michigan in November, 1963,

by the Harvard Student Legislative Research Bureau, is a response to this state legislative need.

The proposed act is based upon the provisions of the 1964 federal Civil Rights Act, as well as provisions which already exist in a number of state civil rights acts, particularly those of New York, N.Y. Executive Law §§ 290-301 (1951, Supp. 1965), California, Cal. Health & Safety Code §§ 33050, 35700-35744 (West Supp. 1964), and Cal. Labor Code §§ 1410-32 (West 1955, Supp. 1964), Massachusetts, Mass. Gen. Laws Ann. ch. 151B, §§ 1-10 (1958, Supp. 1964), New Jersey, N.J. Stat. Ann. §§ 18:25-1 to -28 (Supp. 1964), and Minnesota, Minn. Stat. Ann. §§ 363.01 to .13 (1957, Supp. 1964). The operative parts of the proposed law cover employment practices (part III), public accommodations (part IV), public and private housing (part V), and educational institutions (part VI). An administrative tribunal in the form of a seven-man Civil Rights Commission is created (part VII) to process and remedy complaints either on its own motion or upon notification by an aggrieved party. Violation of any provision of the statute is made a misdemeanor.

No voting rights provision is included. Title I of the Voting Rights Act of 1965, Pub. Law 89-110, 79 Stat. 437, provides federal remedies if the states do not eliminate discriminatory activity in the registration of voters, with particular attention to prescribed voter qualifications. This should be done on the state level by eliminating any discriminatory voter test or qualification, and then enforcing such requirements as may exist in a nondiscriminatory fashion. It should be noted however that a few states, *e.g.*, Arizona, have enacted legislation declaring the right to vote without discrimination. Ariz. Rev. Stat. § 41-1421 (Supp. 1965).

Comments on particular sections of the proposed draft follow.[2]

[2]The National Conference of Commissioners on Uniform State Laws is currently drafting a proposed Uniform State Civil Rights Act, the language of which is more nearly that of the federal statute. Copies of the tentative draft are available at the American Bar Center in Chicago.

See generally Bonfield, *State Civil Rights Statutes: Some Proposals*, 49 IOWA L. REV. 1067 (1964); Girard and Jaffe, *Administration of Fair Employment Laws*, 14 BUFF. L. REV. 114 (1964). Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations*, 14 BUFF. L. REV. 22 (1964).

PART I. SHORT TITLE; DECLARATION OF POLICY

This part contains a declaration of policy, employing language not unlike that of existing state civil rights acts. Cal. Health & Safety Code § 35700 (West Supp. 1964), Cal. Labor Code § 1411 (West Supp. 1964); Minn. Stat. Ann. § 363.12 (Supp. 1964); N.J. Stat. Ann. §§ 18:25-3, 4 (Supp. 1964); N.Y. Executive Law §§ 290, 291 (Supp. 1965); Pa. Stat. Ann. tit. 43, §§ 952, 953 (1964). Bracketed sections are optional. Because sex is an optional ground on which states may choose to outlaw discrimination, the term "sex" is placed in brackets. It should be noted however that in part III sex is made an unlawful basis of discrimination without the option, owing to similar provisions in Title VII of the Civil Rights Act of 1964.

Absent any statement of legislative intent in the statute, legislation is frequently attacked in the courts on the grounds that the legislature has exceeded the limits of the state's police power because there are no express legislative findings as to the relationship, for example, of a "fair housing" law to the public health, safety, welfare and morals. Such attacks have not been successful. *Levitt & Sons, Inc. v. State Div. Against Discrimination,* 31 N.J. 514, 158 A.2d 177, 185-86, *appeal dismissed,* 363 U.S. 418 (1960); *Mass. Comm'n Against Discrimination v. Colangelo,* 344 Mass. 387, 182 N.E.2d 595, 597 (1962). However the preamble in section 102 should eliminate the possibility of any such challenge. See Klein, *The California Equal Rights Statutes in Practice,* 10 Stan. L. Rev. 253, 273 (1958).

Section 103 states the legislature's intent as to the desired construction of the provisions of the statute. The language is a synthesis of the rules of construction in California's, Michigan's and Minnesota's FEP acts and in Pennsylvania's and New Jersey's comprehensive civil rights statutes. Cal. Lab. Code § 1431 (West Supp. 1964); Mich. Stat. Ann. 17.478(10)(a)(1960); Minn. Stat. Ann. § 363.11 (1957); Pa. Stat. Ann. tit. 43, § 962 (a) (1964); and N.J. Stat. Ann. § 18:25-27 (Supp. 1964).

PART II. DEFINITIONS

Part II contains definitions of terms which are largely self-explanatory, and found in a number of existing laws, *e.g.,* N.Y.

Executive Law § 292 (1951, Supp. 1965); N.J. Stat. Ann. § 18:25-5 (Supp. 1964).

A few specific comments and references follow.

Section 201(e) broadly defines "public accommodation" in language which includes any facility covered by the federal statute. In addition to the general broad terminology, there are some specified examples which, in some instances if not named, might be regarded as borderline cases. The problems which might otherwise arise, when courts are left free to pick and choose, have been illustrated in California. See generally, Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application,* 33 So. Cal. L. Rev. 260 (1960) and Klein, *The California Equal Rights Statutes in Practice,* 10 Stan L. Rev. 253 (1958), for useful discussions and comparisons of the pre- and post-1959 California civil rights statutes. Because most statutory public accommodations law is derived from the common law prohibitions against discrimination by common carriers and innkeepers, public accommodations statutes have been regarded as in derogation of the common law. Accommodations not listed have often been excluded from the purview of the law by a restrictive interpretation. The proposed definition seeks to combine a more explicit list of public accommodations with a broad, all-inclusive statement to the effect that discrimination is prohibited in those establishments or enterprises which solicit the general public for private profit. The underlying theory is that those holding themselves out to the public bear a responsibility not to deny the public the right to rely on their services and facilities. Van Alstyne, *A Critique of the Ohio Public Accommodations Law,* 22 Ohio St. L.J. 201, 208 (1961). These provisions represent a synthesis of the language of the California, Massachusetts, and New York statutes prohibiting discrimination in places of public accommodation and other similar business establishments. Cal. Civ. Code §§ 51, 52 (West 1954, Supp. 1964); Mass. Ann. Laws ch. 272 § 92A (1959); N.Y. Executive Law § 292(9) (Supp. 1965). The draft is also drawn from the Ohio Civil Rights Commission's recommendations to the legislature of that state. Some were enacted in 1961. Ohio Civil Rights Comm'n, *Report: Discrimination in Public Accommodations in Ohio* 27-59 (1960); Ohio Rev. Code Ann. §§ 2901.35, 4112.02(G) (Page 1954) (1965).

The categorization in paragraph (2) was suggested by the Report of the Ohio Civil Rights Commission, *supra*, at 6-7, 49-50. Note that subparagraphs (vi) and (vii) specifically include physical culture facilities (to avoid the unfavorable result in *Gardner v. Vic Tanny Compton, Inc.*, 182 Cal. App. 2d 506, 512, 6 Cal. Rptr. 490, 495-96 (1960)), and convalescent and nursing homes, closing the gap suggested by the 1957 opinion of the Michigan Attorney General in 1 Mich. Att'y. Gen. Biennial Rep. 387 (1957).

Paragraph (3) adopts the New Jersey terminology. N.J. Stat. Ann. § 10:1-4 (1960; Supp. 1964).

Paragraph (4) excludes purely private institutions. Evasive club arrangements are of course to be guarded against. Courts have, in fact, upheld New York Commission rulings that the fact that a respondent is a private membership corporation is not conclusive if, in effect, the only persons excluded are members of minority groups. Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 Harv. L. Rev. 526, 565, & n. 252 (1961), citing, *e.g.*, *Castle Hill Beach Club, Inc. v. Arbury*, 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957).

The draftsmen believe that it is preferable to specify the criteria for recognition of an establishment as "distinctly private." The New Jersey and New York statutes contain less than helpful definitions:

> Place of public accommodation . . . shall not include . . . any institution, club or place of accommodation which is in its nature distinctly private. N.Y. Executive Law § 292(9)(Supp. 1964).

> Nothing contained in . . . this title shall be construed to include, or apply to, any institution, club or place of accommodation which is in its nature distinctly private. . . . N.J. Stat. Ann. § 10:1-5 (1960).

What is a place of accommodation which is "in its nature distinctly private"? If the statute does not answer the question then the courts or the commission must. The draftsmen propose that Professor Van Alstyne's criteria for a "private club" be inserted in the statute. Van Alstyne, *A critique of the Ohio Public Accommodations Law*, 22 Ohio St. L.J. 201, 208 (1961).

Sections 201 (g), (h) and (i) are the key housing provisions. The language of these subsections has been drawn from Cali-

fornia, New York, and Massachusetts law. Cal. Health & Safety Code § 35710(3), (6) (West Supp. 1964)[3]; N.Y. Executive Law § 292 (11), (12) (Supp. 1965); Mass. Ann. Laws ch. 151B, §§ 1(11), (12) (Supp. 1964). The only housing accommodations exempt from the provisions of this act are, in addition to those falling within the religious or denominational exemption, privately financed single-family dwellings and privately financed duplex, triplex, and quadruplex arrangements. Ordinarily, "fair housing" statutes extend only to public housing, tax-exempt housing, urban redevelopment housing, publicly financed multiple dwellings, and large tract and subdivision developments with FHA or VA insured or guaranteed mortgages. Single-family dwellings, duplex, triplex, or quadruplex arrangements, in which the owner resides, although publicly financed, are excluded from the coverage of many such statutes. See, *e.g.*, Cal. Health & Safety Code §§ 35710(3), (6) (West Supp. 1964); N.J. Stat. Ann. § 18:25-5 (l) (Supp. 1964); N.Y. Executive Law § 292 (11) (Supp. 1965).

"Fair housing" legislation comparable in scope to this draft recently was enacted in Massachusetts and in California. Mass. Gen. Laws Ann. ch. 151B, §§ 1(12), (13), 4(6) (Supp. 1964) (All publicly assisted housing, all privately financed multiple dwellings of three or more units and contiguously located housing of ten or more units, and all housing except one- or two-family owner-occupied homes and housing not offered for sale by the usual methods: through brokers, signs and other forms of adver-

[3] Article I, § 26, of the California Constitution provides as follows:

Neither the State nor any subdivision or ageny thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

This amendment, the controversial "Proposition 14", was adopted in November, 1964. While the full impact of this section on California fair housing laws is not yet clear, it could render them unconstitutional. The California Fair Employment Practice Commission, which administers that state's housing laws, has indicated that it will not process complaints against owners of residential property clearly covered by the new amendment. However real estate brokers, business establishments, and others not so covered are still subject to existing conciliation and enforcement processes.

Article I, § 26, is currently under challenge in the California Supreme Court as violative of the Equal Protection Clause of the Fourteenth Amendment. See Lockard, *op. cit. supra* note 1, at 61 n. 63.

tising.) See also Cal. Health & Safety Code §§ 35710, 35720 (West Supp. 1964).

Section 201(g) includes within the purview of the proposed statute privately financed multiple dwellings of five or more units. "Five or more" is clearer to some than "more than four" units; the former parallels the California, New York and Massachusetts language, and is less burdensome. Present law in California, Massachusetts, and New York drops the "multiple dwelling" line to three or more units. Cal. Health & Safety Code § 35710(6) (West Supp. 1964); Mass. Gen. Laws Ann. ch. 151B, § 1(11) (1958); N.Y. Executive Law § 292 (12) (Supp. 1965). "Three or more" is a strongly recommended alternative. By virtue of the fact that the Massachusetts law is inclusive of privately financed multiple dwellings, the decision of that state's Supreme Judicial Court that the statute is constitutional is crucial to the validity of the Bureau's proposal. *Mass. Comm'n Against Discrimination v. Colangelo,* 344 Mass. 387, 182 N.E. 2d 595 (1962). New York City's "Fair Housing" ordinance is similar. It, too, has been upheld. *Martin v. City of New York,* 22 Misc. 2d 389, 201 N.Y.S.2d 111 (1960); Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation,* 74 Harv. L. Rev. 526, 588 (1961).

Section 201 (h) lists six categories of "publicly assisted" housing. Discrimination in public housing projects (paragraph (1)) is generally prohibited, *e.g., Detroit Housing Comm'n v. Lewis,* 226 F. 2d 180 (6th Cir. 1955). Government housing is a place of public accommodation under Michigan law, and discrimination is proscribed therein. Mich. Stat. Ann. § 28.343 (1962). See also N.Y. Executive Law § 292(11) (Supp. 1965).

Paragraph (2) exempts only religious, denominational, educational or other charitable associations or organizations. California's existing law excludes those housing accommodations whose sole tax exemption is due to the owner's status as a veteran. *Compare* Cal. Health & Safety Code § 35710(3) (a) (West Supp. 1964) *with* N.Y. Executive Law § 292(11) (c) (1) (Supp. 1965). There is no reason for an exclusion of those whose tax-exempt status is due solely to their status as veterans.

Paragraph (3) is a standard provision found in most anti-discrimination statutes. See, *e.g.,* Cal. Health & Safety Code §

35710(3) (b) (West Supp. 1964); N.Y. Executive Law § 292(11) (c) (2) (Supp. 1965).

Paragraph (4) specifically includes community redevelopment or urban renewal projects. The language is that of California and New York law. Cal. Health & Safety Code § 35710(3) (c) (West Supp. 1964); N.Y. Executive Law § 292(11) (c) (3) (Supp. 1965).

Paragraph (5) is derived from the New York statute. N.Y. Executive Law § 292(11) (c) (4) (Supp. 1965).

Paragraph (6) is similar to provisions in the laws of New York, California, and New Jersey. N.Y. Executive Law § 292(11) (e) (Supp. 1965); Cal. Health & Safety Code § 35710 (3) (d) (West Supp. 1964); N.J. Stat. Ann. § 18:25-5 (m) (Supp. 1964). However, the proposed legislation includes all publicly assisted housing accommodations. Both the New York and California statutes are limited in their coverage to ten and five contiguously located housing accommodations, respectively.

The draft covers not only those publicly assisted housing accommodations actually encumbered by a governmentally guaranteed or insured loan, but also those on which a commitment to insure or guarantee the loan is outstanding. Here, the pattern of both the California and New York statutes has been followed to avoid the issue raised in the leading case construing the New Jersey statute. *Levitt & Sons, Inc. v. State Div. Against Discrimination,* 31 N.J. 514, 524-29, 158 A.2d 177, 182-84, *appeal dismissed,* 363 U.S. 418 (1960) (where the court held valid the state law prohibiting discrimination in transactions involving publicly assisted housing accommodations).

There is authority for the proposition that because discrimination based on race or color in public housing projects provided by the state through its political subdivisions or agencies has been declared violative of the Fourteenth Amendment, *Detroit Housing Comm'n v. Lewis,* 226 F.2d 180 (6th Cir. 1955), an extension of the same prohibition to private housing receiving public assistance is a "reasonable further step in the application of the policy against such conduct." *Burks v. Poppy Const. Co.,* 57 Cal.2d 463, 370 P.2d 313 (1962), citing *Banks v. Housing Authority of the City & County of San Francisco,* 120 Cal. App.2d 1, 260 P.2d 668 (1953). What is proposed here is to ban discrim-

ination not only in publicly assisted housing, but also in privately financed multiple dwellings and largely-privately financed tracts. *Mass. Commission v. Colangelo, supra.* While the constitutionality of this type of legislation is not absolutely established, arguments in opposition have not been persuasive. Recent Cases, 75 Harv. L. Rev. 1647, 1648 (1962). Massachusetts and New York laws have for some time prohibited discrimination by developers of non-governmentally financed tracts of ten or more units. Mass. Ann. Laws ch. 151B, § 1 (12) (Supp. 1963); N.Y. Executive Law §§ 292(11) (e), 295(5) (a) (Supp. 1965).

Sections 201 (k) and *(l)* define "real estate salesman" and "real estate broker" in terms similar to the New York provisions. N.Y. Executive Law §§ 292 (14), (15) (Supp. 1965).

Part III. Discrimination Prohibited in Employment

Title VII of the Civil Rights Act of 1964 provides that, in the event of a violation of any of the provisions of that title which is also a violation of state law, no federal action shall be taken within 60 days from the commencement of state proceedings. Sections 706 (b) and (c), 78 Stat. 259(b) and (c), 42 U.S.C.A. § 2000e-5. Therefore the language of this provision follows that of the federal law so as to cover all possible violations of the federal statue. Thus although most existing state fair employment practices acts do not cover discrimination on the basis of sex, the proposed draft includes this category because of its inclusion in the federal statute. Sections 703(a), (b), (c), and (d), 78 Stat. 255 (a), (b), (c), and (d), 42 U.S.C.A. § 2000e-2.

The provisions are applicable not only to intrastate commerce, but to interstate commerce as well. *Colorado Commission v. Continental Airlines,* 372 U.S. 714 (1963).

Section 301 (d) prohibits certain interrogations which have the inherent tendency to invite discrimination. Certain questions asked prior to employment might appear to be calculated to elicit improper information, but should nevertheless be lawful under this act. For instance, questions as to maiden name or as to whether the applicant has changed his or her name might appear to be directed at determining the national origin of the applicant.

On the other hand, the employer might be asking the question so that he will have all possible names necessary for investigation of conviction records or bankruptcy rolls. In such cases it is for the commission to determine the validity of the employer's purpose. See *Holland v. Edwards,* 307 N.Y. 38, 119 N.E.2d 581 (1954).

After an individual has definitely been hired, his employer may ask him questions concerning his race, color, religion, national origin, or ancestry. For purposes of planning for extra workdays, it may be helpful to know the employee's religious affiliation, for example. A photograph would be helpful for purposes of identification. Even after the individual is hired, however, his race or religion is not to be used as a basis for dismissal or any other act affecting his rights or status as an employee.

Section 302 provides for exceptions to section 301, namely the situation in which sex, religion, or national origin is a bona fide qualification. Whether a bona fide occupational qualification exists is a question of fact to be determined by the commission. It would not seem violative of the provisions of this act, for instance, if an employer were to hire only those persons whose background matched the particular motif of his operation. The Tulip Festival Committee of Holland, Michigan, might well require that any paid participants in the festival be of Dutch descent. An Indian concern which sold handmade goods to tourists would rightfully want its employees to be of Indian descent.

Section 303 exempts from coverage religious organizations. Provisions similar to the religious exception may be found in existing state law. Wash. Rev. Code Ann. § 49.60.217(5) (1962). Fraternal orders, such as the Masons or Rotarians, are not included in this exception.

Section 304 excludes close relatives and domestics from the coverage of this part owing to the uniquely personal nature of the relationship.

Part IV. Discrimination Prohibited in Public Accommodations

The language of this part has been drawn primarily from the relevant provisions of New Jersey and New York antidiscrimination legislation and from existing provisions of Michigan law.

N.J. Stat. Ann. §§ 10:1-3, 18:25-12 (f) (1960, Supp. 1964); N.Y. Executive Law § 296(2) (Supp. 1965); Mich. Stat. Ann. § 28.344 (1962).

The coverage of a public accommodations statute extends to those enterprises within the state and those in interstate commerce if they solicit the patronage of residents through local agents or instrumentalities. *People v. Bob-Lo Excursion Co.*, 317 Mich. 686, 27 N.W.2d 139 (1947), *aff'd*, 333 U.S. 28 (1948); Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 Harv. L. Rev. 526, 566 (1961).

Part V. Discrimination Prohibited in Multiple Dwellings, and Housing Accommodations Which Are Contiguously Located, or Publicly Assisted

Discrimination is comprehensively prohibited in transactions involving a multiple dwelling, a publicly assisted housing accommodation, or a group of contiguously located tracts.

State legislatures may wish to include sex as a proscribed ground of discrimination. Because there is no such provision in the federal law, it is here offered as an option.

As to advertising practices involving the above transactions, or the inquiring about or recording of a prospective transferree's race, color, religion, ancestry, or national origin, the New Jersey "presumptive evidence" rule is proposed (sections 501, 502, 802) as it is in those sections prohibiting discrimination in employment practices, public accommodations, and educational institutions. See N.J. Stat. Ann. §§ 18:25-12(g), (h) (Supp. 1964).

It is well settled that an antidiscrimination statute which extends to privately owned real estate is constitutional. Indeed, the Supreme Judicial Court of Massachusetts, rejecting the absolute property and contract rights argument which was advanced to challenge that state's fair housing law, said that it was "unable to distinguish on constitutional grounds" the impact of the fair housing statute on the property owner and real estate broker from the fact situations in cases upholding as constitutional statutes which restrict property and contract rights by prohibiting discrimi-

nation in places of public accommodation (*District of Columbia v. Thompson,* 346 U.S. 100 (1953)), private employment (*Holland v. Edwards,* 307 N.Y. 38, 119 N.E.2d 581 (1954)), and union membership and privileges (*Railway Mail Ass'n v. Corsi,* 326 U.S. 88 (1945)). *Mass. Comm'n Against Discrimination v. Colangelo, supra,* 182 N.E.2d at 600-01. *Accord, Colo. Antidiscrimination Comm'n v. Case,* 151 Colo. 235, 380 P.2d 34 (1963).

Section 503 reflects similar provisions in Minnesota, New Jersey, New York, and California. Minn. Stat. Ann. §§ 363.03 (2), (3) (1957, Supp. 1964); N.J. Stat. Ann. § 18:25-12(i) (Supp. 1964); N.Y. Executive Law § 296(5) (d) (Supp. 1965); Cal. Health & Safety Code § 35720 (3) (West Supp. 1964). Comprehensive treatment of transactions involving housing accommodations requires prevention of discriminatory loan policies.

With respect to sections 504, 505, 506, there is a difference of opinion as to whether the legislature should set out specific provisions for contracts or other instruments or whether the agency involved should promulgate them, having been authorized, or required, by the legislature to do so. In California considerable agitation developed over allegedly discriminatory practices in housing constructed in project areas. Accordingly, the 1961 California Legislature enacted specific covenants to be included in all deeds, leases, or contracts for the sale of publicly assisted housing accommodations. Cal. Health & Safety Code §§ 33435, 33436 (West Supp. 1964). These provisions provide a strong element of control, arguably too much. Because such dictation of contract terms may be obnoxious to many, and because the statute is quite effective without them the draftsmen do not recommend them, but merely offer them in an optional way for consideration of those states in which problems of enforcement are abnormally troublesome.

Section 507 protects the innocent bona fide purchaser or lessee who may be unaware that his vendor or lessor acted in violation of the proposed legislation.

PART VI. DISCRIMINATION PROHIBITED IN EDUCATIONAL INSTITUTIONS

The prohibition of discrimination with respect to "privileges" and "facilities" of educational institutions in section 601 raises a question regarding scholarship funds. If a scholarship fund has been set up by a private individual at a private institution and application of this fund is limited to persons of a certain race, religion, or ancestry, a requirement that applicants for this particular fund meet the conditions would not appear to be in violation of this act. In order to avoid complications, an educational institution might be well advised to have its admission and scholarship applications on separate blanks and have them sent to separate offices if it does not already do so. As a related point, it seems doubtful that a public educational institution could administer such a fund. See *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia,* 353 U.S. 230 (1957).

Under section 602 (a) and (b), the educational institution is not to elicit information concerning the race, color, religion, ancestry, or national origin of any individual seeking admission, but this is not to say that such information may not be sought after the individual has been definitely accepted. For purposes of planning class days, it may be helpful to know the student's religious affiliation, for instance. A photograph would be helpful for purposes of identification.

Even after the applicant is accepted, however, his race or religion is not to be used as a basis for expulsion or other act affecting the student's rights or status.

If an educational institution uses a quota system to attempt to obtain geographical distribution of its student body (by state, for example), and this system coincidentally prefers one religious or racial group over another the quota system in and of itself should not be considered discriminatory. Section 602 (c).

If admission to an educational institution is in good faith limited to the inhabitants of a certain geographical area, the fact that it is attended almost exclusively by those of a given race is not of itself evidence of discrimination. *Henry v. Godsell,* 165 F. Supp. 87 (E.D. Mich. 1958); Section 603.

PART VII. [STATE] CIVIL RIGHTS COMMISSION; POWERS OF ENFORCEMENT

Section 701 establishes a seven-member Civil Rights Commission. Many states already have such administrative bodies, or other agencies which could readily assume and administer the proposed functions (*e.g.*, a fair employment practices commission). See generally, Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of the Administrative Process*, 74 Yale L.J. 1171 (1965); see also 3 Race Rel. L. Rep. 1085 (1958).

An alternative to election of a Commission Chairman by the members would be appointment by the Governor. This would be a completely proper mode of determination. Minn. Stat. Ann. § 363.04 (1957, Supp. 1964); N.Y. Executive Law § 293 (1951, Supp. 1965). The "Senate" is bracketed. The legislature should indicate the appropriate body for approval of such appointments.

With respect to the provisions of section 702, the legislature may wish to alter in its discretion the length of these terms of office, which are similar to those prescribed in Michigan. Mich. Const., art V, § 29 (1963).

In section 704, specific state administrative procedure act provisions or other corresponding laws should be cited at the bracketed point.

Under section 705, because the regulation of discrimination in the fields of education, housing, and public accommodations will require much additional work by the Commission it is advisable that the position of Commissioner be made a full-time job. He should be paid an annual salary rather than *per diem* stipends, but the exact amount of the salary must be fixed in relation to the general salary scale of the state's governmental employees. If it appears that the Commission will not have enough work to justify the full-time efforts of seven commissioners, the number of commissioners may be reduced by statutory amendment.

In section 706 (e) the Commission is given power to initiate complaints. Such a provision is one way to circumvent the reluctance of individual litigants to bring complaints. Individuals have been reluctant because they feared reprisals in spite of statutory

provisions outlawing such reprisals and because action of the commission eliminating discrimination in a particular situation probably would not be forthcoming soon enough to benefit the individual who brought a complaint. 74 Harv. L. Rev. 526, 531 (1961). For example, if a hotel discriminates, the transient will probably not remain in town to file a complaint. If a developer discriminates in selling housing, he will have sold the house anyway by the time the Commission has adjudicated the complaint, and the complainant will not have the house unless he has in the meanwhile engaged in a "dwell-in."

Section 706 (f) empowers the Commission to issue a subpoena. The Commission need apply to the proper court only for a contempt citation against a recalcitrant witness. This promotes efficiency and removes a minor duty from the courts. To prevent the abuse of this power the Commission may only issue a subpoena after it has sought voluntary compliance. Furthermore, only the Commission as a whole may issue a subpoena. The power is not given to any individual commissioner although some proposals have suggested that this be done.

The practice of delegating to administrative agencies the authority to issue subpoenas without recourse to the court is a common one. The Michigan Board of State Auditors is an example. Mich. Stat. Ann. § 3.451 (1961).

The procedure of enforcement under the proposed draft section 707 is as follows. A person may file a complaint with the Commission. The Commission then investigates, and if it finds it likely that the allegations of the complaint are true, it attempts conciliation. If conciliation fails, it brings formal proceedings. This procedure is followed by most state antidiscrimination commissions, *e.g.*, N.Y. Executive Law §§ 295, 297 (1951, Supp. 1965). Such a procedure combines the functions of prosecutor and judge in one body. In Minnesota procedure has been devised whereby a Commission has rule-making, policy-making, and educational functions. Complaints are filed with the Commission which then attempts conciliation, and if conciliation fails, it brings formal proceedings. The actual judging after formal proceeding is done by a Board of Review which (although this has not been done in Minnesota) should consist of men appointed for a longer term than the members of the Commission, and who are

therefore insulated from political influence. Minn. Stat. Ann. § 363.07 (1957, Supp. 1964). Such a system would have two advantages. First, the functions of prosecutor and judge would be more effectively separated. Secondly, the conciliation process would work more effectively. In the conciliation process, all parties must "lay all their cards on the table" if conciliation is to be effective. They will only do so if they are assured that what they disclose will be kept secret and will not be used against them. Furthermore, to ensure effective judicial review, decision of the case must be based on the written record. Nevertheless, if the same people who preside over the conciliation efforts take part in deciding the case after formal proceedings, the respondents will probably feel that what they said during the conciliation efforts was used against them *sub silentio* in formal proceedings. The effectiveness of the conciliation process will therefore be reduced. This can be avoided by setting up a separate board to decide cases after formal proceedings. Against these advantages must be placed the disadvantages of a more complicated arrangement, which will probably require more people for effective operation. See 74 Harv. L. Rev. 526, 589 (1961).

Section 707 (g) authorizes the Commission to impose a broad variety of sanctions in order to bring about compliance with the statute. As these sanctions are discretionary with the Commission problems of enforcement should be minimized. If the housing accommodation has been sold, the Commission need not force the developer to sell that housing accommodation to the complainant. In public accommodation cases, the complainant may well have moved and specific enforcement will do no good. In employment and education cases, it is likely to be a useful remedy, however.

Because the sanctions referred to above may not benefit the complainant, a provision has been added whereby at the discretion of the Commission the complainant may recover his actual damages and five hundred dollars. There is some danger that this provision will lead people to bring complaints for monetary gain, but the amount they will recover is sufficiently small as to make it unlikely that people without a bona fide complaint will risk their time and money. The Commission will have to work out by rule criteria for determining when damage recoveries will be allowed. The provision for up to five hundred dollars in punitive

damages has been added because in many cases actual damages will be small or incalculable. If a Negro is turned away from a movie theatre, for instance, his actual damages are unlikely to be greater than the price of a theatre ticket.

In section 708 the state legislature should fill in the name of the appropriate state court in which review of a Commission order may be sought.

Strong arguments have been advanced (see Witherspoon, *supra,* 74 Yale L.J. 1171, at 1205-17) for authorizing the state commissions to organize local commissions. Experience has shown that such local commissions can be far more effective in working out community relations problems at the neighborhood level than a state-wide body. The Bureau strongly supports such action. For a model act concerning state establishment of local human relations commissions, see Witherspoon, *supra,* Appendix A, 74 Yale L.J. 1171, at 1226.

Part VIII. Miscellaneous

Section 801 specifically makes it a crime to conspire to do any of the enumerated unlawful acts. Absent such a provision, conspiracies between employer groups, apartment house owners associations, for example, might become rather attractive to prospective violators of the act, or to those seeking some loophole to avoid compliance with the statute's provisions.

Section 802 is the New Jersey "presumptive evidence rule." It is an extension of the principle of section 201(e)(3). N.J. Stat. Ann. §§ 10:1-4; 18-25-12 (f), (g) (3),(h) (3) (1960, Supp. 1964). It applies to parts III, IV, V, and VI. Its impact is to place the burden of proof on the proprietor of a public accommodation, for example, to show that he was not responsible for any communication alluding to his establishment which announces or suggests any admission or exclusion policy based on race, color, religion, ancestry, or national origin.

PART IX. CRIMINAL SANCTIONS; ADMINISTRATIVE AND CIVIL REMEDIES

Section 901 provides criminal sanctions for a violation of the statute. Criminal sanctions against discrimination emanate from common law prohibitions against discrimination by innkeepers and common carriers. These prohibitions were almost invariably written into a number of state penal statutes at an early date: in California, in 1872; in Michigan, in 1885. Cal. Pen. Code § 365 (West 1955); Mich. Stat. Ann. § 28.344 (1962). See N.J. Stat. Ann. § 18:25-26 (Supp. 1964); N.Y. Executive Law § 299 (1951).

Section 902 incorporates by reference the administrative remedies provided in part VII. See the comments with respect to that part. Subsection (b) codifies the monetary damages available in an administrative or civil (appellate) proceeding. The $500 penalty figure is intended to serve as both a deterrent to a prospective violator, and as compensation to a complainant. Even if actual damages are nominal, a complainant should be compensated for the time and expense involved in filing his complaint, if such complaint is found to be meritorious. California imposes a fine of $250. Cal. Civ. Code § 52 (West Supp. 1964).

An alternative civil action is not provided because this could be used to bypass the expertise and expediency of the administrative tribunal, an undesirable result. Where the administrative remedy is exhausted or if for some reason the Commission has refused to process the complaint and resort is had to a civil action, broad remedial power must be placed at the disposal of the court, so that the relief may be tailored to fit the nature and circumstances of the alleged violation. Normally of course the Commission is the forum of first impression, and the case will only come before the court on appeal.

Frequently monetary compensation in civil rights cases is an inadequate remedy. Private litigation is expensive. In most jurisdictions, where relief by way of monetary damages is provided by statute, injunctive or other specific relief rarely is obtainable, although there is strong support for the view that equitable relief is—or should be—available whether or not a statute authorizes it. California courts, however, have held that the public accommodations statute, which permits monetary damages, does not

exclude all other remedies for a violation of the rights conferred even though the statute does not mention injunctive or other specific relief. A writ of mandamus was upheld as an appropriate method of enforcing the statute where the court concluded that money damages were an inadequate remedy. The importance of preserving a statutory declaration of a personal right, the court reasoned, would be sufficient basis for the granting of injunctive relief. *Orloff v. Los Angeles Turf Club,* 30 Cal. 2d 110, 180 P.2d 321 (1947). This is not the law in most jurisdictions.

Section 902 makes it clear that equitable and other affirmative relief is available to the complainant. For a discussion of the standards for obtaining equitable relief, see Klein, *The California Equal Rights Statutes in Practice,* 10 Stan. L. Rev. 253, 273 (1958); Rhine & Zimmerman, *The Unruh Act as Applied to Real Estate Brokers,* 13 Hasting L.J. 120, 121-22 (1961). It is not suggested that injunctive or other equitable relief will be appropriate in every case. However, it well may be more effective in some fact situations than in others, *e.g.,* in housing, educational institutions, or in such public accommodations as theaters, sports arenas, etc., as opposed to restaurants where one could be seated at a table and just not be served, or in employment situations where the courts may frown on coercing personal relationships. Note, *Equity: Injunctive Relief Under State Civil Rights Statutes,* 8 Hastings L.J. 220, 223-24 (1957).

The state attorney general is empowered to seek damages, or injunctive relief, on behalf of any complainant. Such a procedure will assure a solution in those cases in which the aggrieved party does not wish to seek redress himself—*e.g.,* the foreign diplomat, or the tourist travelling through or briefly remaining in the state —or in those instances in which the aggrieved party is without funds to do so.

Section 904 provides that the remedies afforded by the statute are not individually exclusive of each other, but are cumulative. It would defeat the purpose of the act if, for example, an aggrieved party had to wait for several years while a criminal prosecution was pending before he could obtain injunctive relief through the Commission. The purpose of this statute is to meet the varied and complex problems of discrimination with a broad arsenal of remedies, and with a minimum of procedural "red tape."

A Supplementary State Civil Rights Act

ROBERT E. RODES, JR.*

Under the following statute, civil rights groups, with the approval of the state civil rights commission, may enter into agreements with employers, labor organizations, school authorities, or other public or private agencies, for a direct attack on de facto segregation through a deliberate mixing of races in a desired proportion. Professor Rodes characterizes his draft as "a suggestion for controlled concessions to the principle of direct mixing of the races" in such a manner as to be "philosophically consistent with an ultimate commitment to a society in which racial considerations play no part."

ACTION taken for the purpose of "redressing racial imbalance" by deliberately mixing the races in desired proportions has been attacked as a form of "inverse discrimination" on the theory that only rigorous disregard of race is consistent with a moral and legal commitment to equal treatment.[1] On the other hand, it has been defended as the only way to escape from the toils of *de facto* segregation—the theory being that only by deliberately having people of different races rub shoulders with one another can the sociological and cultural barriers to true equality be broken down.

The following draft is offered as a suggestion for controlled concessions to the principle of direct mixing of the races. It endeavors through its classifications to make such concessions philosophically consistent with an ultimate commitment to a society in which racial considerations play no part. It endeavors through its administrative controls to limit such concessions to cases where they are really needed, and to insure that such concessions will be understood as only a temporary expedient. It endeavors through requiring the participation of civil rights organizations to insure that such concessions will in fact contribute to the lessening of racial tensions.

Even with all this to be said in its favor, I am not sure whether,

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* Professor of Law, Notre Dame University; A.B., Brown University, 1947; LL. B., Harvard, 1952.

1. See *e.g.*, Fair Share Org. v. Mitnick, 134 Ind. App. 675, 188 N.E.2d 840 (1963); Hughes v. Superior Court, 339 U.S. 460 (1950).

after preparing this draft, I would favor its enactment. I have yet to be convinced that the way to implement the principle of equal treatment is temporarily to depart from it. I offer the draft simply in the hope that the formidable questions of principle and policy involved can be more intelligently addressed in the light of a concrete proposal.

The question of the constitutionality of the proposed legislation —as well as its compatibility with the federal civil rights act— will probably turn out to be basically the same as the underlying policy question of the desirability of direct attacks on *de facto* segregation. To be sure, there is a colorable contention here that at least some of the provisions involve no state action, but I do not find the contention very persuasive. Perhaps more persuasive is the argument that making a special class of victims of discrimination is not to be equated with the making of gratuitous classifications based on race: the racial classification is made not by the legislature but by the very situation the legislature is trying to alleviate.

Despite the force of this argument, if discrimination in favor of minority groups is to be judged by the same standards as discrimination against them, I doubt if this legislation will stand up. To uphold such measures as these, we must say with the Supreme Court of New Jersey that:

> Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts at segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation.[2]

Whether the Supreme Court will accept this principle has yet to be determined.

AN ACT

To Encourage the Integration of Minority Groups into the Schools, Communities, and Workplaces of the State by Empowering the Civil Rights Commission to Require Certain Agencies of Government to take Action to that End, and to Permit others to do so.

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[2]Morean v. Board of Educ. of Montclair, 42 N.J. 237, 243-44, 200 A.2d 97, 100 (1964). See also Balaban v. Rubin, 14 N.Y. 2d 193, 199 N.E.2d 375 (1964).

PART I. PURPOSE AND DEFINITIONS

SECTION 101. *Short title.*

This Act shall be known, and may be cited, as the "[State] Supplementary Civil Rights Act."

SECTION 102. *Definitions.*

As used in this Act:

(a) "Commission" means the [State] Civil Rights Commission created by [citation].

(b) "Minority group" means all persons of any one race, color, creed, national origin, or ancestry who live or work in any county, if in such county (1) there exists a custom or practice of discriminating against such persons with respect to education, employment, the purchase or occupancy of housing accommodations, or the use or enjoyment of public accommodations, and (2) such custom or practice is so widespread and so burdensome as to create a substantial impairment of the educational, economic, social, or cultural opportunities of such persons.

(c) "Segregation" means the concentration of disproportionate numbers of persons of any one minority group in a limited number of schools, neighborhoods, workplaces, types of employments, or public accommodations in a county described in subsection (b) of this section, if such concentration causes or contributes to (1) ill feeling toward such minority group on the part of other persons, (2) such custom or practice of discrimination as is described in subsection (b) of this section, or (3) a substantial impairment of the economic, social, educational, or cultural opportunities of members of such minority group.

(d) "Civil rights organization" means any non-profit corporation or voluntary association active in a county described in subsection (b) of this section, having for its primary purpose the elimination of segregation, of discrimination based on race, color, creed, national origin, or ancestry, or of other conditions burdensome to the members of a minority group as such.

PART II. QUALIFICATION; IMPLEMENTATION OF AGREEMENT

SECTION 201. *Qualification petition.*

Any civil rights organization or organizations may file with the Commission a petition alleging as to a designated county, that:

(a) The persons of a designated race, color, creed, national origin, or ancestry, who live or work in such county constitute a minority group as defined in subsection (b) of section 102.

(b) Members of such minority group are subject to segregation as defined in subsection (c) of section 102.

(c) Petitioner or petitioners are actively pursuing in such county the purposes described in subsection (d) of section 102, and enjoy substantial support among the members of such minority group.

Not less than ten nor more than thirty days after receiving such a petition, the Commission shall hold a public hearing in the county seat of the county designated in the petition. If, from the evidence introduced at such hearing, the Commission shall find the allegations of the petition to be true, it shall enter an order declaring the provisions of this Act in effect in such county with respect to the minority group designated in the petition.

SECTION 202. *Employment, housing, public facilities: Approval and implementation of agreement.*

In any county in which there shall be in effect an order entered pursuant to section 201, it shall be lawful to make and implement, with the approval of the Commission, any agreement between a civil rights organization and any school board, employer or labor organization, or group of employers or labor organizations, proprietor or group of proprietors of public accommodations, or owner, builder, or lessor, or group of owners, builders, or lessors of housing accommodations, reserving to members of the minority group not more than twenty per cent of the places or positions in any school, workplace, type of employment, or contiguous group of housing accommodations covered by such agreement, or excluding members of the minority group from not more than sixty per cent of such places or positions, or both. When such an agreement has been made, the parties to it shall file with the Commission a petition for approval. Not less than seven nor more than twenty-one days after receiving such a petition, the Commission shall hold a public hearing. If, from the evidence introduced at such hearing, the Commission shall find:

(a) that the agreement in question was entered into by the civil rights organization in a good faith attempt to ameliorate, reduce, or eliminate segregation, or other undesirable conditions described in subsections (b) and (c) of section 102;

(b) that the implementation of such agreement will in fact have such an effect; and

(c) that such agreement constitutes a desirable temporary expedient for the accomplishment of the ultimate goal of equal treatment of all persons regardless of race, color, creed, national origin, or ancestry, the Commission shall enter an order approving such agreement.

SECTION 203. *Education, training: Approval and implementation of agreement.*

In any county in which there shall be in effect an order entered pursuant to section 201, it shall be lawful to make and implement with the approval of the Commission any agreement between a civil rights organization and any school board, private educational institution, employer or labor organization, or group of employers or labor organizations, or any other person or persons for any plan of education, apprenticeship, on-the-job training, or other literary, cultural, or vocational instruction for members of the minority group. When such an agreement has been made, the parties to it shall file with the Commission a petition for approval. Not less than seven nor more than twenty-one days after receiving such a petition, the Commission shall hold a public hearing. If, from the evidence introduced at such hearing, the Commission shall find:

(a) that the agreement in question was entered into by the civil rights organization in a good faith attempt to ameliorate such impairment of the economic, social, educational, or cultural opportunities of the minority group or its members as described in subsections (b) and (c) of section 102;

(b) that the implementation of such agreement will in fact have such an effect; and

(c) that such agreement constitutes a desirable temporary expedient for the accomplishment of the ultimate goal of equal treatment of all persons regardless of race, color, creed, national origin, or ancestry, the Commission shall enter an order approving such agreement.

SECTION 204. *Compliance.*

In case of the failure of any party to an agreement approved under section 202 or section 203 to comply with the requirements of such agreement, the Commission may proceed in accordance with the provisions of the [State] Civil Rights Act for conciliation in cases of discriminatory practices, but if such conciliation is unsuccessful, the Commission shall proceed no further, except as is provided in section 403 of this Act. No proceeding shall be entertained in any court or administrative agency for the enforcement of any such agreement except as provided in this section or in section 403.

PART III. INTEGRATION OF PUBLIC SCHOOLS

SECTION 301. *Authority of Commission to propose and implement plan.*

If it shall appear to the Commission that:

(a) conditions of segregation exist in any public school system in a

county in which there is in effect an order entered pursuant to section 201; and

(b) such an agreement as is described in section 202 would contribute materially to the amelioration, reduction, or elimination of such conditions of segregation; and

(c) negotiations aimed at the formation of such an agreement have been in progress for not less than ninety days, and the Commission has used its good offices pursuant to section 501 to assist in such negotiations; and

(d) it is unlikely that an agreement conformable to section 202 can be reached within a reasonable time, the Commission may formulate a plan for the distribution of pupils belonging to the minority group among the several schools of such school system. The plan may reserve to members of the minority group not more than twenty per cent of the places in any such school, exclude members of the minority group from not more than sixty per cent of the places in any such school, or both. Copies of such plan shall be served upon the school board or other authority in charge of such school system, and upon any civil rights organization involved in the negotiations referred to in subsection (c). Not less than seven nor more than twenty-one days after such service, the Commission shall hold a public hearing. If, from the evidence introduced at such hearing, the Commission shall find:

(e) that all the matters set forth in subsections (a), (b), (c), and (d) are verified;

(f) that the implementation of the plan proposed by the Commission will contribute materially to the amelioration, reduction, or elimination of the conditions of segregation referred to in subsection (a); and

g) that such plan constitutes a desirable temporary expedient for the accomplishment of the ultimate goal of equal treatment for all persons, regardless of race, color, creed, national origin, or ancestry, the Commission shall enter an order that such plan be put into effect.

SECTION 302. *Compliance.*

In any case of failure on the part of the authority in charge of a school system subject to a plan adopted pursuant to section 301 to comply with the requirements of such plan, the Commission shall proceed in accordance with the provisions of the [State] Civil Rights Act for cases of discriminatory practices. No proceeding shall be entertained in any court or administrative agency for the enforcement of any such plan except as provided in this section or in section 403.

PART IV. LEGALITY; EXPIRATION; TERMINATION

SECTION 401. *Effect of [State] Civil Rights Act.*

Neither the [State] Civil Rights Act nor any other law or ordinance dealing with discrimination on account of race, color, creed, national origin, or ancestry shall be construed to prevent the implementation of any agreement approved by the Commission under section 202 or section 203, or any plan adopted by the Commission under section 301.

SECTION 402. *Expiration.*

Any order entered pursuant to section 201, any agreement approved pursuant to section 202, or section 203, or any plan adopted pursuant to section 301, shall expire at the end of three years from the date of the Commission's final action thereon, unless an earlier expiration date is specified in such order, agreement, or plan. The expiration of an order entered under section 201 shall not affect the validity of any action taken while such order was in effect. The expiration of an agreement approved under section 202 or section 203, or of a plan adopted pursuant to section 501, shall not restrict the protection extended by section 401 to any action taken pursuant to such agreement or plan while it was in effect. The Commission may by order extend the protection of section 401 to any action it finds reasonably necessary for the orderly termination of any such agreement or plan during a period of not more than two years after its expiration.

SECTION 403. *Termination.*

The Commission may, on the complaint of any interested party, terminate any agreement approved under section 202 or section 203, or any plan adopted pursuant to section 301, if it finds after a public hearing:

(a) that the implementation of such agreement or plan no longer serves the purposes set forth in section 202, or section 203, or section 301, as the case may be; or,

(b) if the complainant is a party (other than a civil rights organization) to the agreement in question, or is an authority in charge of a school system subject to the plan in question, that the implementation of such plan or agreement arouses such opposition among the members of the minority group as to constitute a substantial economic, social, or political burden to the complainant; or,

(c) in the case of an agreement, that such agreement is not being implemented in good faith by the parties to it.

For purposes of this section, an interested party shall include any civil rights organization, any party to the agreement in question, the authority in charge of any school system subject to the plan in question, or any person who has been discriminated against on account of race, color, creed,

national origin, or ancestry through any action taken pursuant to such plan or agreement, *provided,* that no plan or agreement shall be terminated under subsection (b) of this section except on the complaint of a party described therein.

PART V. PROCEEDINGS BEFORE THE COMMISSION

SECTION 501. *Assistance in negotiations.*

The Commission shall use its good offices to assist in the negotiation of such agreements as are described in sections 202 and 203. To this end, it may hold hearings, take testimony under oath, subpoena witnesses, books, records, or documents, and publish findings and recommendations.

SECTION 502. *Authority to exclude negotiating parties.*

The Commission may, on its own motion, or on the complaint of any civil rights organization:

(a) Exclude from further negotiation of agreements under section 202 or section 203 any civil rights organization which it finds to lack substantial support among the members of the minority group.

(b) Exclude from acting as a civil rights organization under this Act any organization which it finds not to fall within the definition set forth in section 102 (d).

Action shall not be taken pursuant to this section except on a preponderance of the evidence introduced at a public hearing.

SECTION 503. *Rights of participants.*

Full participation in the hearings provided for in this Act, including the right to appear in person or by counsel, to introduce written or oral evidence, to examine written evidence introduced by others, and to cross-examine witnesses presented by others, shall be afforded by the Commission as follows:

(a) In a hearing provided for by section 201, to any civil rights organization active in the county, and to any government agency concerned with race or intergroup relations or with public education in such county.

(b) In a hearing provided for by section 202 or section 203, to any party to the agreement in question.

(c) In a hearing provided for by section 301, to any authority in charge of a school system subject to the plan in question, and to any civil rights organization involved in the negotiations referred to in subsection (d) of said section 301.

(d) In a hearing provided for by section 403, to the complainant, to any

party to the agreement in question, or to any authority in charge of a school system subject to the plan in question.

(e) In a hearing provided for by section 502, to the organization affected and to the complainant, if any.

The Commission shall provide by regulation for participation by other interested persons.

PART VI. MISCELLANEOUS

SECTION 601. *Judicial review.*

Except as is otherwise provided in this Act, all proceedings before the Commission under this Act, and all proceedings to obtain judicial review of the orders and determinations of the Commission under this Act, shall be conducted in accordance with the applicable provisions of the [State] Civil Rights Act and of the [State] Administrative Procedure Act.

SECTION 602. *Severability.*

[Severability provision.]

COMMENT

PART I. PURPOSE AND DEFINITIONS

SECTION 102. *Definitions.*

This draft presupposes the existence of a state civil rights act. That is, the general principle of equal treatment for all regardless of race is to be the ordinary legal approach; the approach of this draft is to be the exception.

Subsections (b) and (c) are intended to define the situation we refer to when we speak of *de facto* segregation. The classification, as I have said, is meant to be so worded as to be philosophically consistent with the principle of equal treatment, in that it deals with members of a minority group not simply as such, but as victims of discrimination. Thus, the act defines a class as to which a serious problem exists. Only if racial classifications are held to be unreasonable per se can the classification be objected to.

Subsection (d) is intended to insure that the participation by the minority group in the arrangements contemplated is through

organizations specialized to do the work. I debated including "and enjoying substantial support among the members of a minority group" among the elements in this definition (*cf.* § 201(c); § 502(a)), but I decided not to, as I felt that the Commission should review this question periodically in a special proceeding. Such a proceeding is provided for in section 502(a).

PART II. QUALIFICATION; IMPLEMENTATION OF AGREEMENT

SECTION 201. *Qualification petition.*

This section is calculated to limit the operation of the act to places where there exist conditions of *de facto* segregation (subsections (a) and (b)), and where responsible leaders among the victims of such segregation are persuaded that the procedures set up in the act will be a desirable way of dealing with such segregation. Subsection (c).

SECTION 202. *Employment, housing, public facilities: Approval and implementation of agreement.*

This section defines the cases in which direct action to redress racial imbalance will be approved by the Commission. The requirements of good faith on the part of the civil rights organization and independent approval by the Commission are meant to insure that the plan will not serve as a cover for mere token integration. The requirement that the plan be found a desirable temporary expedient is to make sure that the ultimate goal is not lost sight of.

The twenty per cent and sixty per cent figures are intended to avoid token integration, and to avoid a situation in which an all-white establishment, once opened to Negroes, becomes all-Negro. It should be noted that if an agreement reserves twenty per cent of the places in a given establishment to Negroes it does not follow that the other eighty per cent are reserved to whites. Under the state civil rights act, the other eighty per cent must be made available to whites and Negroes on equal terms unless the agreement provides further that sixty per cent or less are to be reserved for whites.

SECTION 203. *Education, training: Approval and implementation of agreement.*

This section makes possible the establishment of special education and training programs for members of the minority group without violating the provisions of any law requiring equal treatment in such matters. Its purpose is to overcome any educational or cultural disadvantage that may result from segregated conditions.

SECTION 204. *Compliance.*

See *infra,* comment on section 302.

PART III. INTEGRATION OF PUBLIC SCHOOLS

SECTION 301. *Authority of Commission to propose and implement plan.*

Where the conditions of *de facto* segregation involve a public school system, this section places on the Civil Rights Commission instead of on the school board the ultimate responsibility for balancing the interest in racial distribution against the other educational interests to be served. As the issues raised transcend the matters of educational policy with which the school board is equipped to deal, this distribution of authority seems desirable. Such a provision might also improve the situation of otherwise unobjectionable school administrators whose usefulness is impaired by their inability to reach agreement with representatives of the civil rights movement.

SECTION 302. *Compliance.*

Except in the case of a public school, it is intended that there be no sanctions included in an arrangement under this act except to allow the state civil rights act to run its course and require equal treatment for all. I had thought of giving the Civil Rights Commission power to enforce any approved agreement, but I felt that such a power might in some cases raise constitutional problems under *Shelley v. Kraemer,* 334 U.S. 1 (1948), and might also inhibit the negotiation of such agreements and their use to alleviate racial tensions.

PART IV. LEGALITY; EXPIRATION; TERMINATION

Section 401. *Effect of [State] Civil Rights Act.*

This section shields approved arrangements from the charge that they violate the state civil rights act by "inverse discrimination." By implication, it would also shield peaceful demonstrations by a civil rights organization in order to bring about such an arrangement. Such demonstrations have been enjoined in the past on the ground that their objectives were unlawful. This would not, of course, prevent a holding that such an arrangement violated the federal civil rights act. If, however, the federal courts can be persuaded that the policy of attacking *de facto* segregation in this way is a sound one, they may well hold that the implementation of that policy does not violate the federal act. Otherwise, some action by Congress would be required to give this act full scope.

SECTION 402. *Expiration.*

This section is intended to insure the temporary character of any arrangement entered into pursuant to this act. It would not, of course, preclude the entry of a new order under Section 201 if the requisite conditions still obtained upon the expiration of the old order.

SECTION 403. *Termination.*

This section is designed to deal with changed conditions (subsection (a)), with the case where the arrangement does not afford a party the good relation with the minority group that he intended to achieve by entering into it (subsection (b)), and with the case where a party takes advantage of his state civil rights act immunity without living up to his agreement (subsection (c)). If a plan or agreement is terminated under this section, the parties will, of course, be subject to the provisions of the state civil rights act as if such plan or agreement had not been adopted.

PART V. PROCEEDINGS BEFORE THE COMMISSION

SECTION 501. *Assistance in negotiations.*

Section 501 gives the Commission the same kind of powers in assisting in the negotiation of agreements under this act that it probably now exercises in conciliation proceedings under the state civil rights act.

SECTION 502. *Authority to exclude negotiating parties.*

No arrangement under this act can serve its purpose unless it is supported by the minority group. Without such support, there is no guarantee that the arrangement will not increase, rather than decrease, the burden of discrimination; there is no guarantee that one who enters into such an arrangement can improve his relations with the minority group by doing so. For this reason, it is imperative that no organization claim to speak for the minority group in this respect when it has in fact no real authority to do so.

SECTION 503. *Rights of participants.*

This section is intended to insure adequate participation by interested persons in administrative proceedings conducted under the act.

PART VI. MISCELLANEOUS

SECTION 601. *Judicial review.*

If the state civil rights and administrative procedure acts do not adequately deal with procedural matters left open by the foregoing sections, this section will have to be expanded.

The Origins of the Magnae Cartae

HELEN SILVING*

In this year of the seven-hundred-and-fiftieth anniversary of the English Magna Carta, it is fitting to inquire once again into the sources of this remarkable document which we believe to contain the fundamentals of due process. Miss Silving traces these fundamentals as expressed in the Magna Carta as well as in its Spanish counterpart, the Magna Carta Leonesa, to Biblical origins.

THE PRINCIPLE of "Rule of Law" or "legality" is actually a complex of rules, the common denominator of which is the formalization of state intervention in human affairs by reference to law rather than by sheer force. This principle has ramifications in all areas of law; lately emphasis has been placed on administrative law, but its greatest significance lies in criminal law, and the present discussion is limited to its criminal law connotations. I shall deal specifically with the historical origins of this principle.

The origins of two principal tenets of democratic government, perhaps reducible to a single one, are shrouded in mystery: the Magna Carta's prohibition against restriction of a free man's liberty *"nisi per legale iudicium parium suorum vel per legem terre"*[1] and the maxim of *"nullum crimen, nulla poena sine lege."* One might doubt the importance of tracing the origins of well established principles of this type; adherence to them in countries of the Western World is, in theory at least, uncontested. The fact is, however, that ancient foundations of law affect its present-day understanding and enforcement in a variety of intangible, unconscious ways. Such foundations have an impact also on its susceptibility to acceptance by other countries that do not share the Western democracies' ancient history, because in the un-

* Professor of Law, University of Puerto Rico; J.D. and Pol. Sc. D., University of Vienna, Austria; LL.B., Columbia, 1944. Miss Silving has been an Advisor to the Penal Reform Commission of Puerto Rico, and is presently an Advisor to the Justice Department of Puerto Rico.

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conscious origin and justification are not discernible, and a more than superficial acceptance of law depends upon its influence upon the unconscious as well as upon the conscious.

What are the origins of that fountainhead of Anglo-American liberty, the 39th and the 40th Articles of the Magna Carta? Two prominent legal historians, Edward Jenks and Max Radin, engaged in a famous controversy about the so-called "Myth of the Magna Carta"[2] that clearly exceeded in significance mere niceties in the history of culture. Jenks's thesis, that the Great Charter was not a symbol of the liberty of the common man at all until the 17th century, when Coke, for political reasons, began to attribute to it such a historic role, appealed to the type of intellectual who would rather be boldly skeptical than right. Radin strongly supported the democratic character of the charter, adducing much history in support, particularly the facts that public notice of the charter was secured by affixing it to church doors and that its observance was sanctioned by curses and threats of excommunication. Whether these features do or do not point to an endeavor to protect, or appeal to, the common man, need not be discussed in the present context, since I believe I have found a more obvious source of the apparent sanctity of the charter, which is supported by the mentioned features and which, in turn, warrants the assumption of its democratic character.

Equally disputed is the origin of the maxim *"nullum crimen, nulla poena sine lege."* Some trace it to Rome, while others vigorously oppose this view.[3] Various writers allege that the original document which marks the beginnings of the maxim is precisely the famous 39th Article of the Magna Carta. Others claim, however, that the principle of this article is exceeded in democratic contents by an instrument which precedes it in time, the *"Charta Magna Leonesa"* given by Don Alfonso, King of León and Galicia, in the Cortes of León in 1188.[4] But while that charter stresses quite modern notions of notice and proof,[5] which the English charter does not, there seems to be more indication in the latter of reliance upon pre-existing law and rights claimed as due.[6] This does not preclude the possibility of a common origin of both charters, and such community appears to be likely in the view of this writer.

It may be useful to proceed from the hypothesis that neither

the Spanish or the English charter nor the *"nullum crimen, nulla poena"* principles are detached phenomena, each of which emerged as a sui generis notion and apart from a single common cultural context. The charters were conceived in an era when religious emotions were at their peak and there is every reason to believe that the charters were rooted in these emotions, whatever may have been their political source or impact.[7] Once this is accepted, new horizons of viewing the total complex of the democratic heritage as derived from religious ideologies are opened. It may be convenient and systematically advantageous at this point to abandon temporarily the charters and the *"nullum crimen, nulla poena sine lege"* principles and attempt to sketch a comprehensive line of thought evolving from this hypothesis and the available material, subject, of course, to a later connection.

As all political ideologies, the philosophy of "government of laws" (Montesquieu) or of "Rule of Law" in civil and common law tradition is of theological origin. "Rule of Law," as contrasted with rule by force alone, refers to a special type of "justification" of authoritative action, its "legitimization." Political "justification" of authority is traceable to the notion of religious "justification of man" before God, an act or a process of giving account of oneself or of one's conduct.[8]

But political "justification" is also more directly related to religious thought than solely by its foundation in personal justification. The Old Testament, the fundamental book of the Judaeo-Christian tradition, is also a political document. It is, indeed, a genuine "Bible" of political insight. Most achievements of modern democratic thought and many heuristic ideas of criminal law and procedure of our times are traceable to it.[9] The idea of "Rule of Law" is the product of Old Testament thought.

In the Old Testament may be found the roots of all later speculations about the nature and sources of government. To it may be traced the course of a comprehensive evolution of ideas from an initial justification of total freedom, through justification of the very notion of government, to an ultimate conditioning of government upon its limitation by law.

Ecclesiastes notes that there is evil in one man "ruling over another to his hurt."[10] As the English version, "to his hurt," so

is the Hebrew original ambiguous: in fact, the King James version translates the passage as reading "to his own hurt," whereas the Standard Edition prefers "to his hurt." The passage may thus be read to refer to the harm suffered by the victim of the rule or to that suffered by the ruler. It seems to pose the dilemma of power, in its two aspects, as experienced by him who holds it and by him who is subject to it. The temptation or corrupting influence of power appears to be visualized as combined with the suffering of the victim, uniting the seeming opposites (Freud) into a single symbol of "conscience." The passage raises the fundamental question of whether any rule of man over man can be good, implying the essential precariousness of the very concept of "good government."

In the view of the Old Testament, "rule" of anyone, in contrast perhaps to action confined to the individual sphere, requires a "justification" reaching beyond faith or belief in the righteousness of one's cause and, indeed, beyond objective reason or goodness. The Old Testament finds it necessary to "justify" or "legitimize" not only man's rule over another, but indeed the Rule of God. The source of the requirement of an account is thus not doubt regarding the inherent justice or perfection of the act of authority itself, but a positive affirmation of the value of man's freedom from submission to any rule—a freedom which even God himself cannot invade without specific "justification." All basic principles of democratic law, whether of the common law or of the civil law, such as habeas corpus, hearing, trial, judicial review, presumption of innocence, and proof requirements, on the procedural side, as well as substantive legal requirements, share this element of the necessity of giving an account for authoritative action, over and above its immanent merit.[11]

God's Covenant with the Children of Israel, as a source of the legitimacy of His Government, has been the prototype of all theories of state contract, including the modern ones of Hobbes, Locke, and Rousseau. The doctrine of "government based on the consent of the governed" expressed in various constitutional documents is traceable more or less directly to God's government by the consent and choice of the people. The contractural acceptance by the people of God's rule and His laws is solemnly

expressed in alternative forms by means of a "blessing," in the event of observance of the assumed law, and a "self-curse," in the sense of advance submission to the threatened evil, in the event of non-observance.[12]

A most significant implication of the theory of state contract, as visualized in the Old Testament, is the principle of reciprocity obtaining between the ruler and the ruled, expressed in the mutuality of God's choice of the Children of Israel as His people, and their choice of God as their ruler. The advantages of choosing God as a ruler are often extolled, so that it appears to be clear that the sacrifice of freedom by the governed is amply compensated.

In addition to God's Covenant regarding His own rule, there is a separate Covenant required to be made for the establishment of worldly rule. The Bible does not favor monarchical rule. It presents it as a rejection of God's own rule, and as not affording the people a true equivalent for the forfeiture of their freedom. Worldly rule is conceded solely in deference to the people's will, though it is in itself deemed an evil. The evil of such rule consists particularly in the threat of abuse of authority by a human ruler. The terms of the people's Covenant with the king contain certain special clauses against such abuse and against exploitation of the people.[13] In this context there appears a provision that the king must govern strictly within the terms of the law laid down in writing before his assumption of power, the Torah. The "law" laid down therein is emphatically not an open system of rules; nothing must be added to it or detracted from it.[14]

Usurpation of power by the ruler, consisting of his exceeding the bounds established by popular consent, is presented in the Bible as a sin punished by God. In the history of religious and theologically inspired political thought the problem of usurpation or abuse of power has been variously answered. Among the proposed solutions there may be found the two extremes of toleration of injustice in the form of its demonstration by martyrdom, on the one hand, and resistance to oppression, on the other. The former rather than the latter is prevalent in the Bible, particularly in the New Testament. In any event, according to the Biblical conception kings and other rulers are emphatically not

above the law, and kings are known to have yielded to censure by prophets. Notice also that unqualified obedience is due to judges [15] rather than to kings.

Procedural legality appears in the Bible in various places, such as the provisions for public hearing before the congregation, for standards of testimonial proof, for thorough investigation into the facts of suspicion or accusation, for the talionic liability of the informer. There may also be found interesting provisions that may well be the root of various modern legal privileges. Thus, for example, our injunction against unreasonable searches and seizures and our general conception of the privacy of the home might be traceable to the Biblical prohibition against entering the house of a debtor in order to obtain a pledge.[16]

Returning now to the initially posed question as to the origins of the Magnae Cartae and the *"nullum crimen, nulla poena sine lege"* principles, one might wonder why comparative legal scholars have paid little attention to the striking parallelism which obtains between the provisions contained in these documents and in these maxims and Biblical tenets. Profound anthropological and psychological investigations might afford the answer. But the terms of reference of this essay do not permit investigation of such intricate, deeply-rooted relationships between law and religion, or into the unconscious motivations of secularism. My concern at present is with the external relationships cognizable by comparative textual and linguistic research.

Some scholars have noticed a similarity between the English and the Spanish charter, and inferred from this feature that the latter charter must have served as a pattern for the former.[17] While there is no reason to exclude altogether the possibility of such a direct relationship between the two charters, it seems to be equally, or even more likely, that this similarity is referable to the charters' common origin in the Bible. Such a probability is supported by the fact that the draftsmen of both charters were undoubtedly Churchmen, learned in the Bible and Canon law.[18]

As regards the English charter and the documents dealing with its enforcement, it may be instructive to notice that the very phraseology used is clearly derived from the Biblical vocabulary. *"[N]ec super eum ibimus nec super eum mittemus"* ("nor will we go upon him, nor send upon him") corresponds to the Hebrew

Biblical style of "going upon" or "coming upon" another, which the Revised Standard version renders as "coming against" one,[19] but which literally means "coming upon" *(alav, aleychem),* the proper term denoting "against" being *"negdo."* Radin reports that in 1279 a Council at Reading called by Archbishop Peckham decreed excommunication against all *"qui veniunt et faciunt contra magnam chartam."*[20] *"Veniunt et faciunt,"* meaning literally "coming and doing" [against the charter], is undoubtedly derived from the Biblical version "doing" or "walking" under or against the statutes, as in *Leviticus* 18 : 3, 4: "You shall not do as they do in the land of Egypt, . . . and you shall not do as they do in the land of Canaan. . . . You shall not walk in their statutes. You shall do my ordinances and keep my statutes and walk in them." (Revised Standard version).

The "self-curse," as a sanction of the Charter, is undoubtedly modeled after the Biblical pattern, and there is hardly any need to search for parallels in Homer.[21] Excommunication, which was apparently used against the violators of the charter as late as 1489, is the equivalent of the common Biblical "being cut off from the people," as a sanction of the law's prohibitions. Being "outlawed" or "exiled" *(utlagetur, exuletur),* generally used in England as a substitute for punishment in composition cases in the sanctuary practice,[22] reflects this Biblical notion of exclusion from the congregation or the people. That the charter was affixed to church doors was but a natural consequence of its clearly religious conception.

The popular notion of democracy is reflected in numerous Biblical provisions,[23] perhaps most markedly in that stressing the equality of each man's "ransom for his soul," collected upon the taking of a census.[24] Fear of monarchy and the emphatic command of strict adherence to the law imposed on the king are related to the Biblical conception of the potential danger that the king might "look down upon his brethren,"[25] the people. If the charter follows this Biblical pattern, then *"parium suorum"* does not imply enforcement of differences in rank, in the sense of privileges granted to the highborn, but rather aims at the exclusion of arbitrary royal power.

One of the most difficult notions is the *"lex terre,"* which may refer to the Biblical idea of the land functioning as a sanctioning

agent under the oath, as a "self-blessing" or in the alternative as a "self-curse"—the promised land for one who keeps the Covenant or the charter and the land that spews out the one who does not.[26] It is possible that at the time of the Magna Carta this conception of *"lex terre"* (not *"terrae"*), the sanctioning land, stood for the law under which the land functions as such an agent or for the form of proof that will be regarded as admissible or sufficient under such a law.[27]

The principles of *"nullum crimen, nulla poena sine lege"* are clearly contained in the Biblical provision that the king govern under the law laid down in writing before his accession to power. This law is required to be clear, the Bible commanding "all the words of this law" to be written "very plainly"[28] and stating that Moses "undertook to explain this law."[29] This may be taken to exclude vagueness or uncertainty of the law. Nothing must be added to, or detracted from, the law. This excludes analogical and extensive (or restrictive) interpretation. The law is external, implying that it is in existence prior to commission of any given offense. However, the Talmud showed concern with the question of whether the children of Noah could be bound by a law that was not proclaimed at the time of their conduct. The Bible requires as a condition of punishment that the offender know the law in advance of the commission of the crime and not merely that he have an opportunity to learn it.[30] These are all the elements of the maxim, *"nullum crimen, nulla poena sine lege praevia et scripta,"* statutory advance description, strict interpretation, and prohibition of analogy. To what extent this maxim is reflected in the Magna Carta, if indeed it is at all expressed in the text of the charter, is controversial. Certainly, the notion of limitation of government power expressed in the maxim is reflected in the very procedure of the sovereign's submitting himself to restrictions—a procedure which in the atmosphere of English legal thought is particularly significant as a custom-forming event. A most important feature of the charter is its provision for a sanction against non-observance, in the form of the King's advance consent to rebellion against him should he violate the charter.[31] Notice also that the effectiveness of enforcement is secured by the creation of a "committee" of twenty-five barons, chosen by the barons, in charge of enforcement—a committee which decides by majority

vote. While this mode of sanction or enforcement seems not to be referable to a Biblical pattern, the notion of advance self-subjection to a sanction, in the event of a future failure to observe the law, is clearly Biblical.

An old document such as the Magna Carta is not only that which it "was" at the time of its conception, but also that which it becomes in the course of history. In this sense, undoubtedly, the Magna Carta stands for the idea, expressed in England by Bracton, of subjection of the King not to man but to *God and the law,* an idea rooted in the Bible which has dominated Anglo-American thought. It may be pertinent to notice that the idea of this subjection, as applied in England, has in a sense distorted the Biblical conception by placing "God and the law" on a par as sources of authority. In the Bible God himself is regarded as bound by His Covenant and the law. Thus, the English version of the supremacy of law does not approach Biblical dimensions even today. It may be due to this fact that there is today no formalized written law in English constitutional practice. In the United States in most jurisdictions the postulate of *nullum crimen sine lege* encompasses the written law.

An essential complement of *"nullum crimen sine lege"* is *"nulla poena sine lege."* Indeed, since the ultimate legal test of the concept of crime lies in its operation as a condition of sanctions, one might well assert the notion of punishment to be the primary concept of criminal law. In the Bible limitation of punishment is postulated both in terms of an absolute maximum, derived from considerations of the human dignity which even a wicked man is deemed to possess, and in terms of a relative measure, expressed in the prohibition of punishment in excess of guilt.[32] The English charter likewise provides that punishment shall not be out of proportion to the offense,[33] though—in contrast to the Bible which assumes an egalitarian appproach to punishment[34]—that charter formulates the respective rules in terms of differences in social rank. Regrettably, the requirement of proportionality of punishment to guilt, reflected both in the Bible and in the Magna Carta, seems not to have been carried over into our contemporary law with a vigor equal to that attending the development of habeas corpus and due process,[35] though there are some indications of a recent trend toward a renascence of that concept.[36]

In the Bible even Naboth the Jez reelite, the victim of queen Jezebel's conspiracy to pervert justice by use of false witnesses, had a hearing, was advised of the charges against him, and was confronted with the witnesses against him before the congregation.[37] His trial lacked compliance with the provisions of the law demanding a "thorough investigation."[38] The requirements of such investigation are the subject of the Magna Carta Leonesa, which indeed supplies enforcement methods by introducing special "investigators" of crime.[39] In this charter there may also be found a provision for talion against the false witness, no doubt traceable to the Biblical pattern.[40]

The Spanish charter's elaborate rules directed at illegal searches and seizures,[41] which have left a clear impact on the laws of the Western world, may be traceable to Biblical conceptions of the privacy of a man's home.[42]

The trial of Naboth shows that fulfillment of certain formal conditions of democratic criminal procedure does not afford a sufficient guarantee against conviction of the innocent. There is also need for substantive-law justice and for judicial personnel responsive to this requirement. In neither charter, nor in any other "constitutional" document, has the substantive principle of the "independence of judicial [or any other] judgment" been as strikingly expressed as in the Biblical norms: "In a case at trial you shall not tend to cast your vote with the multitude to convict;"[43] "Do not call conspiracy all that this people call conspiracy."[44] The principle of judicial impartiality is formulated in the Bible in the interesting prohibition against "partiality to the poor," as against "deference to the great."[45] The charters' provisions rather deal with "denial" and "delay" of justice. Those of the Spanish charter[46] exceed in technical skill and refinement the English charter's curt "[t]o no one will we sell, to no one will we refuse or delay, right or justice."[47] They differentiate between denial by a particular judge and total denial by all judges of a land and set a specific maximum period for judicial action; in addition, they provide for proof of denial and the sanctions imposed upon it. Whether there is any relationship between such provisions and the Biblical standards of proper judicial conduct is a complex question. In this area the charters seem to be more obviously related to each other than they are to the Bible. A simi-

larly difficult question is whether and, if so, to what extent the Spanish charter's provisions against obstructing and contradicting judicial action[48] is traceable to the Biblical rule of obedience to judges.[49]

The ultimate source of Biblical authority is the Covenant concluded on two levels: between God and the children of Israel and between the ruler and the people. This Covenant is sanctioned by "self-curses," and there is no specific sanction other than this in the event of usurpation or abuse of power. Thus, apart from the oath, sworn by both Don Alfonso IX and King John, as well as by rulers and office-holders until present times, no Biblical pattern was set for a worldly sanction against a ruler. But apparently in King John's time the effectiveness of the oath had become dubious. So, it was supplemented by the grant of a right of resistance to oppression, made effective by the creation of an enforcement committee. The meaningfulness of such a right, of course, is predicated upon the existence of an authority superior to both the ruler and the ruled; in its absence any rebel may claim such right. Notwithstanding its theoretical precariousness, the right to resist oppression continued to be asserted, perhaps without uniformity of meaning. It may be found in the Declaration of Independence as well as in the basic laws of the French Revolutionary Period, and even in some modern constitutions. Today, clauses to this effect are interpreted restrictively.[50] This may be due to an increasing acceptance of the institution of judicial review; the latter may be thought to be incompatible with the right of resistance, which is an ultimate remedy rather than an unqualified privilege. The Biblical command of unqualified obedience to judges may have played some role in the invention and maintenance of judicial review at a time when Biblical influence on legal development was no doubt much stronger than it is today.

Many other allegedly modern constitutional limitations upon substantive and procedural law, particularly criminal law, might be traced to Biblical roots. But such an ambitious undertaking requires a comprehensive study of comparative materials. At this time it may be sufficient to point out the strong possibility that historically controversial old constitutional documents of the Western world, as well as some quite modern constitutional ideas, have their origin in the Bible. It is remarkable, indeed, and has

an interesting bearing on the nature of our reactions to the Bible, that this has passed unnoticed, while efforts have been made to connect our constitutional documents with Greek and Roman ideas.[51] One might indeed wonder about the psychological background of the fact that, as Voltaire put it, *"la Bible est plus célèbre que connue."* Could this phenomenon be related to the fact that one of the principal themes of the Bible is man's relation to authority?

If it is conceded that the English Magna Carta, as well as the Spanish one,[52] was conceived within a frame of thought imbued with Biblical ideas, then the question of the charter's political character must be evaluated in relation to the general political philosophy set by the Biblical pattern. That this philosophy is democratic in both a libertarian and an egalitarian sense, cannot be disputed. Some passages of the charter, of course, are undemocratic[53] and some reflect orientation to feudal differences in rank. But the significance of the Magna Carta lies not so much in the immediate social implications of its particular provisions, as in the general spirit which it reflects—that of "justification of authority," indeed, of all authority, and the subjection of authority to a state contract and to limitation by law. Within a feudal framework, a pattern of authority set on the highest level had great bearing on relationships of a lower order of authority. Whether or not at the time of the charter's issue the pattern of the Magna Carta affected the common man's immediate relation to authority is secondary to the question of its impact on the general conception of authority. The Magna Carta's roots in the Bible gave it a democratic imprint. That "no freeman must be imprisoned . . . *nisi per legale iudicium* . . ." is significant not only per se, but also as reflecting the Biblical tenet that "the man-slayer die not, until he stand trial before the congregation."[54]

The Biblical roots of our democratic ideology create most intricate problems when an attempt is made to transplant this ideology into a soil in which the same roots are not available. For although we have consciously separated our democratic persuasions from their religious origins and, in fact, believe we have established a perfect wall of separation of Church and State, the original union continues to influence us in many ways.[55] Nor would it help were we to convert to the Judaeo-Christian creed

people whom we wish to "democratize," for the missing roots are those of the past and are operative precisely because of their impact as a phenomenon of the past. But it is desirable that in pursuing our endeavor to convert people to "democracy," we recognize that their emotional reactions to freedom and equality do not have the same roots as ours, though in some cultures they may have independent roots.

NOTES

1. The famed 39th Article reads thus: *Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre* [No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land].

Article 40 reads as follows: *Nulli vendemus nulli negabimus aut differemus rectum aut iusticiam* [To no one will we sell, to no one will we refuse or delay, right or justice].

2. Radin, *The Myth of the Magna Carta,* 60 HARV. L. REV. 1060 (1947).

3. See LUIS JIMENEZ DE ASUA, II TRATADO DE DERECHO PENAL, note 67 ter, at 383-84 (2nd ed. 1950).

4. King Alfonso's oath reads (Articles 12 and 13) thus: *Establezco y juro, que si alguno me delatase un crimen cometido por otro, pondré de manifiesto el delator al delatado; si el delator no pudiese probar la delación en mi tribunal, sufrirá la pena que debiera sufrir el delatado si la delación se hubiese probado* [I decree and swear that if anyone denounce to me a crime committed by another, I shall confront the accused with his accuser; if the accuser cannot prove his accusation in my court he shall suffer the punishment which the accused should have suffered had the accusation been proved].

Juré también que nunca haré mal ni daño en las personas y sus bienes por delación de agravio contra mi, o de crimen que se impute a alguno; sino que le emplazaré por carta que venga a mi tribunal a estar a derecho, segun lo que este disponga. Si no se probase el delito imputado, el delator sufrirá la pena prescrita en el articulo anterior, y pagará además los gastos que haya hecho el delatado en ir y volver por el emplazamiento de mi carta [I have also sworn that I shall never inflict either evil or damage upon persons or their property by virtue of a denunciation of an offense against me or of a crime ascribed to anyone; rather, I shall summon him by letter to come to stand trial in my court, according to the latter's orders. If the crime ascribed be not proven, the accuser shall suffer the punishment prescribed in the preceding article, and in addition shall pay the costs which the accused incurred in coming and returning pursuant to the summons in my letter].

The Spanish translation is to be found in JOSE RAMIRES SANTIBANEZ, AVENTANDO CENIZAS, *Estudio comparativo entre el Ordenamiento de León de 1188 y la Gran Carta Inglesa* 1215 (1922). The English translation is the present author's.

5. See note 4 *supra.* Notice that already Canon II of the Council XIII of Toledo (year 183) contained provisions against extraction of confessions by force and for public trial, as well as safeguards of proof which resemble our presumption of innocence. In fact, the document contains a democratic element which seems to be missing in our law, that is, an innocent man's right to be declared by all to be innocent. See RAMIREZ SANTIBANEZ, *op. cit. supra,* 69-70.

6. It must be clearly understood, however, that *lex terre* may—and probably does—refer to a method of proof rather than to a *"lex"* in the Roman law sense of a statute.

7. For the contention that the English Charter was patterned after the Spanish one, see note 17 *infra.*

8. See Hirsch, *Macht und Recht,* 17 JURISTENZEITUNG 1 (1962).

The controversy over the proper method of such personal religious justification aroused violent struggles, culminating in bloodshed and warfare. This may make us pause to consider whether the genuine issue in such justification even in this original form was not rather one of rationalizing man's aggression against man—a guilt for which such atonement might have been warranted.

9.Compare Silving, *The Jurisprudence of the Old Testament,* 28 N.Y.U.L. REV. 1129 (1953).

10. *Eccl.* 8: 9.

11. This principle of requiring "justification" for government action beyond the substantive merits of the concrete issue, especially the defendant's guilt, is dramatically expressed in decisions of the United States Supreme Court expanding the area of limitation of government action, whether federal or state, in the realm of coerced confessions, searches and seizures, and the privilege against self-incrimination.

12. *Deuter.* 27: 11-26.

13. *Deuter.* 17: 15-20.

14. *Deuter.* 4: 2; 12: 32.

15. *Deuter.* 17: 11, 12.

16. *Deuter.* 24: 10, 11.

17. RAMIREZ SANTIBANEZ, *supra* note 4, at 94-5, draws attention to the fact that Don Alonzo VIII of Castile (first cousin of Don Alonzo IX of León) was married to Leonora Plantagenet, daughter of Henry II of England and sister of John, and that in 1212, John sent a group of prominent men to Spain for the purpose of reaching an alliance with Emeer Muhammed An-Nasir. He infers from the existence of such relationships that the English may very well have known of the Spanish Charter. The Marqués de Montesa, however, after comparing the two charters, concedes that it would be indeed difficult to assume that the Runnymede rebels had the Spanish charter in mind when they dictated their terms to King John. Cited *ibid.*

18. Notice that at the time of the issue of these documents noblemen other than of the clerical class hardly possessed the educational qualification for drafting documents of this type. Both of these documents show a remarkable skill in draftsmanship.

19. *E.g.,* 1 *Samuel* 12:12.

20. Radin, *supra* note 2, 1063-64.

21. Radin refers to the curse-as-sanction in Homer. *Op. cit. supra,* at 1066. However, this type of sanction is a very common feature in the history and prehistory of law. See HELEN SILVING, *The Oath,* in ESSAYS IN CRIMINAL PROCEDURE (1964).

22. On this see forthcoming article by this writer, *Sanctuary,* in ENCYCLOPAEDIA BRITANNICA (1965).

23. Notice particularly that the talion principle of the Bible is applied indiscriminately, that is, to all children of Israel and resident aliens alike. This contrasts with the composition system obtaining at the time of the charters, when the finger of a man of higher rank had a higher price than that of a man of lower rank.

24. *Exodus* 30: 12-15.

25. *Deuter.* 17: 20.

26. *Num.* 35: 34; *Deuter.* 24: 4.

27. BRUNNER, DIE ENTSTEHUNG DER SCHWURGERICHTE 177-89 (1872).

28. *Deuter.* 27: 8.

29. *Deuter.* 1: 5.

30. See Ryu & Silving, *Error Juris: A Comparative Study,* 24 U. CHI. L. REV. 421, at 424 (1957).

31. Article 61 of the Magna Carta. On the significance of an enforceable right of resistance to oppression, see *infra.*

32. *Deuter.* 25: 1, 2, 3, reads: "If there is a dispute between men, and they

come into court, and the judges decide between them, acquitting the innocent and condemning the guilty, then if the guilty man deserves to be beaten, the judge shall cause him to lie down and be beaten in his presence with a number of stripes in proportion to his offence. Forty stripes may be given him, but not more; lest, if one should go on to beat him with more stripes than these, your brother be degraded in your sight." [Revised Standard Version].

33. See Articles 20 and 21, which read in pertinent part: "20. A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense. . . . 21. Earls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offense."

34. Compare note 23 *supra*.

35. See particularly Williams v. New York, 337 U.S. 241 (1949). For criticism of this aspect of our present law see Silving, *"Rule of Law" in Criminal Justice,* in ESSAYS IN CRIMINAL SCIENCE 75 (Mueller ed. 1961).

36. See particularly the dissent of Justices Goldberg, Douglas and Brennan from the United States Supreme Court's refusal to review death sentences imposed upon rape convictions, Rudolf v. Alabama, 32 U.S.L.W. 3154 (1963), to the effect that a death sentence in the case of a rapist "who has neither taken nor endangered human life" may constitute "cruel and inhuman punishment."

37. 1 *Kings* 21.

38. *Deuter.* 19: 18; 13: 14; 17: 4.

39. Articles 16 to 18. The English charter contains some proof requisites in Article 38.

40. *Deuter* 13: 15; 19: 17-21. Compare the Magna Carta Leonesa, Arts. 12 and 13; for text see note 4 *supra*.

41. Articles 6 to 8 provide that neither the king nor any other person may enter by force the house of another; that if in attempting to search the house of another, a person kills the owner, the culprit shall suffer the punishment for treacherous killing [for interpretations of the concept of *"alevosia y traición"* see A. QUINTANO REPOLLES, I COMMENTARIOS AL CODIGO PENAL 207-09 (Madrid 1946)]; and that immunity from both punishment and civil responsibility is granted to those who kill the aggressor in defense of the house.

42. Compare note 16 *supra* and accompanying text.

43. *Exodus* 23: 2. [This translation is the present writer's].

44. *Isaiah* 8: 12. [Revised Standard Version].

45. *Lev.* 19: 15; *Exodus* 23: 3.

46. Articles 19 and 20.

47. Article 40.

48. Article 21; see also Articles 22 et seq.

49. Compare note 15 *supra*.

50. On this see Silving, *The Conflict of Liberty and Equality,* 35 IOWA L. REV. 357, at 358-59 (1950).

51. For an exception see MACIVER, GREAT EXPRESSIONS OF HUMAN RIGHTS, beginning with the presentation of the Bible as the great charter of man's freedom and dignity: Robert Gordon in *Vision of Micah.* However, no effort has been made in this article to connect constitutional documents with the Bible.

52. There is no denying the fact that certain politico-legal institutions of Spanish history showed a strong libertarian character, which was not paralleled in Europe with the exception of Poland. On the Polish *liberum veto* and the *disentimiento* of the Spanish Cortes, see Silving, *The Conflict of Liberty and Equality, supra* note 50, at 360-61 and footnotes 11 to 14. Notice, however, in this context that some of these institutions, while affording a philosophical background for evolution of institutions of a functional democracy, were themselves self-defeating. In contrast to them, the English ones, emerging in response to practical needs, have been conceived to be operational. Thus, in the Magna Carta (1215) the Committee of Enforcement was to decide not unanimously but by a majority vote.

53. Notice, for example, elimination of the writ *praecipe* (Art. 34), whereby certain cases could be transferred from a feudal to the King's court.

54. *Num.* 35: 12; *Joshua* 20: 9.

55. On some adverse, rather—as in this instance—beneficial, effects of the past see SILVING, *op. cit. supra* note 21.

Harvard Student Legislative Research Bureau: Its Purpose and Functions

Purpose

The primary purpose of the Harvard Student Legislative Research Bureau is to make available to governmental and public service groups technical services in the preparation and drafting of legislation. Since its organization in 1952, the Legislative Research Bureau has drafted legislation dealing with a variety of subjects in response to requests submitted by federal, state and local legislators and officials, state attorneys-general and law revision commission, members of law school faculties, and civic groups.

While assisting clients in a practical manner, the Bureau provides valuable educational experience for its members. The responsibility for the work of the Bureau rests entirely with its students selected annually on a competitive basis.

The Bureau is financed by a grant from Harvard Law School and does not accept remuneration from clients.

Selection of Projects

Since the Bureau receives more requests for assistance each year than it can accept, selection of projects is necessary to insure that the projects undertaken will receive prompt and thorough treatment.

When a request is received, the legal and drafting problems which it poses undergo a preliminary study and analysis for the purpose of determining whether the project is one which the Bureau can accept. Several factors are considered in making this decision. Among them are: the importance of the proposed legislation to the community in which it may be enacted, the educational experience which the project offers to the membership, the availability of personnel, the interest of the membership, and the likelihood of the bill's being enacted into law.

The Bureau does not accept projects involving research alone, but only those which include the drafting of specific legislation.

Drafting and Editing

A project, once accepted, is referred to a committee of the membership which does the actual research and drafting. Experienced third-year members act as committee chairmen, overseeing the work and guiding its progress. Work on projects begins shortly after the opening of the academic year, and project deadlines are established according to the requirements of the client and the complexity of the problems involved.

The completed draft and the explanatory memorandum which accompanies it are next submitted to critical review by student editors. Most of the projects are also submitted to a member of the Harvard Law School faculty for review and comment. When the staff is satisfied with the form and content of the completed draft and the covering memorandum, they are forwarded to the client for consideration. The Bureau tries to keep in close contact with clients to be certain that its drafts conform to clients' policy determinations. The procedure is flexible enough to allow adaptation to the particular needs of clients.

Bureau Policies

The Bureau serves the community by assisting proponents of legislation in presenting their ideas in statutory form appropriate for legislative consideration. It is entirely technical and non-political in function. Drafts are based on the policies of clients, and neither the Bureau nor Harvard Law School endorses any of these policies. Neither the Bureau nor any of its members will lobby for the passage of any bill.

Project requests should be directed to the Director of Research, Harvard Student Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Massachusetts 02138.

A State Statute for the Disposition of Unclaimed Property‡

This Bureau Draft utilizes the framework of the Uniform Disposition of Unclaimed Property Act and sets forth a proposal for the more effective capture of the Nation's growing quantum of unclaimed property. The statute specifically deals with the problem of conflicting claims by several states in response to the Supreme Court's recent opinion in Texas v. New Jersey, 379 U.S. 674 (1965).

I. INTRODUCTION

To states ever seeking new sources of non-tax revenue, the introduction of laws to capture potentially large sums in unclaimed personal property has become an attractive proposition. Little of such property is ever reclaimed by the persons entitled to it. The advantages of virtually perpetual state control of these funds, combined with a desire to prevent windfalls to the holders, have led ten states to enact their own comprehensive abandoned property statutes. Twelve other states have enacted either the modern Uniform Disposition of Unclaimed Property Act, 9A Uniform Laws Ann. 416 (1965) (hereinafter called the Uniform Act) or legislation based upon it.

At present, the law of many states does not reflect this trend toward comprehensive legislation for the purpose of tapping this rich source of revenue. Disconnected provisions for state custody and, in some cases, eventual escheat of some types of unclaimed personal property are scattered through state statutes, but procedures for capture vary from the mandatory and complex to the voluntary and simple. Many types of property that make up a large proportion of the abandoned property revenues of some states are not specifically covered in others.

This proposed statute is intended to bring escheat law up to date. Leaving intact existing provisions for immediate escheat of realty and personalty under the descent and distribution laws, the statute collects in one act most of the other law dealing with abandoned unclaimed personal property, tangible and intangible. The statute greatly expands the classes of property now subject

‡ See 1 HARV. J. LEGIS. 151 (1964) for the text of a proposed federal act to resolve conflicting state claims to abandoned property.

to a presumption of abandonment in many states. It provides a uniform procedure for the reporting, delivery, state custody, and final escheat of the property, as well as claim procedures and means by which the state treasurer can enforce the statute.

The statute is a thirty section adaptation of the basic property classifications and reporting procedures of the Uniform Act modified to accord with the recent decision in *Texas v. New Jersey*, 379 U.S. 674 (1965). Section 404, "Claims by other states," and section 602, "Enforcement," were added specifically because of the *Texas v. New Jersey* decision. Also, whereas the Uniform Act is purely "custodial" in nature, in that the state never takes absolute title, and claims for held property may be made at any time, this proposed act is of the combined custodial-escheat type enacted in 1962 by Connecticut. Conn. Gen. Stat. Ann. §§ 3-56a to -75a (Supp. 1964). After fifteen years of state custody during which claims may be made, the state treasurer is empowered to institute proceedings to declare the property escheated to the state.

II. Constitutional Problems

Two primary constitutional problems exist in the area of state escheat of unclaimed property: (1) due process considerations raised by the elimination, because of the disproportionately large expense involved, of individual notice of state action to the many persons entitled to small amounts of property presumed abandoned (discussed in the comments to sections 301 and 302); and (2) the requirement that holders of unclaimed property report and deliver the property to the state even though the statute of limitations has run in the holder's favor as against the owner (discussed in the comments to section 601). A third, and the most serious, constitutional problem was only recently resolved by the *Texas v. New Jersey* decision. As more states enacted escheat laws, there was the increasing possibility that holders of unclaimed property would be liable to deliver the property to more than one state. This problem and its resolution are discussed immediately below.

The chief uncertainty involved in the escheat statutes of many states was constitutional in nature. In *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), the Supreme Court of

the United States had declared it a violation of due process for more than one state to escheat a given item of intangible personal property. It appeared that any state facing an actual or potential dispute by a sister state would be forced to bring an original action in the Supreme Court for a declaration of its rights before it could take the property.

This situation arose because a growing number of states were enacting abandoned property statutes and because the Court in previous cases had approved two conflicting tests for a state's power to escheat property through state court proceedings. In *Connecticut Mutual Life Insurance Co. v. Moore,* 333 U.S. 541 (1948), New York was given power to take custody of unclaimed insurance policies issued on the lives of its residents by foreign corporations. In *Standard Oil Co. v. New Jersey,* 341 U.S. 428 (1951), the state of the property holder's domicile was permitted to escheat intangibles held for owners whose last known addresses were outside New Jersey. In the *Connecticut Mutual* case, the majority expressly did not decide what other states might also have sufficient contacts, although a number of additional possibilities occurred to commentators. With this conflict of authority it was not surprising, therefore, to find that the jurisdictional tests incorporated in the unclaimed property laws of the several states should vary, each being most favorable to the enacting state. Since both jurisdictional tests approved by the Court required some "contacts," either with the owner or the holder, jurisdictional tests varied not only by state but also by types of property covered by the particular state's law. In an attempt to resolve the conflicts that would naturally arise, the Uniform Act suggested a reciprocity clause, Uniform Disposition of Unclaimed Property Act § 10, 9A Uniform Laws Ann. 428 (1965), which allowed another state to escheat certain types of property if the owner's last known address were there. But the success of this clause was contingent upon its enactment by every state, and this was considered unlikely, especially in those states most adversely affected, *e.g.,* New Jersey and New York which, under the *Standard Oil* case, could escheat property on the basis of the holder's domicile being in the state.

Amid this confusion, however, the then pending original jurisdiction case of *Texas v. New Jersey,* first of the cases brought in

the Supreme Court under the *Western Union* doctrine, held some promise of laying down a single rule, or scheme of rules, to guide states seeking to escheat intangible personalty. That promise was realized. On February 1, 1965, a majority of eight, speaking through Mr. Justice Black, set forth a "federal common law" rule that only the state of the last known address of the person entitled to the debt, as shown on the records of the holder, could escheat. Where there was no address recorded, the state of the holder's domicile could take the property for itself until another state came forward with proof that the last known address of the property owner was in that state. The state of the holder's domicile similarly could escheat if the owner's last known address on the holder's records were in another state which did not then provide for escheat of such property, except that the other state could take the property as soon as its laws did so provide. 379 U.S. 674, 682 (1965). The Court accepted the basic proposals of its special master appointed to hear the arguments of Texas, New Jersey, Florida, and Pennsylvania, all claiming some $26,000 in debts held by the Sun Oil Company, which asked only to be protected from multiple liability. Florida, an intervenor in the action, was upheld in its contention that the last known recorded address of the owner should be the guide.

The Court rejected proposed primary rules which would have allowed escheat only by the state with the "most significant contacts" with the property; or by the state of the holder's domicile (the test advocated by Mr. Justice Stewart, dissenting); or by the state where the holder had its principal place of business. The Court's solution, it maintained, was dictated not by constitutional compulsion but by equity and ease of administration. Moreover, it was in line with cases holding that the state of a decedent's domicile at death could levy an inheritance tax on the decedent's intangible personalty, wherever located, whereas another state, in which was located the physical evidence of the intangibles, could not levy such a tax. *Baldwin v. Missouri,* 281 U.S. 586 (1930); *Farmers Loan & Trust Co. v. Minnesota,* 280 U.S. 204 (1930); *Blodgett v. Silberman,* 277 U.S. 1 (1928).

The primary rule, granting unclaimed property to the state of the owner's last known address, is simple and is easily administered. It will apply in most cases. Because it "will tend to

distribute escheats among the States in the proportion of the commercial activities of their residents," 379 U.S. 674, 681, it is, in the draftsmen's opinion, highly beneficial and favorable to the majority of states, certainly far preferable to a rule giving huge sums in unclaimed property to the relatively few states where large national corporations, owing debts to persons throughout the country, are domiciled.

Texas v. New Jersey does, however, leave some problems in the area of unclaimed property. But it has cleared away much crippling confusion. To many states, two of the decision's most important effects are likely to be, (1) assurance that the state courts can be utilized for escheat proceedings in the great number of cases where these courts can obtain personal jurisdiction over the holder, and (2) the elimination of any need for state court jurisdiction over the holder as a prerequisite to a valid claim for escheat, since the mere location of the owner's last known address in the state, no matter what "contacts" the state has with the holder, is sufficient under the federal common law developed by the Supreme Court in the exercise of its original jurisdiction. Many problems of enforcing a state's rights remain. These will be canvassed in this memorandum, chiefly in the analysis of section 602, *infra*.

Two questions of marginal application of the decision may be disposed of fairly readily. One involves the apparently simple test of the "last known address" on the holder's records. Can two states dispute which of two or more recorded addresses is the "last known"? Such cases, the draftsmen believe, by their nature will be extremely rare. Generally the last address chronologically reported to the holder will be considered the "last known." (It should be emphasized that, as long as there is some address on the holder's records, actual knowledge by anyone of another, unrecorded address, appears to be immaterial.) The second question concerns those occasions when the state of the holder's domicile may take property because another state, wherein the owner is recorded to have last resided, does not "provide for escheat" of property otherwise due it. Suppose a state presumes a certain item of property abandoned under its laws because the owner has made no claim to it for the statutory fifteen years. The last known address of the owner, on the records of

the corporation, is in a state which provides for taking such property after twenty years. It would seem that the first state could not take the property, since the other state currently 'provides" for its taking, although at some future time.

Texas v. New Jersey is bound to have a profound effect on the abandoned property laws of the states. It will act as a powerful incentive to the passage of comprehensive laws by states not now having them. It must lead to adjustments in existing laws. Some New York City bankers, apparently rather unhappy about the majority opinion, have predicted that the New York Legislature will soon change that state's pioneering 22-year-old statute to conform to the federal law. N.Y. Times, Feb. 7, 1965, §3, p. 11, col. 4.

III. The Proposed Act

The accompanying statutory draft attempts to take full advantage of the opportunities opened to many states by *Texas v. New Jersey*. It asserts each state's right to every type of intangible personal property due to the state under the law as now declared, despite lack of personal jurisdiction over the holder by that state's courts, and regardless of the character of certain holders, *e.g.*, federal courts or public bodies or officers of other states. Tangible personal property is claimed only if actually located in the escheating state.

The various "contacts" requirements contained in individual sections of the Uniform Act as prerequisites to a right of escheat have been eliminated. Section 201 of this draft sets forth the three general Supreme Court standards as prerequisites, referring the reader to the sections dealing with nine classes of property for the time periods and circumstances of owner inactivity giving rise to the presumption of abandonment, if the three basic conditions are met.

The administrative, or procedural, sections of the Uniform Act have been retained largely intact. A new enforcement provision is contained in section 602. Of particular interest is subsection (d). It is aimed at reducing the inconvenience of administration, by giving other states a financial incentive to sue in the name of the escheating state to recover property due to the

escheating state, where the courts of the escheating state cannot obtain jurisdiction over the holder. The section reciprocally provides that at the request of such other state the attorney general will sue in a court in the first state in the name of such other state. It is hoped that this procedure will prove usable in most cases where the state treasurer, choosing to bring suit, otherwise would have to go outside the state. Where the sum involved is large enough, the treasurer might bring the suit himself to save the state the 15 per cent reward recommended to be given to agent-states.

Another important provision is section 404, "Claims by other states." This section sets up an administrative procedure whereby, once a state has taken property under the Supreme Court's two exceptions to the general rule, another state claiming to have become entitled to that property under these two exceptions is given the opportunity to present its claim to the state treasurer. It is hoped that settlements under this section will avoid many original actions in the Supreme Court of the United States.

Generally, the Act operates as follows:

(1) After fifteen years during which no interest has been shown in personal property, it is presumed abandoned.

(2) The holder of such property annually submits to the state treasurer a verified report of all such property held by him. Unless the owner's claim against the holder is barred by the statute of limitations, the holder, before filing the report, mails a notice to the owner at his last known address. Names and addresses of all owners except owners of sums less than ten dollars are reported to the state treasurer. Sums below that amount are reported in the aggregate.

(3) Within 120 days from the receipt of the annual report, the state treasurer gives notice by publication and by mail to each owner named in the report. The owner has 65 days after the second published notice to claim his property from the holder.

(4) If no claim is allowed by the holder within that 65 day period, the holder is given 20 days to deliver the property, with increments accrued during the period of holding, to the custody of the state treasurer. Having done so, he is relieved of all liability to the owner.

(5) Within the 15 year custodial period, the state treasurer may sell received property other than money. Listed shares of stock, if sold, are sold at prevailing exchange prices; other property may be sold at public sale.

(6) Net funds, from which the state treasurer may first deduct the costs connected with the sale and keeping of the property, are deposited in the state treasury. The treasurer retains at least $50,000 in a trust fund from which claims are paid. A public record is kept of the names and addresses of all owners whose names and addresses have been reported to the state.

(7) Claims made for the property during the 15 year custodial period are considered by the state treasurer within 90 days after filing. A formal hearing may be held at the claimant's request. A decision is rendered in writing on each claim.

(8) Claims allowed are paid in full, without deduction for service charges or costs of sale and notice. The owner is credited with interest and other increments accruing to property other than money before any sale by the state treasurer.

(9) Claimants aggrieved by decisions of the state treasurer or by his failure to act may petition the superior court to establish their claim. Trial is de novo without a jury.

(10) At the end of fifteen years of custody, if no claim has been established, the treasurer commences a superior court action for escheat. Again, published and mailed notice of the hearing is given to all owners whose names and last known addresses are on state records. If no claimant appears and succeeds, and if the treasurer establishes that he has complied with the law, the property escheats.

The treasurer is empowered to check the records of anyone he believes is holding unclaimed property presumed abandoned under the terms of this act. Penalties are provided for willful failure to report or deliver such property to the state.

IV. Alternative Solutions to the Problem

New York, New Jersey, Pennsylvania, and Massachusetts, among other states, have their own individual abandoned prop-

erty laws, which do not purport to be based on the Uniform Act. However, most single-state acts were originally introduced before the promulgation of the Uniform Act in 1955. Since then, most states introducing a comprehensive abandoned property law have enacted legislation purporting to be the Uniform Act, or containing the basic structure and some of the basic wording of the Act. Exceptions are Kentucky, Ky. Rev. Stat. ch. 393 (1963); Alaska, Alaska Stat. §§ 09.50.070 to .50.160 (1962), and possibly Texas, Tex. Rev. Civ. Stat. Ann. arts. 3272a, 3273 (Supp. 1964). Delaware's individual act took effect in 1955. Del. Code Ann. tit. 12, §§ 1130-1194 (Supp. 1964).

The property classifications and the procedures set up in the Uniform Act were considered to be well thought out, easily administrable, and fair to holders, owners, and the state. Compare Mass. Gen. Laws Ann. ch. 200A (1958), introduced in 1950, which puts holders to the trouble and expense (although later reimbursed) of giving all notice and making all sales, with court proceedings frequently required. Moreover, the Uniform Act is itself based on the original ideas of such pioneering statutes as the New York Abandoned Property Law, introduced in 1943.

Existing procedures in other states are far from uniform. In New Hampshire, for example, state custody and escheat of inactive bank accounts is a fairly complex process of court hearings and private publications of notice. N.H. Rev. Stat. Ann. §§ 386:24 to :30 (1955). On the other hand, a totally voluntary and unenforceable procedure covers almost any other situation. N.H. Rev. Stat. Ann. §543:10 (1955).

The eventual escheat provided in the proposed statute sets it apart from the Uniform Act, which is a purely "custodial" statute. Unclaimed property statutes are generally classified as custodial, escheat, and combined custodial-escheat (the type used here). Some states provide immediate escheat for some classes of personal property and a period of custody for others. Each type of statute has its advantages and disadvantages.

In the combined custodial-escheat statute, the state is enabled to close its books on a great amount of received property and to consider the property its own, free from a contingent liability of uncertain scope. Still, the owner is protected because this advan-

tage is achieved only after thirty years during which the person entitled to the property has made no claim to it.

Disadvantages of a custodial-escheat statute, as compared with a pure custodial statute, are as follows:

(1) The administrative expense involved in a combined statute is greater than that connected with a purely custodial statute, because of additional court costs, mailings, and publications, and the transfer of property from the treasurer's custodial rolls to escheat rolls.

(2) The degree of uniformity sought in the custodial Uniform Act, the basic structure of which has been otherwise used in this statute, is reduced by provisions for escheat.

(3) From the viewpoint of owners of unclaimed property, a statute which keeps the books open for claims indefinitely is preferable to a law under which the owner eventually loses all right to his property.

In the opinion of the draftsmen, a combined custodial-escheat statute with fairly long periods before custody and escheat represents a safe venture. Much of the administrative expense involved can be charged against property collected under the statute. Owners have 30 years to assert a claim for their property, either to the holder or the state. Other states seeking to take property from the situs state are given, it is felt, sufficient time to act. Finally, nationwide uniformity is not likely in any event, because the states with their own individual abandoned property laws show no signs of a willingness to switch to the Uniform Act.

THE STATUTE

PART I. SHORT TITLE AND DEFINITIONS

SECTION 101. *Short title.*

This Act may be called the "Unclaimed Property Law."

SECTION 102. *Definitions.*

(a) "Banking organization" means any national bank, state

bank, savings bank or institution for savings, trust company, banking company, depository, and all similar organizations.

(b) "Business association" means any private corporation, joint stock company, business trust, partnership, or any association of two or more individuals for business purposes.

(c) "Escheat" (except in section 403) means the presumption of abandonment of property, followed by:

(1) immediate proceedings for the taking of title, or

(2) the required delivery to the State followed by immediate proceedings for the taking of title, or

(3) perpetual State custody of the property, or

(4) a period of State custody followed by proceedings for the taking of title.

(d) "Financial organization" means any building and loan association, federal savings and loan association, credit union, small loan company, investment company, and all similar organizations.

(e) "Holder" means any person in possession of property subject to this Act belonging to another, or who is a trustee in the case of a trust, or is indebted to another on an obligation subject to this Act.

(f) "Life insurance corporation" means any association or corporation transacting the business of insurance on the lives of persons or insurance appertaining thereto, including, but not limited to, endowments and annuities.

(g) "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to this Act, or his legal representative.

(h) "Person" means any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.

(i) "Property" means tangible personalty located in this State, and all intangible personalty.

(j) "Utility" means any person who owns or operates for pub-

lic use any plant, equipment, property, franchise, or license for the transmision of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas.

PART II. PRESUMPTION OF ABANDONMENT

SECTION 201. *General conditions precedent to the presumption of abandonment.*

Unless otherwise provided, intangible personal property is subject to a presumption of abandonment under this Act if the appropriate conditions leading to a presumption of abandonment as described in sections 202 to 210 of this Act are satisfied, and if:

(a) the last known address of the owner appearing on the records of the holder is in this State, whether or not the holder:

(1) is domiciled in this State or is engaged in or transacts business in this State, or

(2) if a court, public corporation, public authority, or public officer, is a court, public corporation, public authority, or public officer of this State or a political subdivision thereof; or

(b) no address of the owner appears on the records of the holder, and the holder is:

(1) domiciled in this State, or

(2) a court of this State, or

(3) a federal court within this State, or

(4) a public corporation, public authority, or public officer of this State or a political subdivision thereof; or

(c) the last known address of the owner appearing on the records of the holder is in another state, and such other state makes no provision in its laws for the escheat of such property, and the holder is:

(1) domiciled in this State, or

(2) a court of this State, or

(3) a federal court within this State, or

(4) a public corporation, public authority, or public officer of this State or a political subdivision thereof.

SECTION 202. *Property held by banking or financial organizations.*

The following property held or owing by a banking or financial organization is presumed abandoned:

(a) Any demand, savings, or matured time deposit made with a banking organization, together with any interest or dividend thereon, excluding any charges that may lawfully be withheld, unless the owner has, within fifteen years:

(1) increased or decreased the amount of the deposit, or presented the passbook or other similar evidence of the deposit for the crediting of interest; or

(2) corresponded in writing with the banking organization concerning the deposit; or

(3) otherwise indicated an interest in the deposit as evidenced by a memorandum on file with the banking organization.

(b) Any funds paid toward the purchase of shares or other interest in a financial organization, or any deposit made therewith, and any interest or dividends thereon, excluding any charges that may lawfully be withheld, unless the owner has, within fifteen years:

(1) increased or decreased the amount of the funds or deposit or presented an appropriate record for the crediting of interest or dividends; or

(2) corresponded in writing with the financial organization concerning the funds or deposit; or

(3) otherwise indicated an interest in the funds or deposit as evidenced by a memorandum on file with the financial organization.

(c) Any sum payable on certified checks or on written instruments on which a banking or financial organization is directly liable, including by way of illustration but not of limitation certificates of deposit, drafts, and traveler's checks, that has been outstanding for more than fifteen years from the date it was payable, or from the date of its issuance if payable on demand, unless the owner has, within fifteen years, corresponded in writing with the banking or financial organization concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with the banking or financial organization.

(d) Any funds or other property removed from a safe-deposit box or any other safekeeping repository on which the lease or rental period has expired due to nonpayment of rental charges or other reason, excluding any charges that may lawfully be withheld, that have been unclaimed by the owner for more than fifteen years from the date on which the lease or rental period expired.

SECTION 203. *Unclaimed funds held by life insurance corporations.*

All moneys held and owing by any life insurance corporation to an insured or annuitant, or other person entitled thereto, shall be presumed abandoned if unclaimed and unpaid for more than fifteen years after the moneys became due and payable, as established from the records of the corporation under any life or endowment insurance policy or annuity contract which has matured or terminated. If it is not definite and certain from the records of the corporation what person is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the corporation. A life insurance policy not matured by actual proof of the death of the insured is deemed to be matured and the proceeds thereof are deemed to be due and payable if such policy was in force when the insured attained the limiting age under the mortality table on which the reserve is based, unless the person appearing entitled thereto has, within the preceding fifteen years, (a) assigned, readjusted, or paid premiums on the policy, or subjected the policy to loan, or (b) corresponded in writing with the life insurance corporation concerning the policy. Moneys otherwise payable according to the records of the corporation are deemed due and payable although the policy or contract has not been surrendered as required.

SECTION 204. *Deposits and refunds held by utilities.*

The following funds held or owing by any utility are presumed abandoned:

(a) Any deposit made by a subscriber with a utility to secure payment for, or any sum paid in advance for, utility services to be

furnished, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility to be entitled thereto for more than fifteen years after the termination of the services for which the deposit or advance payment was made.

(b) Any sum which a utility has been ordered to refund and which was received for utility services rendered, together with any interest thereon, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility to be entitled thereto for more than fifteen years after the date it became payable in accordance with the final determination or order providing for the refund.

SECTION 205. *Undistributed dividends and distributions of business associations.*

Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it or corresponded in writing with the business association concerning it within fifteen years after the date prescribed for payment or delivery, is presumed abandoned.

SECTION 206. *Property of business associations and banking or financial organizations held in respect of dissolution.*

All property distributable in the course of a voluntary or involuntary dissolution or liquidation of a business association, banking organization, or financial organization that is unclaimed by the owner at the date of final dissolution or liquidation is presumed abandoned.

SECTION 207. *Property held by fiduciaries.*

All property and any income or increment thereon held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner has, within fifteen years after it becomes payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in

writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary.

SECTION 208. *Property held by courts and public officers and agencies.*

All property held for the owner by any court, including a federal court, or any public corporation, public authority, or public officer of any state or a political subdivision thereof, that has remained unclaimed by the owner for more than fifteen years is presumed abandoned.

SECTION 209. *Unclaimed property held by the federal government.*

[From the effective date of any law enacted by the federal government providing for the discovery of unclaimed property held by the federal government and for the furnishing or availability of such information to the states,] [A]ll property, including choses in action in sums certain and all debts owed, entrusted funds, or other property held by the federal government or any agency, officer, or appointee thereof, is presumed abandoned only if the last known address of the owner is in this State and the property has been unclaimed for fifteen years. The federal government or a government officer or appointee thereof may deduct from the amount paid or delivered to the State Treasurer the proportionate share of the actual and necessary costs of examining such records and reporting such information. This State shall hold the federal government harmless to the extent of the value of any property so paid or delivered from any claim which then exists, or which thereafter may arise, or be made in respect to property delivered to the State Treasurer by the federal government.

SECTION 210. *Other property held for another person.*

All property not otherwise covered by this Act, including any income or increment thereon and deducting any lawful charges, that is held or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than fifteen years after it became due, payable, or distributable is presumed abandoned.

PART III. IDENTIFICATION AND DISPOSITION OF ABANDONED PROPERTY

SECTION 301. *Report of abandoned property.*

(a) Every person holding funds or other property, tangible or intangible, presumed abandoned under this Act shall report to the State Treasurer with respect to the property as hereinafter provided.

(b) The report shall be verified and shall include:

(1) the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of [ten] dollars or more presumed abandoned under this Act;

(2) in case of unclaimed funds of life insurance corporations, the full name of the insured, annuitant, or beneficiary and his last known address appearing on the life insurance corporation's records;

(3) the nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under [ten] dollars each may be reported in the aggregate;

(4) except for any property reported in the aggregate, the date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(5) such other information as the State Treasurer prescribes by rule as necessary for the administration of this Act.

(c) If the holder is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) The report shall be filed before [November 1] of each year as of [June 30] next preceding. The State Treasurer may postpone the reporting date upon the written request of any person required to file a report.

(e) If the owner's claim has not been barred by the statute of limitations, the holder shall, before filing the annual report, communicate with the owner by first class mail at his last known

address, if any such address is known or may be ascertained by due diligence, setting forth the steps necessary to rebut the presumption of abandonment.

(f) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

(g) The initial report filed under this chapter shall include all property as to which the time period resulting in a presumption of abandonment under the terms of this Act commenced running on or after [Jan. 1, 19—].

(h) The State Treasurer shall keep a permanent record of all reports submitted to him.

(i) The State Treasurer or any person or agency designated by him may at reasonable times and upon reasonable notice examine the records of any person if he has reason to believe that such person has failed to report property that should have been reported pursuant to this Act.

SECTION 302. *Notice and publication of lists of abandoned property.*

(a) Within [120] days from the filing of the report required by section 301, the State Treasurer shall cause notice to be published at least once each week for two successive weeks in a newspaper having general circulation in the county in this State in which is located the last known address of any person to be named in the notice. If no address is listed, or if the address is outside this State, the notice shall be published in the county in which the holder of the abandoned property has his principal place of business within this State.

(b) The published notice shall be entitled "Notice of Names of Persons Appearing to be Owners of Abandoned Property," and shall contain:

(1) the names in alphabetical order and last known addresses, if any, of persons listed in the report and entitled to notice within the county;

(2) a statement that information concerning the amount or

description of the property and the name and address of the holder may be obtained by any persons possessing an interest in the property by addressing an inquiry to the State Treasurer;

(3) a statement that if proof of claim is not presented by the owner to the holder and if the owner's right to receive the property is not established to the holder's satisfaction within [65] days from the date of the second published notice, the abandoned property will be placed not later than [85] days after such publication date in the custody of the State Treasurer, to whom all further claims must thereafter be directed;

(4) a statement that if no claim is filed with the State Treasurer within fifteen years after the close of the calendar year in which any property presumed abandoned under this Act is paid or delivered to the State Treasurer, the property shall escheat to the State and all right, title, or interest therein of the owners will be terminated and all claims of the owners thereto forever barred.

(c) A copy of the second published notice, in which shall be included the date on which the notice is to be published, shall be mailed to the holder on or before the date of publication.

(d) Within [120] days from the receipt of the report required by section 301, the State Treasurer shall mail a notice to each person having an address listed therein.

(e) The mailed notice shall contain:

(1) a statement that, according to a report filed with the State Treasurer, property is being held to which the addressee appears entitled;

(2) the name and address of the person holding the property and any necessary information regarding changes of the name and address of the holder;

(3) a statement that, if satisfactory proof of claim is not presented by the owner to the holder by the date specified in the published notice, the property will be placed in the custody of the State Treasurer, to whom all further claims must be directed.

(4) a statement that if no claim is filed with the State Treasurer within fifteen years after the close of the calendar year in which any property presumed abandoned under this Act is paid or delivered to the State Treasurer, the property shall es-

cheat to the State and all right, title, or interest therein of the owners will be terminated and all claims of the owners thereto forever barred.

SECTION 303. *Payment or delivery of abandoned property.*

(a) Every person who has filed a report as required by section 301 shall within twenty days after the time specified in section 302 for claiming the property from the holder pay or deliver to the State Treasurer all abandoned property specified in the report, except that, if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in section 302, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the State Treasurer, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

(b) The State Treasurer may decline to receive any property reported which he deems to have a value less than the cost of giving notice or holding sale, or he may postpone taking possession until a sufficient sum accumulates. Unless the holder of the property is notified to the contrary within [120] days after filing the report required under section 301, the State Treasurer shall be deemed to have elected to receive the custody of the property.

SECTION 304. *Sale of abandoned property.*

(a) All abandoned property delivered to the State Treasurer under this Act, other than money or securities listed on any established stock exchange, may be sold by him to the highest bidder at public sale in whatever place in this State or elsewhere that affords in his judgment the most favorable market for the property involved. The State Treasurer may decline the highest bid and reoffer the property for sale if he considers the price bid insufficient.

(b) Securities listed on an established stock exchange may be sold by the State Treasurer. Any sale shall be at the prevailing price on that exchange.

(c) Any sale of abandoned property, other than money or

securities listed on any established stock exchange, held under this section shall be preceded by a single publication of notice thereof at least three weeks in advance of sale in a newspaper having general circulation in the county where the property is to be sold.

(d) The purchaser at any sale conducted by the State Treasurer pursuant to this Act shall receive title to the property purchased, free from all claims of the owner or prior holder thereof and of all persons claiming through or under them. The State Treasurer shall execute all documents necessary to complete the transfer of title.

(e) No action shall be brought or maintained by any person against the State or any officer thereof for or on account of any transaction entered into pursuant to and in accordance with the provisions of this section.

SECTION 305. *Deposit of funds.*

(a) All funds received under this Act, including the proceeds from the sale of property under section 304, shall be deposited by the State Treasurer in the [State Treasury], except that the State Treasurer shall retain at all times in a separate trust fund the sum of [fifty thousand dollars], from which he shall promptly pay all claims allowed as hereinafter provided.

(b) Before making the deposit he shall record the name and last known address of each person appearing from the holders' reports to be entitled to the abandoned property and the name and last known address of each insured person, beneficiary, or annuitant, and with respect to each policy or contract listed in the report of a life insurance corporation, its number, the name of the corporation, and the amount due. The record shall be available for public inspection at all reasonable business hours.

(c) Before making any deposit in the [State Treasury], the State Treasurer may deduct:

(1) any costs in connection with the sale of abandoned property;

(2) any costs of mailing and publication in connection with the abandoned property; and

(3) reasonable service charges.

PART IV. CONFLICTING CLAIMS

SECTION 401. *Claims for abandoned property.*

(a) Any person, not including another state, claiming an interest in property paid or delivered to the State Treasurer may file a claim thereto or to the proceeds of the sale thereof within fifteen years from the last day of the calendar year in which such property is paid or delivered to the State Treasurer under this Act.

(b) The State Treasurer shall consider each claim within 90 days after it is filed. He shall hold a hearing, if the claimant requests, and receive evidence concerning the claim.

(c) The State Treasurer shall make a written finding on each claim presented or heard, stating the substance of any evidence heard by him and the reasons for his finding. The finding shall be of public record.

(d) The State Treasurer shall pay each claim allowed without deduction for costs of notice or sale or for any service charges.

SECTION 402. *Judicial action upon determination.*

Any person aggrieved by a finding of the State Treasurer under section 401 or upon whose claim the State Treasurer has failed to act within 90 days after the filing of the claim may file a petition to establish his claim in the [insert appropriate state court]. The proceeding shall be brought within 90 days after the decision of the State Treasurer or within 180 days from the filing of the claim if the State Treasurer fails to act. A copy of the petition and a notice of hearing shall be served upon the State Treasurer, who shall have not less than 30 days within which to respond by answer. The proceeding shall be tried de novo without a jury. If judgment is rendered in favor of the petitioner, the State Treasurer shall make payment as provided in subsection (d) of section 401.

SECTION 403. *Escheat proceedings.*

(a) Within 90 days after the close of the fifteenth calendar year after the year in which any property presumed abandoned

under this Act is paid or delivered to the State Treasurer, if no claim therefor has been made and established by any person, not including another state, entitled thereto, the State Treasurer shall commence a civil action in the [insert appropriate state court] for a determination that such property shall escheat to the State; but if during, and at the expiration of, the 90 days, a final judgment is pending in a court action previously brought by a claimant under section 402, or if a person who has filed a claim to the property within the period prescribed by subsection (a) of section 401 remains entitled at the expiration of such 90 days to bring a court action under section 402, the State Treasurer shall commence his civil action after a final court judgment has been rendered adversely to the petitioning claimant, or after the expiration of the period in which a claimant would be entitled to bring a court action under section 402. The hearing in the action brought by the State Treasurer shall commence not less than 40 days after the commencement of the action.

(b) At the time such action is commenced, the State Treasurer shall cause notice thereof to be published once each week for two successive weeks in a newspaper having general circulation in the county in which is situated the last known address of the owner according to the records of the State Treasurer. If no address is listed, the notice shall be published in the county in which the holder of the abandoned property has his principal place of business within the State. Such notice shall be entitled "Notice of Proceedings to Declare Certain Abandoned Property Escheated to the State of [ ]" and shall include the following matters:

(1) the name and last known address of the owner;

(2) a brief description of the property;

(3) the name of the prior holder or holders;

(4) the amount or value of the property;

(5) a statement that the property was unclaimed for at least fifteen years while in the possession of the prior holder or holders and was unclaimed for fifteen years after it was paid or delivered to the State Treasurer pursuant to this Act;

(6) a statement that a complaint has been filed in the action for escheat;

(7) the place, time, and date of the hearing;

(8) a direction that unless any person claiming to be entitled to the property, or his representative, makes claim for the property in the manner provided in section 401 before the hearing, or appears at the hearing to substantiate his claim, the property shall escheat to the State and all right, title, or interest therein of the owners will be terminated and all claims of the owners thereto forever barred.

(c) Also at the time such action is commenced, the State Treasurer shall mail to the last known address of the owner according to the records of the State Treasurer a notice alike in all respects to the published notice required under the preceding subsection.

(d) If no person shall file a claim, or appear at the hearing to substantiate a claim, or where the court shall determine that a claimant is not entitled to the property claimed by him, then the court, if satisfied by evidence that the State Treasurer has complied with this Act, shall enter a judgment that the subject property has escheated to the State and that all right, title, or interest therein of the owners is terminated and all claims of the owners thereto forever barred.

SECTION 404. *Claims by other states.*

(a) At any time after property has been paid or delivered to the State Treasurer under this Act, and notwithstanding any decree by any court of this State under section 403 that such property is escheated to this State, any other state shall be entitled to present to the State Treasurer a claim that such other state has a superior right to escheat such property because:

(1) although no address of the owner of the property appeared on the records of a holder domiciled in this State, including a court of this State, a federal court within this State, or a public corporation; public authority, or public officer of this State or a political subdivision thereof, when the property was presumed abandoned under this Act, the other state possesses proof that the last known address of the owner was in fact in such other state; or,

(2) the last known address of the owner of the property appearing on the records of a holder domiciled in this State, including a court of this State, or federal court within this State, or a

public Corporation, public authority, or public officer of this State or a political subdivision thereof, was in such other state when the property was presumed abandoned under this Act, and such other state at that time did not provide in its laws for the escheat of such property, but currently so provides.

(b) The State Treasurer shall hold a hearing on each such claim within 90 days after it is filed. He shall make a written finding on each claim heard, stating the substance of any evidence heard by him and the reasons for his finding. The finding shall be of public record. He shall allow a claim if reasonably satisfied by proof of the superior right of the other state.

Part V. Obligations of Holder After Payment or Delivery

Section 501. *Relief from liability.*

(a) Upon payment or delivery to the State Treasurer of property abandoned, the State shall assume custody and shall be responsible for all claims thereto.

(b) Any person who pays or delivers abandoned property to the State Treasurer under this Act, and has in all other respects complied with the provisions of this Act, is relieved of all liability to the extent of the value of the property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to the property.

(c) Any holder who has paid or delivered to the State Treasurer moneys presumed abandoned may make payment therefor within the time limited by section 401 to any person appearing to be the owner, and shall be reimbursed by the State Treasurer upon proof of such payment and proof that the payee was entitled thereto. Any holder who has delivered to the State Treasurer property, including a certificate of any interest in a business association, pursuant to this Act, may reclaim such property if still in the possession of the State Treasurer, without payment of any fee or other charges upon proof that the owner thereof has claimed such property from the holder.

SECTION 502. *Income accruing after payment or delivery.*

When property other than money is delivered to the State Treasurer under this Act, any dividends, interest, or other increments realized or accruing on such property at or prior to liquidation or conversion thereof into money, shall upon receipt be credited by the State Treasurer to the owner's account. Except for amounts so credited, the owner is not entitled to receive income or other increments or money or other property paid or delivered to the State Treasurer under this Act.

PART VI. COMPLIANCE AND ENFORCEMENT

SECTION 601. *Periods of limitation not a bar.*

The expiration of any period of time, specified by statute or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed to be abandoned property, nor affect any duty to file a report required by this Act or to pay or deliver abandoned property to the State Treasurer; but this section shall not be construed to affect any right of defense which became vested prior to the effective date of this Act.

SECTION 602. *Enforcement.*

(a) The State Treasurer may bring an action in a court of appropriate jurisdiction, as specified in this section, to enforce the duty of any person under this Act to permit the examination of the records of such person; or for a judicial determination that particular property known by the State Treasurer to be held by any person is subject under law to escheat by this State pursuant to this Act; or to enforce the delivery of any property to the State Treasurer as required under this Act.

(b) The State Treasurer may bring an action under this Act in any court of this State of appropriate jurisdiction if:

(1) the holder is any person domiciled in this State, including any business association, banking organization, or financial organization organized under the laws of, or created in, this

State, and any national bank, or federal savings and loan association located in this State, but not including any federal court within this State;

(2) the holder is any person engaged in or transacting business in this State, although not domiciled in this State;

(3) the property is tangible personalty and is held in this State;

(4) the holder is any court of this State, or any public corporation, public authority, or public officer of this State, or a political subdivision thereof.

(c) In any case where no court of this State can obtain jurisdiction over the holder, the State Treasurer may bring an action in any federal or state court with jurisdiction over the holder.

(d) At the request of any other state, the Attorney General of this State shall be empowered to bring an action in the name of such other state in any court of this State or federal court within this State, to enforce the abandoned property laws of such other state against a holder in this State of property lawfully subject to escheat by such other state, if:

(1) the courts of such other state cannot obtain jurisdiction over the holder; and

(2) such other state makes reciprocal provision in its laws for the bringing of an action by an officer of such other state in the name of this State at the request of the Attorney General of this State, to enforce the provisions of this Act against any person in such other state believed by the State Treasurer of this State to hold property subject to a presumption of abandonment under this Act, where the courts of this State cannot obtain jurisdiction over such holder; and

(3) the laws of such other state provide for payment to this State of reasonable costs incurred by the Attorney General of this State in bringing an action under this section at the request of such other state.

(e) This State shall pay all reasonable costs incurred by any other state in any action brought by such other state at the request of the Attorney General of this State under this section. Any state bringing such action shall be entitled additionally to a reward of [15] per cent of the value, after deducting reasonable costs, of

any property recovered for the State as a direct or indirect result of such action, such reward to be paid by the State Treasurer.

SECTION 603. *Penalties.*

(a) Any person who wilfully fails to render any report or perform other duties required under this Act shall be punished by a fine of [twenty-five dollars] for each day such report is withheld or such duties not performed, but not more than [one thousand dollars].

(b) Any person who wilfully refuses to pay or deliver abandoned property to the State Treasurer as required under this Act shall be punished by a fine of not less than [one hundred dollars] nor more than [one thousand dollars], or imprisonment for not more than [six months], or both, in the discretion of the court.

PART VII. MISCELLANEOUS

SECTION 701. *Rules and regulations.*

The State Treasurer may make such rules and regulations as he finds necessary to administer and enforce the provisions of this Act.

SECTION 702. *Excepted property.*

This Act shall not apply to any property that has been presumed abandoned or has escheated under the laws of another state prior to the effective date of this Act.

SECTION 703. *Severability.*

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provisions or applications, and to this end the provisions of this Act are severable.

SECTION 704. *Repeals and Amendments.*

The following statutes of this state are repealed or amended, as indicated:

COMMENT

PART I. SHORT TITLE AND DEFINITIONS

SECTION 102. *Definitions.*

The definitions of this section are designed to conform with and to take advantage of the rules set forth in *Texas v. New Jersey.*

The definition of "banking organization" enlarges the Uniform Act's category of "banking organization" to include national banks. Montana, Mont. Rev. Codes Ann. § 67-2201 (Supp. 1965), and Utah, Utah Code Ann. § 78-44-1 (Supp. 1965), also make this change. There is a question raised in this area pertaining to the state's authority to escheat funds held by a national bank. The source of this question is *First National Bank v. California,* 262 U.S. 366 (1923), in which a California statute providing for immediate escheat was held ineffective as against such funds. Although not overruled by *Anderson Nat'l Bank v. Luckett,* 321 U.S. 233 (1944), the latter case, in permitting Kentucky to take custody of funds held by a national bank, distinguished the former case on the basis that Kentucky's laws provided for a custodial period followed by a determination that there was "abandonment in fact" before escheat could occur whereas the California statute provided for immediate escheat on the basis of presumed abandonment. The proposed statute should fall within the protection of the *Anderson* decision. There is a fifteen year custodial period followed by the formal escheat proceedings of section 403 before escheat can occur. Although there remains a possibility that *First National Bank v. California, supra,* could be cited to defeat the proposed statute as it applies to national banks, "it would appear that the *Anderson Nat'l. Bank* case, in effect, removed practically all restriction on the state's power over abandoned bank deposits." Sentell, *A Study of Escheat and Unclaimed Property Statutes* 114 (1962).

Because *Texas v. New Jersey* eliminated any need for the escheating state to have jurisdiction over the holder, the language in the definitions previously making such jurisdiction a prerequisite to action under this act has been deleted from the definitions of "banking organization," "financial organization," "life insurance

corporation," "utility," and all sections of the act which had a "contacts" requirement. Rather than adopt the "contacts" rule, which the Supreme Court felt would leave in permanent turmoil a question which should be settled once and for all, the Court decided to delineate a clear rule which would "govern all types of intangible obligations like these." *Texas v. New Jersey, supra,* at 678. Accordingly, now even in the absence of traditional "contacts" between the state and the holder, the state can escheat property owed to a person whose last known address, as shown on the books of the holder, is in this state. The Court candidly admitted that the rule adopted was not dictated by constitutional considerations and that any of the several rules urged by the various interested states could have been adopted consistent with constitutional requirements. (Query: does original action jurisdiction make any resulting decision of the Supreme Court "constitutional"?) "It is fundamentally a question of ease of administration and of equity." *Texas v. New Jersey, supra,* at 683.

A definition of "escheat" has been added to make clear that in most cases this term refers to all types of laws pertaining to abandoned property. In part this is necessitated by references to the abandoned property laws of other states which may provide for immediate escheat (in the narrow, specific sense), a purely custodial plan, a custodial-escheat arrangement, or some variation thereof. Thus, unless the context otherwise requires, "escheat" is used in a broad sense in both the statute and the memorandum.

The definition of "property" has been limited to tangible personalty located in this state and all intangible personalty wherever located. This change was necessary because of the statement of the Supreme Court in *Texas v. New Jersey, supra,* that "[w]ith respect to tangible property, real or personal, it has alway been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat." At 677.

The definition of property does not, however, include realty. Several reasons prompted this decision. Property in decedents' estates is not made subject to this act, thus, the most likely case in which realty might be involved is excepted. Furthermore, there is a question whether realty can ever be deemed "abandoned" in the sense of, and with the consequences inherent in, the proposed

statute. "The general rule is that the legal doctrine of divestiture of title to property by abandonment is not applicable as to real property where the state has passed a perfect legal title thereto." 1 Am. Jur. 2d *Abandoned Property* §13 (1962); *Sowles v. Minot,* 82 Vt. 344, 73 Atl. 1025 (1909). "A legal title perfected into a grant or vested by deed or by judgment may never be lost by abandonment." *Goldman v. Quadrato,* 142 Conn. 398, 114 A.2d 687 (1955).

Part II. Presumption of Abandonment

Section 201. *General conditions precedent to the presumption of abandonment.*

This section sets forth three rules—one of which must be satisfied before a state can even consider escheating intangible personal property under any of the following sections. Tangible personalty may still be escheated if it is located in this state and meets one of the appropriate tests set out in sections 202 through 210 of this act. This section is simply *Texas v. New Jersey* incorporated into the proposed statute. The statute thus provides for the widest possible assertion of the state's power to escheat property under the Supreme Court decision.

Subsection (a), the primary rule set down by the Court, provides for escheat of abandoned property by a state on the sole basis that the owner's last known address, as shown on the holder's records, is in that state. Subsections (b) and (c) allow escheat by the domiciliary state of the holder, subject to later escheat by another state (see section 404), under the conditions specified in those subsections.

The primary rule gives some states many opportunities for escheating property never before contemplated. Apparently all traditional "contacts" tests with the holder have been abandoned—thus states may claim property held by any corporation in the United States, just so long as the owner's last address as shown by the corporation's books is in the escheating state. (However, jurisdiction over the holder may still be a separate problem for enforcement purposes—see section 602.) Moreover, by subsection (a) (2) it is made clear that this same test—last

known address of the owner—applies to courts, public corporations and officers, so that again the location of such court or public body is irrelevant.

For the purposes of subsections (b) and (c), providing for escheat by the state in which the holder is domiciled, "domiciled in this state" is meant to include courts, public corporations and public officers of this state—however strange it may seem to speak of these entities as being "domiciled" in a state.

SECTION 202. *Property held by banking or financial organizations.*

This section adopts section 2 of the Uniform Act almost without change. The subject matter covered, unclaimed property held by banking or financial organizations, is one commonly covered by statute, whether part of any uniform law or not. At least thirty-six states provide for capture of dormant bank accounts, and many provide for the capture of tangible and intangible personal property taken from safe deposit boxes.

One change, carried uniformly through all sections of the proposed act, first appears in this section. The period necessary for the subject property to be presumed abandoned is suggested to be fifteen years rather than seven as used in the Uniform Act. Several reasons prompted the change. Comments to the Uniform Act suggest that states may well wish to change this provision and that it does not decrease the effectiveness of the Uniform Act to do so. Commissioners' Note, 9A Uniform Laws Ann. 420 (1965). Almost every adopting state lengthens this period; and at least half of these states use the suggested fifteen year period. The proposed act only presumes property abandoned after fifteen years of inactivity; another fifteen year period must run before the property escheats. Fifteen years is used in every section except section 206 for the sake of achieving uniformity in treating different types of property and making the act simpler and more understandable to holders of property.

The tests for deciding whether property is abandoned are similar throughout the act and are mainly three: a lack of activity in relation to the account or other property, written correspondence concerning the property, or other interest as indicated by written memoranda.

SECTION 203. *Unclaimed funds held by life insurance corporations.*

This section is the counterpart of section 3 of the Uniform Act. The only point meriting special mention is the jurisdictional test. The Uniform Act provides for this type of property, as the proposed act does for all types of property in section 201, that escheat may occur if "the last known address of the owner, appearing on the records of the holder, is in this state." This seems ideal, as it spreads over all the states the proceeds to be realized from this area. But states like New York, where many insurance companies are incorporated, have adopted other jurisdictional tests—thus giving rise to the problem of multiple state escheat claims. This problem was resolved by *Texas v. New Jersey, supra,* in favor of the test adopted in the proposed act. New York will undoubtedly have to amend its law. See Section II of this memorandum, *supra,* 140.

SECTION 204. *Deposits and refunds held by utilities.*

The only change in this section from the Uniform Act is to eliminate the "contacts" requirement as formerly contained in the "in this state" language of section 4 of the Uniform Act. See also Section II, *supra.* Total reliance is thus placed on the three rules of section 201.

SECTION 205. *Undistributed dividends and distributions of business associations.*

As in section 204, the change in this section is an elimination of the jurisdictional tests proposed by the Uniform Act. The problem of possible escheat by several states is settled by *Texas v. New Jersey, supra,* at the expense of states in which many corporations are incorporated, by adopting a rule which, in effect, emphasizes population. *Standard Oil Co. v. New Jersey,* 341 U.S. 428 (1951), is thus overruled.

SECTION 206. *Property of business associations and banking or financial organizations held in respect of dissolution.*

This section adopts the category of property covered by sec-

tion 6 of the Uniform Act. It changes the point in time at which the property is presumed abandoned. Presently, under some law, *e.g.*, N.H. Rev. Stat. Ann. §§ 294:97 to :98 (1955), a corporation may exist for three years after the court decree is issued which dissolves such corporation, for the purpose of winding up its business and distributing its property. The end of this three year period or the time when the actual and final dissolution or liquidation occurs, whichever is first, appears to be a convenient and reasonable time at which to presume the property abandoned. With this test no problems of custody, storage, or maintenance of the property will arise solely because of this act, as might have been the case under the Uniform Act's test.

In accord with the *Texas v. New Jersey* decision the "contacts" tests of the Uniform Act have been eliminated.

SECTION 207. *Property held by fiduciaries.*

Various alternative "contacts" requirements contained in the Uniform Act are eliminated from this section, thus adopting the tests of section 201.

SECTION 208. *Property held by courts and public officers and agencies.*

This section is essentially section 8 of the Uniform Act, but in addition, the proposed act covers tangible personalty and also subjects property held by federal courts within the state to the provisions of the act. There is precedent for such a change. Utah Code Ann. §78-44-8 (Supp. 1965), and Va. Code Ann. §55-210.9 (Supp. 1964) specifically include federal courts within the states. The Supreme Court has held that states have this right. *U.S. v. Klein,* 303 U.S. 276 (1938). See annotations, 95 L. Ed. 1093 (1950), 7 L. Ed.2d 871 (1961).

Another change in this section eliminates the "contacts" test. In so doing, the scope of this section becomes very broad—including every court, public corporation, authority or officer of any state, and political subdivisions thereof. Although this seems to be the scope permissible under the Supreme Court rule, the practical difficulties of enforcement and the legal intricacies involved may persuasively argue for limiting this section, either in the

statutory language itself or as the act is administered, to courts, public officials or agencies and political subdivisions which are part of, or located in, this state.

If so limited, enforcement becomes less of a question. A state's own courts should be no problem; however federal courts located even within the state are a different matter. Can a state go to another federal court of equal authority or must it go to a superior court—possibly the Supreme Court? The problem is compounded when, as in the proposed statute, a state tries to reach property held by every court and public authority in every state. In trying to reach such property, a state may find itself bringing numerous original actions in the Supreme Court. However, although the Supreme Court has original jurisdiction in suits involving states as a party, such jurisdiction is not necessarily exclusive. Thus resort may be had to lesser federal courts and even state courts. But in any case where a state is dissatisfied with the results of its efforts in such courts, review may be secured in the form of an original action in the Supreme Court. Should this burden on the courts become too great, another rule regulating this category of holders could be expected. These questions are actually posed by the *Texas v. New Jersey* decision rather than answered.

The seriousness of this problem could be greatly reduced if a majority of the states adopted a provision like that proposed in section 602(d). Such a reciprocal provision would make the attorney general of each state the agent of the other states. See section 602 and the related discussion.

SECTION 209. *Unclaimed property held by the federal government.*

This section has no counterpart in the Uniform Act. However, several states have provisions pertaining to this class of property. Kentucky flatly subjects such property like any other class to the provisions of the act. Ky. Rev. Stat. Ann. §393.068 (1963). California has a statute, in addition to the Uniform Act, in many ways like the Uniform Act but pertaining only to federally held property. Cal. Civ. Proc. Code §§1600-1615 (West Supp. 1964). No cases have been litigated under these laws; if there

are problems or objections in this area, they are yet to be tested.

Interest by the states in this class of abandoned property is understandable, considering the potential source of revenue involved. One observer reports that it has been estimated that the value of the unclaimed property held by the federal government amounts to about five billion dollars. Sentell, *A Study of Escheat and Unclaimed Property Statutes* 71 (1962).

The problem concerning this class of property is that of discovery. Presently the states have no means of determining what property is held by which part of the federal government; nor is the federal government required to disclose such information. If and when federal laws are passed providing for such disclosure, this class of abandoned property may well be one of the most important in terms of revenue realized.

The proposed subsection presents alternative approaches to this problem. If the bracketed part is deleted, then the proposed subsection is like Kentucky's. Federally held property is just another category of property presently subject to the act. Should the states learn of property being held by the federal government, or should informal disclosure procedures be established by agencies of the federal government, the states could proceed immediately to take custody of the property presumed abandoned. If the bracketed part is included, any activity by the state concerning this class of property is necessarily delayed until formal enactment of laws by Congress providing "for the discovery of unclaimed property held by the federal government, and for the furnishing of such information to the states."

It should be noted that the word "only" is used in stating the jurisdictional test to make it clear that the state will escheat property held by the federal government *only* when the last known address of the owner is in this state. Since the federal government is not really domiciled in any state, it will be left to other statutes or decisions to dispose of property within the scope of the exceptions (section 201(b) and 201(c)) to the court's primary rule—which is made the sole jurisdictional test for this section.

SECTION 210. *Other property held for another person.*

This omnibus section of the proposed act is essentially the

omnibus section 9 of the Uniform Act, except that once again the requirement of contacts in the escheating state has been eliminated pursuant to *Texas v. New Jersey, supra.*

PART III. IDENTIFICATION AND DISPOSITION OF ABANDONED PROPERTY

SECTION 301. *Report of abandoned property.*

This is section 11 of the Uniform Act with only minor modification. Section 23 of the Uniform Act is incorporated into this section, since it seems closely related to the other parts of the section. In broadening the permissible scope of applicability of this act, *Texas v. New Jersey* also complicated much of the administrative procedure needed to be set up in the act. The best example may possibly be found in this section, requiring the reporting to the appropriate state treasurer of property deemed abandoned under its laws. For just as one can require such reporting, so can every other state in the union—and every statute may establish different procedures, times, and forms. Thus the reporting obligation of a corporation operating in many states may impose a heavy burden on interstate commerce. Although probably a justifiable hindrance, everything possible should be done to minimize this burden. A uniform reporting procedure would be a great improvement. Should such a statute be proposed, every state should of course amend its reporting requirements accordingly. However, since the reporting requirements proposed in this act are drawn from the Uniform Disposition of Unclaimed Property Act, it is entirely conceivable that any proposed uniform reporting procedure would closely follow that already in this proposed act. Several parts of this section merit special comment.

Subsections (b) (1) and (b) (3) are the source of a problem discussed more fully under section 302, *infra.* This problem is one of two major constitutional objections raised against the Uniform Act—that dispensing with notice to the last known owners of property of any value violates the due process clause of the Fourteenth Amendment. Under an act of our type, where custody leads to final escheat, the problem is compounded. This problem of notices arises because of practical necessity, as is indicated by

subsections (b)(1) and (b)(3). To require notice by the state to owners of all property notwithstanding its value, holders would have to report to the state all known names and addresses of owners. For some holders, such as banks, who hold many small amounts, this would be a great burden. Moreover, the proceeds realized by the state would not justify the expense involved—there being a distinct possibility that a particular claim would result in a net loss to the state. The same constitutional problem arises no matter what minimum dollar value is chosen as the point at which the reporting of known names and addresses is no longer required. Accordingly, although the Uniform Act uses three dollars, many states use a higher dollar value, twenty-five being common but fifty being the maximum. Ten dollars is used in the proposed act as a compromise, but the figure is certainly open to change. In (3), holders are authorized to report such items in the aggregate rather than individually. This is merely an extension of (1), since individual names and addresses are not reported.

An alternative solution to this problem is available but not recommended, since a constitutional test of this aspect of the act is not likely, and the outcome under the proposed act is far from certain. However, to avoid the constitutional problem which results from not reporting names and addresses of owners of property of less than ten dollars in value, a state could simply elect not to take custody of, or eventually escheat, such amounts. This would violate the objective of preventing windfalls to holders, and could prove to be a material windfall to those holders who, if complete reporting of names were required, would be unduly burdened. Avoiding either undesirable effect, *i.e.*, a windfall or undue burden, seems to justify the constitutional risk involved in the recommended statute.

Subsection (d) provides for the time when reports must be filed. Such dates may be changed to meet specific situations in various states unknown to the draftsmen. For example, if other reports are required of particular types of businesses, it may be desirable to have the time for filing all reports, related in any way, coincide for the convenience of the businessman making the report. However, it should be remembered that nationwide uniformity

in the reporting requirements would be of the greatest benefit to businesses required to report to two or more states.

Subsection (e) requires that the holder communicate with the owner if reasonably possible. This subsection requires greater effort on the part of the holder than does the corresponding part of the Uniform Act. Such contact is deemed desirable to avoid, if possible, the constitutional objections to taking property without due process of law through lack of notice. This section makes no exception for minimum dollar amounts. Thus a holder must try to notify by mail any owner whose name and address are known or can be discovered with due diligence.

Subsection (g) regulates how much property must initially be reported. By omitting this section, a fair interpretation of the statute would be that all property must be reported upon which the period of time resulting in the presumption of abandonment had run by the effective date of the act. Rather than accept this solution, which presents practical difficulties for conscientious holders, the draftsmen recommend that the bracketed date be made to read January 1 of the twentieth year preceding the year in which the act becomes effective. Thus, any property which by the terms of the proposed act has been presumed abandoned for more than five years would not be reported.

States which have adopted provisions similar to the proposed subsection (g) have chosen various periods of time beyond which reporting of abandoned property is no longer required. In states where the period for the presumption of abandonment to arise is fifteen years, twenty-five years is a common period of limitation. In such states, any property which, by the terms of the proposed act, has been abandoned for more than ten years would not be reported. The actual period chosen is subject to each state's individual preference.

SECTION 302. *Notice and publication of lists of abandoned property.*

This is section 12 of the Uniform Act, but with some material changes. While the Uniform Act was admittedly designed to minimize administration expense, the proposed section 302 is

more concerned with avoiding the constitutional objection to the act introduced in the comment to section 301.

The most important change relating to the constitutional problem is the omission of a section of the Uniform Act dispensing with notice to owners of property of less than twenty-five dollars. It is claimed that escheating the property violates the due process clause of the Fourteenth Amendment because there is no notice given the owner at any time of the proceedings. In *New Jersey v. Standard Oil Co.*, 5 N.J. 281, 74 A.2d 565 (1950), a similar provision of the New Jersey act dispensing with notice to the owner prior to the escheat of amounts under fifty dollars was declared unconstitutional. Moreover, this provision of the Uniform Act has been held unconstitutional by a New Mexico trial court. *Clovis National Bank v. Callaway,* 69 N.M. 119, 364 P.2d 748 (1961). Unfortunately, the decision on this point was not appealed. However, these cases indicate that a constitutional objection does exist when the requirement of notice is dispensed with. The recommended section 302 provides for complete direct notice and publication within the context of aggregate reporting as provided by section 301. By simply omitting the Uniform Act's provision, the proposed statute requires mailed notice and publication by the state for all names and addresses of owners known to the state. This will include all owners of property of value greater than ten dollars and, if reported by the holders, those owners of property of value less than ten dollars. Notice to all owners is the only sure way completely to avoid the constitutional objection, but practical considerations make this undesirable, unless the alternative is adopted which exempts items of property of less than ten dollars in value from the provisions of the act. It is believed that the safeguards provided here and in section 301 (direct communication by the holder) may well be adequate to satisfy constitutional requirements.

Subsection (c) is an addition to provide the holder with notice so that he may more easily meet his obligations under this section and section 303.

SECTION 303. *Payment or delivery of abandoned property.*

The proposed section 303 brings together in one section the

provisions found in the Uniform Act in sections 13, 22, and 24. These provisions all relate to the payment or delivery of abandoned property to the state treasurer and it is deemed desirable that the provisions be combined.

SECTION 304. *Sale of abandoned property.*

This is a modification of section 17 of the Uniform Act. The Uniform Act section requires a treasurer's sale within one year after the delivery of the property. The proposed section would allow him greater leeway for discretion based on prevailing market trends and prices. He does not have to sell, but if he does sell, sale under subsection (a) must be in the place offering, in his judgment, the best market. The draftsmen saw no reason to confine places of sale to cities in the situs state. Although in practice most sales probably will be made within the state, there may arise situations where no in-state city offers any market for a particular item. As worded, the proposed section makes unnecessary the Uniform Act's wording: "He need not offer any property for sale if, in his opinion, the probable cost of sale exceeds the value of the property." That becomes simply one more factor to be taken into consideration in deciding whether to sell at all.

The section adds a separate provision for securities listed on an established stock exchange. The new classification is contained in the California version of the Uniform Act. Cal. Code Civ. Proc. §1516 (West Supp. 1964). The language in subsection (b) relating to sale of such stock is a modification of the California language, which says: "Securities listed on an established stock exchange shall be sold at the prevailing prices on said exchange." The language in subsection (b) makes clear that, as with the property covered under subsection (a), the treasurer does not have to sell the stock. If in his judgment sale would be advantageous, it shall be at prevailing exchange prices. There should be no difficulty in meeting this requirement. The treasurer can without difficulty open an account with a broker, to whom ordinary orders may be given. Any broker's commission will be deducted from the receipts of the sale price received by the state, but the sale itself would have been at prevailing exchange prices.

Subsection (e) contains the wording of Cal. Code Civ. Proc. §1516(d) (West Supp. 1964). This was prudently added to the

Uniform Act to hold the state harmless in any action brought by an owner aggrieved by the state sale of what he might consider a cherished item of personal property.

SECTION 305. *Deposit of funds.*

This section is based on section 18 of the Uniform Act. The draft provides that all funds, except for a $50,000 fund from which claim payments may be expeditiously made without the need for an appropriation, shall go to the state treasury. Another fund might be chosen to receive these moneys. Some states choose the school fund; Virginia designates the Literary Fund, and North Carolina, the state university. This is a matter for legislative determination.

Subsection (c) lets the treasurer reimburse himself for expenses connected with specific property, the balance being paid over to the state treasury. This allows records to be kept as to part of the cost of administering this act, and puts operations to a large extent on a self-sustaining basis.

PART IV. CONFLICTING CLAIMS

SECTION 401. *Claims for abandoned property.*

This section sets forth the procedure for filing claims to property already in the custody of the state for all persons except other states. In order to incorporate the special standards applicable to claims made by another state into the statutory claim procedure, without unduly complicating the procedure for all other claimants, it was decided a separate section was necessary. Accordingly, section 404 was drafted to set forth the procedure for claims brought by other states, and states were excepted from the operation of section 401.

Subsection (a), based on section 19 of the Uniform Act, provides a claim period equal to and concurrent with the time period after which the property is escheated. A 15 year period during which the state has custody of the property is equal to the period some states now provide for pre-escheat treasury custody of court-held funds. It is considered of sufficient duration to protect the interests of owners, considering that the total

period, counting from the time the period leading to presumption of abandonment begins to run until the time of escheat, is 30 years in most cases.

The subsection is drafted to provide a claims period running from an easily determinable date — the last day of the calendar year in which the property passes to state custody — rather than the date the presumption of abandonment arose, or a report was made to the state treasurer. As drafted, therefore, the section will often yield a claims period longer than precisely 15 years. This is a further protection for owners.

Subsections (b) and (c) are modeled after section 20 of the Uniform Act. A number of states having comprehensive abandoned property statutes report that few formal hearings are held on claims. New York holds such hearings in only three per cent of refund cases. Sentell, *A Study of Escheat and Unclaimed Property Statutes* 72 (1962). Nevertheless, the machinery should be available to provide all possible safeguards for owners, particularly because our proposed statute is of the combined custodial-escheat type. If a claimant requests a formal hearing, he will have one. Otherwise, the state treasurer will take the claim under advisement and will decide it in accordance with administrative procedures which he shall have devised. In either case, the state treasurer is required to render a decision in writing. This provides an additional element of fairness to claimants.

Subsection (d) provides that the successful claimant receive his property or the sale value of it without charge for the costs connected with its keeping or sale. In this respect the statute is "purely" custodial, with the state acting essentially as a gratuitous bailee. This is yet another aid to and protection for owners.

In practice, the state probably will suffer no net loss by reason of this apparent generosity. State abandoned property statutes draw into the treasury much more than the state is ever required to pay out in claims allowed to owners. Even under purely custodial statutes, the state has the use, for all intents and purposes in perpetuity, of large sums it will never have to repay. Arizona, for example, in the first five years of operation of the Uniform Act, took in $589,000 while paying out only $89,000. Oregon's four-year figures are $542,000 in receipts, only $103,000 in refunds. Utah's figures for four years: $608,000 received; $42,000

paid out. Sentell, *A Study of Escheat and Unclaimed Property Statutes* 81-84 (1962).

SECTION 402. *Judicial action upon determination.*

This is fundamentally section 21 of the Uniform Act. For the convenience of the state treasurer, it is suggested that for purposes of the actions authorized in sections 401 and 402 each state fill in the brackets with the particular name of the appropriate state court located in the county wherein is located the capital of the state.

The provision for trial de novo yields additional protection for a claimant. He or the treasurer may make use of any previous written decision of the treasurer as evidence, but the court is not to make any presumption in favor of the correctness of such decision.

This section is also limited to claimants other than states, since the procedure for states is contained in section 404. The limitation is achieved by adding "under section 401" as a limitation to "person." Section 401 now specifically excludes states.

SECTION 403. *Escheat proceedings.*

This section also specifically excludes states from its operation through the language "not including another state" in subsection (a) and "of the owners" in subsections (b)(8) and (d). The specific exclusion may not actually be necessary, since any final escheat proceedings can be effective only as against other persons and not other states. "[T]he State of corporate domicile should be allowed to cut off the claims of private persons only, retaining the property for itself only until some other state comes forward with proof that it has a superior right to escheat." *Texas v. New Jersey, supra,* at 682. Thus, under this language of the Supreme Court any attempt by a state to prevent or cut off subsequent claims by another state under the *Texas v. New Jersey* exceptions would be wholly ineffective.

This section borrows its basic structure from the similar escheat provision of Connecticut. Conn. Gen. Stat. Ann. §3-72a (Supp. 1964). It provides a specific escheat procedure, as opposed to the present generally-worded law which simply declares

certain kinds of unclaimed property, at the expiration of the custodial period, escheated to the state. In effect this section gives an owner further notice of the jeopardy of his property and one more chance to obtain it, this time solely through court proceedings instead of administrative hearing. However, the escheat judgment, once rendered, cannot be reopened. To provide for such reopening upon, for example, a statement that the claimant had never received actual notice, would vitiate the escheat provision of this statute.

A civil action for escheat in an action in rem. It is believed that the provisions for notice in this section are sufficient to meet any constitutional due process requirements, where names of owners are known to the state. Here again, however, where small sums reported in the aggregate are involved, there can be no notice, and the section, as do sections 301 and 302, risks unconstitutionality for considerations of ease and expense of administration.

Whereas Connecticut provides only for notice by publication within the state, this proposed section once again requires a state mailing of notice to the last known address of the owner, whether within or without state boundaries.

It should be noted that subsection (a) delays the treasurer in beginning his escheat action in two situations. Section 402 may operate so that a claimant filing at or near the end of the claims period will have 180 days thereafter to file his own action if the treasurer does not render a decision on his claim, or 90 days if the treasurer does act adversely. Also, a court action brought by the claimant either before or after the expiration of the claims period might not have come to final judgment within 90 days after the close of the fifteenth year after the state received the property. It would be unfair to let the state treasurer interfere with these rights by precipitating an escheat action, particularly because the claimant may not be the owner named in the state records and so might receive no notice of the escheat proceedings.

As drafted, the section produces a custodial period that often will be longer than the minimum 15 years. From delivery to commencement of the escheat action, the period could be as long as 16 years, 89 days. The ease of administration provided by an end-of-calendar-year date from which the custodial period begins makes the longer period worthwhile. Moreover, the section al-

lows the state treasurer to bring virtually all his escheat actions which date back to a given year at the same time.

SECTION 404. *Claims by other states.*

This important section provides the administrative procedure by which another state, claiming a right in property which has already been escheated by this state under one of the Supreme Court's exceptions to the general rule (section 201 (b) and (c)) may present its claim without bringing an original action in the Supreme Court. Thus states may avoid forcing original actions in the Supreme Court.

The state treasurer is directed to allow the claim if he is reasonably satisfied that the claiming state has shown a superior right to the property under one of the two specific exceptions set out by the Supreme Court. Sections 201 (b) and 201 (c) are meant to embody the two exceptions, set out in *Texas v. New Jersey, supra,* as precisely as possible. Of course, if the state making the claim is dissatisfied with the state treasurer's disposition of the claim it can always bring an original action in the Supreme Court.

An issue which may prove troublesome to resolve in such cases is whether or not a claiming state has proved that "the last known address of the owner was in fact in such other state." The test under the primary rule, the last known address of the owner appearing on the records of the holder, is quite objective and easy to apply. But what constitutes proof that the "last known address of the owner was in fact in such other state"? What sources of information will be accepted? And when has one proved that an address is really the last known address? And known to whom? Must the owner have died at such address for one to be sure that it was the last known address?

Although the revised statute separates the claim procedure for states from that applicable to all other claimants, there are some similarities between sections 401 and 404. The time within which the state treasurer must act is the same, and he must make a written finding on all claims, which finding shall be of public record. There are also differences besides those already noted. A state may bring an action at any time after the state has taken custody of the property while all other claimants must act within fifteen

years. Under section 404, the state treasurer must hold a hearing on each claim, while under section 401 such action is discretionary unless requested by the claimant.

PART V. OBLIGATIONS OF HOLDER AFTER PAYMENT OR DELIVERY

SECTION 501. *Relief from liability.*

Section 501 constitutes, with some change, section 14 of the Uniform Act. The holder is relieved of "all liability," insofar as claims by alleged owners are concerned. Subsection (c) provides that the holder, if satisfied as to the validity of a claim made to him, may make payment to the owner and be reimbursed by the state upon proof of payment and the validity of the claim. If a claim is made upon the holder for a specific item of tangible or intangible property, he may reclaim it from the state if it has not been sold by the state treasurer. Although a holder is under no obligation to make such a payment to the claimant, he may well want to be the one to do so to maintain favorable customer relations.

SECTION 502. *Income accruing after payment or delivery.*

This is essentially section 15 of the Uniform Act, modified in a manner quite similar to that used by California. Cal. Code Civ. Proc. §1514 (West Supp. 1964). It differs from the Uniform Act in that the Uniform Act does not provide for crediting to the owner's account any increment related thereto.

There would seem to be little justification for denying the owner any earnings or increments realized or accrued on his property except for the practical difficulties involved. That is, when the property held by the state is money or has been converted into money, identifying specific earnings or increments attributable thereto becomes practically impossible. Why should one owner be credited with a greater rate of interest than another simply because the state purchased a better investment with his money? Should the state be chargeable with a minimum return on the property it holds whether or not the property in fact earned such amounts? Because of these and other questions, it seems defens-

ible to deny the owner credit for any earnings once his property is in the form of cash.

But the above reasons do not justify denying to the owner credit for interest, dividends, or other increments clearly attributable to his property before its conversion or liquidation into cash. While under section 17 of the Uniform Act, property must be sold within one year, a different result is reached by section 304 of the proposed act. In the proposed section 304, the state is empowered to sell the property, but is not required to do so at all. Thus, any specifically identifiable earnings or increments, which may be substantial, continue to be credited to the owner's account indefinitely.

Part VI. Compliance and Enforcement

Section 601. *Periods of limitation not a bar.*

Section 16 of the Uniform Act lifts the bar of the statute of limitations in requiring holders to report or pay over property to the custody of the state. That is, unclaimed property is treated as subject to the act even though the period of limitations has run in the holder's favor before the presumed date of abandonment.

In *Campbell v. Holt,* 115 U.S. 620 (1885), the Supreme Court held that where, under the local law as interpreted by the courts, title to real or personal property has not "vested," the Fourteenth Amendment is not violated by legislation reviving a cause of action barred by the statute of limitations. Perusal of local law therefore becomes important in this connection. While the draftsmen are of opinion that, as drafted, the section is constitutional, on balance it may be decided that it would be wise to join Arizona, Washington, and Utah in omitting this section. Omission would have the effect of allowing the statute of limitations as a defense to any state action seeking to enforce a report or delivery of abandoned property.

Taking New Hampshire as an example, N.H. Const., part I, art. 23, a Bill of Rights article, forbids the General Court to pass "retrospective laws . . . for the decision of civil causes. . . ." A law that takes away the ripened defense of the statute of limitations in an action pending at the law's effective date is retrospec-

tive, unconstitutional, and void. *Woart v. Winnick,* 3 N.H. 473, 481 (1826), citing at 479 the language of Justice Story sitting as United States circuit justice in New Hampshire in *Society v. Wheeler,* 2 Gallison 105 (1805): "Upon principle every statute, which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

"A law may be retrospective in its operation, if it affect an existing cause of action, or an existing right of defence, by taking away or abrogating a perfect existing right, although no suit or legal proceeding then exists." *Clark v. Clark,* 10 N.H. 380, 386 (1839); *Rockport v. Walden,* 54 N.H. 167, 173 (1874).

It would certainly appear that, at least as to rights of defense vested before the effective date of this proposed statute, a legislature cannot act to force the holder to put the property in state hands for the custody of an owner who could not himself obtain the property from the holder. The California Supreme Court, per Traynor, J., has reached this conclusion. *Douglas Aircraft Co. v. Cranston,* 58 Cal. 2d 462, 374 P.2d 819 (1962) (interpreting the statute of limitations provision as applying only to claims on which the statute had not run on the effective date of California's act). Oregon had added a proviso similar to the one the draftsmen of this proposed statute have inserted. Ore. Rev. Stat. §98:376 (Replacement 1963). Illinois, in adopting the Uniform Act, was faced with an 1895 state supreme court decision that on the complete running of the statute of limitations, a right of defense against a money demand was a vested property right within the protection of the constitutional guaranty of due process. Nevertheless, the Uniform Act's section 16 was enacted without change. Ill. Ann. Stat. ch. 141, §116 (Smith-Hurd 1964). An accompanying comment admits that "the decision has never been reversed and would furnish a basis for attacking the constitutionality of section 16 insofar as it attempts to remove a bar which has accrued prior to the time the State asserts its right to take custody of the property."

With respect to rights of defense which, but for section 601 of this proposed statute, would vest while the statute is in force, the draftsmen see no unconstitutionally retrospective element in the

section's operation. The section might be seen as equivalent to legislation extending the statute of limitations, or otherwise preventing it from ever running in favor of a potential litigant. Such legislation has been allowed universally. The California Supreme Court found no difficulty in supporting the similar California section. "As to [claims on which the statute of limitations had not run on the effective date of the act], and as to claims that will arise in the future, however, it prevents the running of the statute applicable between the holder and the owner from barring the duty of the holder to report and pay to the Controller." *Douglas Aircraft Co. v. Cranston,* 58 Cal. 2d 462, 466, 374 P.2d 819, 822 (1962).

The question of constitutionality is a close one, however. The New Jersey Supreme Court reached an opposite result in *New Jersey v. Standard Oil Co.,* 5 N.J. 281, 74 A.2d 565 (1950). It is not clear whether the limitations period had run to its end after the effective date of New Jersey's general unclaimed property law, but the decision did not purport to turn on any such distinction. The state was simply denied escheat of unpaid wages, money owing on checks, and money payable on bond coupons. "The principle is embedded in our jurisprudence that where a right of action has become barred under existing law, the statutory defense constitutes a vested right which is proof against legislative impairment." 5 N.J. at 293, 74 A.2d at 571.

If the particular state's law of vesting is seen as in accord with that of New Jersey, it may be desirable to shorten the period of presumption of abandonment to less than the limitations period. That is the solution adopted by the New Jersey legislature. N.J. Stat. Ann. §2A:37-29 (1952). The draftsmen with their view that lifting the bar of later-vesting rights of defense is not retrospective, do not consider this necessary.

It might have been chosen, as a matter of policy, to draft the statute so as to permit the statute of limitations to serve as a defense to state action claiming abandoned property. Massachusetts does not require a holder in whose favor the limitations period has run to report property presumed abandoned, "unless the court orders him to do so." Mass. Gen. Laws Ann. ch. 200A, §7(c) (1958).

Although some courts have held that the running of the period

of limitations vests a right of defense against the owner, it has not been stated that the statute removes all liability to pay the debt, or that it vests actual title to the unclaimed property. The draftsmen therefore see no substantial obstacle and have decided to lift the bar for the purpose of preventing windfalls to holders.

In connection with many types, perhaps the bulk, of abandoned property, the statute of limitations does not run during the period of inactivity which gives rise to the presumption of abandonment. See *Hutchins v. Gilman,* 9 N.H. 359 (1838) (no cause of action triggering the running of the statute accrues to one who has received money for another until a demand is made). The Uniform Commissioners cite funds held by fiduciaries, insurance policies, utility deposits, and bank deposits as in the category of property falling outside the scope of the statute of limitations problem. Commissioners' Note, 9A Uniform Laws Ann. 437-38 (1965).

This problem seems to be complicated even more by the *Texas v. New Jersey* decision. Now a conflict of laws problem arises as to which statute of limitations might be applicable—that of the escheating state or that of the state where the holder is domiciled. And if the latter, can the law of this state affect the running of a statute of limitations in another state? Because of these problems, and because as previously noted, there will probably be few cases where the statute has run, it may be desirable to omit this section, thus making the running of a statute of limitations a bar to any action under this act. The problem of which statute of limitations would be applicable would remain however.

SECTION 602. *Enforcement.*

This new section is quite important to the act and unless an appreciable number of states pass this or a similar provision, the Supreme Court's "simple rule" may not be so simple to effectively administer—thus defeating by default the whole purpose of abandoned property laws.

Subsection (a) brings together provisions previously found in various sections of the Uniform Act. This subsection merely states what rights the state treasurer may seek to enforce or determine through court action.

Subsection (b) specifies the situations in which the state treas-

urer may use his own courts—which should be in most cases. But the "contacts" with the holder necessary to have the right to escheat the property under *Texas v. New Jersey* (which are apparently none—see section 102), and the "contacts" necessary to have jurisdiction over the holder in one's own state courts would seem to be two different standards. It would seem that the traditional "contracts" tests retain their validity when thinking in terms of suing a non-resident holder in one's own state courts. Thus subsection (b) enumerates the conditions under which states have been held to have such traditionally sufficient "contacts" as to sustain a suit. It is conceivable, of course, that an entirely new "contacts" test would be approved for suing non-resident holders in one's own state courts. If the mere fact that the owner's last known address was in this state is accepted as sufficient "contact" with the holder so that this state can get jurisdiction in its courts over a holder on that basis alone, then *all* escheat proceedings could be in the courts of the escheating state, and the remaining subsections of section 602 would be unnecessary. But if such a jurisdictional rule were accepted, it would seem that it would have to be restricted to the sphere of escheat proceedings, for the prospect of the application of such a jurisdictional rule to other areas of the law can be alarming.

Jurisdiction over federal courts is not asserted by this subsection to be in the state courts. It is recognized that resort must be had to some other federal court. See also section 208.

"Court of this state of appropriate jurisdiction" is also meant to be a broad and permissive standard under which the state treasurer may operate. It is meant to include any court of this state which the state treasurer may find appropriate or convenient.

Assuming that the traditional "contacts" tests will be adhered to for jurisdictional purposes (which seems to be the more likely and logical position), and that therefore there will be some cases in which our courts cannot get jurisdiction over the holder, it is then necessary to have a provision like subsection (c) to reach these cases. The rights described in subsection (c) must necessarily follow from the Supreme Court's decision in *Texas v. New Jersey* to make meaningful its ruling that states can escheat property simply because the last known address of the owner is in this state. Otherwise, in those conceivable cases where the state can-

not get jurisdiction over the holder, the state would have the meaningless "right" to escheat property which it had no power to reach. Moreover, there seems to be no constitutional objection to one state suing in the courts of another state. 81 C.J.S. *States* §223 (1955). In the absence of statutes prohibiting such suits, a state seems to be treated like any other person coming into the state to sue. It is also relevant here that although the Supreme Court has original jurisdiction in suits involving states as a party, such jurisdiction is not necessarily exclusive—thus the resort to the lesser federal courts and even state courts provided in subsection (c). But in any case where a state is dissatisfied with the results of its efforts in such courts, review may be secured in the form of an original action in the Supreme Court.

This section is not meant to encourage the state treasurer to go to courts outside the state; rather it is contemplated that his courts will be used in any case where it is possible to do so, including those cases where several courts might have concurrent jurisdiction, and that subsection (c) will be resorted to only where his courts cannot get jurisdiction. Since resort to subsection (c) may be too burdensome on the state treasurer, or the costs involved too great, this section must be read in conjunction with subsection (d).

Subsection (d) really provides an alternative method for accomplishing the same result as provided in subsection (c). In many cases however, it is felt that the subsection (d) procedure will be preferable for reasons of overall ease of enforcement of the abandoned property laws of all the states and because claims which would otherwise be unprofitable to collect may be profitably enforced under this section—thus preventing windfalls to the holders.

Action by this state for another state is conditioned upon that state's willingness to act for this state in corresponding circumstances. But to encourage the passage of such reciprocal provisions by other states, especially important states like New Jersey and Delaware, certain concessions and implied promises are contained in the proposed statute.

Subsection (d) (1) limits the operation of this section to those cases where the state cannot get jurisdiction over the holder (in effect an alternative to direct action under subsection (c)), thus

excluding those cases where both states might get jurisdiction, but for some reason the state treasurer would prefer to have the other state's attorney general act for him. This limitation is important to states like Delaware and New Jersey, for it indicates a willingness to be similarly limited in their reciprocal provisions. Although there will still probably be more instances when, for example, New Hampshire asks Delaware to act than when Delaware asks New Hampshire to act for it, this limitation eliminates one large category (concurrent jurisdiction over the holder) from the possible operation of this subsection. It should also be pointed out that the language of the entire section is permissive—the attorney general of one state may or may not act for another state as he chooses, thus giving him the discretion to act selectively or arbitrarily.

The enacting state also asks only for reasonable costs when acting for another state, while promising other states not only their reasonable costs in acting for the escheating state, but also 15 per cent of the value, after deducting reasonable costs, of the property recovered by such other state for the escheating state. (The 15% is only a recommended figure and can be adjusted accordingly.) It is hoped that this incentive will prompt such states as New Jersey and Delaware to pass reciprocal provisions, since in this manner they get at least something from the funds which otherwise they could not touch. At the same time, other escheating states probably save the significant expenses of trying to enforce their claims in such foreign states. Moreover, in the event of a particularly large amount of property, a state could act directly through its state treasurer under subsection (c) and avoid paying the percentage reward recommended in subsection (d) when another state prosecutes its claim.

SECTION 603. *Penalties.*

The penalties section is section 25 of the Uniform Act.

In the light of the act's purpose of preventing windfalls to holders and providing non-tax revenue to the states, and considering the state's desire to protect the owner by taking custody of property owed him, it may be seen that willful failure to abide by the provisions of this law is a fraud on the state that can well be held criminally punishable. States with such acts make various

provisions for fine and imprisonment. Massachusetts allows a court to fine up to $500. Florida and Oregon provide that willful offenders shall be guilty of a misdemeanor, with no specific mention of fines or terms of imprisonment. Daily fines range from $5 (New Mexico) to $100 (Utah), with maximum amounts of $1,000 (California, Illinois, Montana, New Mexico) to $5,000 (Idaho, Utah). The draftsmen suggest that a $25 a day fine, with a maximum of $1,000, is adequate under subsection (a), and that a fine of $100 or $1,000 or imprisonment for not more than six months, or both, is appropriate under subsection (b).

This section will operate in conjunction with section 301 (i), and section 602 (a) which empower the state treasurer to compel the reporting and delivery of unclaimed property presumed abandoned. After bringing such actions, the treasurer and the attorney general may concur in the belief that a criminal sanction is warranted, and proceedings may be instituted to that end. It should be noted that the requirement in section 301 that the report of abandoned property be verified, and a similar requirement for statements filed under section 303 (a), provide an additional possible penalty in the form of an indictment for false swearing.

PART VII. MISCELLANEOUS

SECTION 702. *Excepted property.*

Additional exceptions can be added to this section. To achieve the desired uniformity made posible by adoption of this proposed act, such exceptions should be few in number. They would be appropriate, however, where a state has laws governing classes of unclaimed property unique to that state, or where strong policy reasons argue for not changing existing law.

SECTION 703. *Severability.*

This is section 28 of the Uniform Act. In view of the questions on the constitutionality of provisions for notice to owners, and the problem relating to lifting the bar of the statute of limitations, it was thought best to have a severability section, hopefully to keep the remainder of the act in force pending amendment of parts held invalid.

SECTION 704. *Repeals and amendments.*

Each state should repeal or amend all of its existing law dealing with the escheat of unclaimed property to conform its law to the provisions of the proposed act. Only in this way can the objective of uniformity be achieved.