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THE FEDERAL TAX LIEN ACT OF 1966 — AN HISTORIC BREAKTHROUGH†

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I. INTRODUCTION

During the past fifteen years, lien creditors of various kinds have suffered a series of defeats in litigation involving competing federal tax liens. The United States Supreme Court in case after case awarded priority to the federal tax lien over competing mechanics' liens,[1] real estate tax liens,[2] sureties' liens,[3] mortgagees' liens for fees of a foreclosing attorney,[4] landlords' liens,[5] and liens of attaching creditors.[6] More distressingly, in announcing and refining the doctrine of the "inchoate lien,"[7] the Court cast doubt over the relative priority of a federal tax lien and numerous other liens and financing techniques. Fortunately, the defeat in the courts has been changed in good measure to victory by the Federal Tax Lien Act of 1966 (FTLA).[8]

†This paper is based in part on a paper presented by the author at the Fifty-Ninth Annual Conference on Taxation of the National Tax Association in Denver, Colorado, on September 26, 1966; it will appear in somewhat altered form in 20 ABA SECTION OF TAXATION BULL., No. 2, at 101 (1967). The writer gratefully acknowledges the encouragement and assistance of his associates and particularly the assistance of Michael A. Glass of the New York bar.

A review of old files made during the preparation of this paper uncovered correspondence with respect to necessary statutory relief against harsh judicial tax lien results dating as far back as 1957. It was during that year that Churchill Rodgers, then Chairman of the Section of Corporation, Banking and Business Law of the American Bar Association, played a leading role in stimulating interest in this subject and in forming a Special ABA Committee on Federal Liens. The committee was comprised of a chairman and two representatives from each of the three interested sections: Corporation, Banking and Business Law; Real Property, Probate and Trust Law; and Taxation. In the interim, Laurens Williams, Thomas Plumb, Daniel Wentworth, the late Earl Kullman, Kenneth Johnson, and many, many others labored long and patiently in this special vineyard for improvement in the law. The Federal Tax Lien Act of 1966 stands as a tribute to the effectiveness of the labors of these dedicated lawyers.

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1. United States v. White Bear Brewing Co., 350 U.S. 1010 (1956), United States v. Colotta, 350 U.S. 808 (1955).
2. United States v. City of New Britain, 347 U.S. 81 (1954).
3. United States v. R.F. Ball Constr. Co., 355 U.S. 587 (1958).
4. United States v. Pioneer Am. Ins. Co., 374 U.S. 84 (1963).
5. United States v. Waddill, Holland & Flinn, Inc., 323 U.S. 353 (1945).
6. United States v. Acri, 348 U.S. 211 (1955).
7. ABA, FINAL REPORT OF THE COMMITTEE ON FEDERAL LIENS 4 (1959) [hereinafter cited as ABA REPORT].
8. Pub. L. No. 89-719 (November 2, 1966) [hereinafter cited as FTLA]. The portions of the act relevant to the discussion in text are reprinted in appendix, *infra*.

The FTLA is an omnibus revision of the law affecting federal tax liens and levies. While this paper is primarily concerned with the provisions governing priorities, an effort will be made toward the end of the article to outline briefly the other changes made by the act.

At early common law, a lien was a right to retain possession of another person's chattel until the debt owed for repairs or improvement made to the chattel had been paid.[9] It was purely a possessory right. As the law evolved, however, liens were recognized in situations in which the creditor lacked possession.[10] In such situations, the lien became a right to proceed against property of a debtor, have it sold, and have the proceeds of sale applied to the debt owed to the holder of the lien.[11] The development of the concept of non-possessory liens brought with it the problems of lien priorities, as more than one creditor might claim a lien on the same property. If the property was sold to pay the owner's debts, a question was presented as to which creditor would be paid first from the proceeds of sale. The general rule of lien priorities among private parties is that the "first in time is first in right."[12] However, this general rule is subject to various exceptions, one of the most important of which rests on recording laws. Thus, for a prior mortgage or other lien to prevail over a subsequent interest, it is frequently necessary that notice of the earlier mortgage or lien be recorded with the county clerk or in the office of some other public official.[13]

The statute first creating the federal tax lien did not specify the priority rules by which it was to be governed.[14] In the absence of any specification, the intention seemed clear that the federal tax lien was to be governed by the "first in time, first in right" rule, and the United States Supreme Court eventually so held.[15] It was recognized at a much earlier date, however, that third parties contracting with a taxpayer needed additional protection;[16] for, while the rule afforded some protection against later

9. Vaught v. Knue, 64 Ind. App. 467, 115 N.E. 108 (1917); 53 C.J.S. *Liens* § 1.a. (1948).

10. *See generally id.* § 1.b.

11. *Id.*

12. *See, e.g.,* Exchange State Bank v. Federal Sur. Co., 28 F.2d 485 (8th Cir. 1928); S. Birch & Sons Constr. Co. v. Capehart, 192 F. Supp. 330 (D. Alaska 1961); United States v. Record Publishing Co., 60 F. Supp. 194 (N.D. Cal. 1945).

13. *E.g.,* UNIFORM COMMERCIAL CODE §§ 9-301—9-304, 9-306—9-310, 9-312—9-315, *especially* § 9-312(5); N.Y. REAL PROP. LAW § 291 (McKinney 1961).

14. Revenue Act of 1866, ch. 184, § 9, 14 Stat. 107.

15. United States v. City of New Britain, 347 U.S. 81 (1954).

16. In United States v. Snyder, 149 U.S. 210 (1893), a purchaser from a delinquent taxpayer was subordinated to a secret federal tax lien against the seller, of which the purchaser had no notice and no way of obtaining notice.

federal tax liens, no protection could be had against a prior lien, unless its existence could be ascertained from a public record.

In 1913, a recording requirement for the federal tax lien was enacted[17] in what was the predecessor of section 6323 of the Internal Revenue Code of 1954. Until its recent amendment, Section 6323 provided that the federal tax lien should "not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof" had been filed.[18] For these four categories, therefore, the general "first in time, first in right" rule was replaced by a rule which protected the earlier tax lien only if notice thereof was filed.

Although the legislative history of the predecessor of section 6323 reflected a Congressional attitude that "the government should . . . occupy the same position with respect to liens on property as does the individual,"[19] experience during the intervening period, and especially during the past fifteen years, had been otherwise. Difficulties arose for two main reasons. First, as will be demonstrated, the four categories enumerated in the 1954 Code's section 6323 proved to be too narrow. Second, in applying the "first in time, first in right" doctrine, the United States Supreme Court held that for an earlier competing lien to be first in right vis-à-vis a later federal tax lien, the earlier lien had to be "choate." That is, the identity of the lienor, the property subject to the lien, and the amount secured by the lien all had to be fixed and certain as of the time the federal tax lien arose, or, as to the four categories then mentioned in section 6323, as of the time notice of the federal tax lien was filed.[20]

It is the purpose of this article to examine briefly the major problems that arose under the prior federal tax lien law in the areas of mortgages and other security interests, mechanics' liens, purchasers' rights, possessory liens, attorneys' liens, sureties, insurance policies, and certain miscellaneous liens; to indicate how the FTLA changes that law; and to determine what problems remain.

II. MORTGAGES AND OTHER SECURITY INTERESTS

A. Prior Law

1. *Real Estate Morgages.* A mortgagee's claim for the principal amount of his mortgage loan, to the extent it was disbursed

17. Act of Mar. 4, 1913, ch. 166, 37 Stat. 1016.
18. Int. Rev. Code of 1954, § 6323, 68A Stat. 779.
19. H.R. Rep. No. 108, 62d Cong., 2d Sess. 2 (1912).
20. United States v. City of New Britain, 347 U.S. 81 (1954).

by the mortgagee prior to the time notice of a federal tax lien was filed, and his claim for interest accruing prior to such time were clearly entitled to priority over that tax lien.[21] While it had been suggested that the mortgagee's claim for interest on such principal accruing after a federal tax lien filing would not be entitled to priority,[22] no appellate court had so held, and the Internal Revenue Service had not pressed the point. There were decisions, however, that the mortgagee's claim for disbursements made after notice of a federal tax lien had been filed was inferior to the filed federal tax lien. If a mortgagor failed to pay his insurance premiums or real estate taxes, a mortgagee might have to pay them himself to protect his interest. The mortgagee would have had no alternative but to make such payments, as well as payment of attorneys' fees incurred in foreclosing the mortgage, after notice of a federal tax lien had been filed. Nevertheless, the mortgagee's claims for insurance premiums,[23] attorneys' fees on foreclosure,[24] real estate taxes,[25] and advances made to finance the completion of construction[26] were held to be inferior to a federal tax lien filed after the mortgage but prior to the payment of such items by the mortgagee.

To the typical real estate investor, it was a shock to find that he could lose money on a first mortgage investment even though the foreclosed property was worth more than his total claim.[27]

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21. This statement presupposes that the property subject to the mortgage was identifiable at the time of the filing of the federal tax lien. On this assumption, *see* United States v. Sampsell, 153 F.2d 731 (9th Cir. 1946); United States v. Lord, 155 F. Supp. 105 (D.N.H. 1957). Concern was expressed by some writers that even the mortgagee's claim for principal and interest might not be given priority if the so-called Insolvency Priority Statute, 31 U.S.C. § 191 (1964), were applicable. Seligson, *Creditors' Rights,* 1964 ANN. SURVEY AM. L. 495.

22. *See* ABA REPORT 15.

23. United States v. Lord, 155 F. Supp. 105 (D.N.H. 1957).

24. United States v. Pioneer Am. Ins. Co., 347 U.S. 84 (1963).

25. Bond v. United States, 279 F.2d 837 (4th Cir.), *cert. denied,* 364 U.S. 895 (1960).

26. While not involving a construction loan, the principle of United States v. R. F. Ball Constr. Co. 355 U.S. 587 (1958), seemed to indicate that the lien for any disbursement made after notice of a federal tax lien is filed would be inferior to the federal lien.

27. In United States v. Schroeder, 204 F. Supp. 199 (S.D. Iowa 1962), *aff'd,* 348 F.2d 223 (8th Cir. 1965), an investor in farm mortgages with a total claim of $180,000 against mortgaged properties worth more than $500,000 lost $11,000 because federal tax liens amounting to more than $1,000,000 arose after the mortgage but before local real estate tax liens. Therefore, "a prior mortgagee runs the risk of losing an amount equal to unpaid real estate taxes if the mortgaged property is sold at a foreclosure sale to a third party free and clear of all liens and the proceeds are insufficient to satisfy the claims of the mortgagee, federal government and municipality, arising in the order named." Creedon, *On Mortgage Foreclosures and Federal Tax Liens,* 18 BUS. LAW. 1117, 1120 (1963).

He reasoned, quite logically, that a first mortgage is traditionally paid first, and the fact that notice of a federal tax lien is filed later against the mortgaged property should be irrelevant. Thus, as might be anticipated, the mortgage community reacted bitterly to Supreme Court decisions narrowing the mortgagee's rights against the federal tax lien.

It should be noted that the nature of a federal tax lien is entirely unlike that of a state or local real estate tax lien. The latter is a lien for ad valorem taxes — that is, taxes based on the value of the property. The taxes are, in general, for services available to the property, such as fire, police, and school; and, traditionally, the lien for such taxes is prior to all earlier mortgages and liens on the property. The mortgagee realizes that real estate taxes must be paid from the income of the property and makes allowances accordingly when the mortgage investment is made. A federal tax lien, on the other hand, is completely unrelated to the value of the property subject to the lien. It may be for withholding taxes, income taxes, or any of a number of other kinds of federal taxes, and it may aggregate far in excess of the total value of the taxpayer's property. A mortgagee has no way of making allowances for such taxes. If the superpriority rule applicable to state real estate tax liens were applied generally to federal tax liens, the security of a mortgagee would, in many cases, be completely wiped out.

2. *Other Security Interests.* Three more major problems existed under the old provision for holders of other security interests. First, while the former section 6323(a) protected a "mortgagee" against an unfiled federal tax lien, the term "mortgagee" was not defined. Thus, it was not clear whether it would include those who finance inventory using trust receipts[28] or holders of a variety of other types of security interests permitted under the Uniform Commercial Code.[29]

Secondly, the Supreme Court's definition of a "choate" competing lien required that the property subject to the competing lien be identifiable at the time of federal tax lien filing.[30] While this requirement posed no problem for the typical real estate mortgagee, whose lien is normally on an identifiable piece of property, the requirement did endanger a number of other common financing techniques. Thus, any type of financing arrange-

28. Statement by Hon. Stanley S. Surrey, Assistant Secretary of the Treasury, *Hearings on H.R. 11256 and H.R. 11290 Before the House Committee on Ways and Means*, 89th Cong., 2d Sess. 37 (1966) [hereinafter cited as *1966 Hearings*].

29. UNIFORM COMMERCIAL CODE § 1-201(37).

30. United States v. City of New Britain, 347 U.S. 81 (1954).

ment which provided for the substitution of security (such as accounts receivable and inventory) might have been vulnerable to attack by a federal tax lien to the extent that the property subject to the security interest was so encumbered after the tax lien filing.

Lastly, as indicated earlier, the Supreme Court's definition of a "choate" competing lien also required that the amount of the lien be fixed and certain at the time the tax lien was filed. Under this rule, the financer of accounts receivable, inventory, and other commercial transactions would have been required to search for a federal lien every time it made an advance — which might be one or more times a day. Such a requirement was obviously impractical.

B. Provisions of the Act

1. *Security Interest Concept.* Whereas previously section 6323(a) protected "any mortgagees and pledgees,"[31] the new act substitutes the concept of "the holder of a security interest,"[32] which is borrowed from the Uniform Commercial Code.[33] Thus any holder of a "security interest" is protected against unfiled federal tax liens, the term "security interest" being defined to include "any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability."[34] The conditional vendor and financer of inventory or accounts are obviously included.

2. *Interest and Expenses Provision.* The revised section 6323(e) in the act solves many of the most troublesome problems mentioned earlier. Under this section, if a mortgage or other security interest is entitled to priority over a federal tax lien, the priority extends to interest expenses; reasonable expenses, including attorneys' fees, incurred in collecting or enforcing the obligation; reasonable costs of insuring, preserving, and repairing the mortgaged property (the word "preserving" being intended to include ground rent payments made by a leasehold mortga-

31. Int. Rev. Code of 1954, § 6323(a), 68A Stat. 77a.

32. FTLA § 101(a), *amending* Int. Rev. Code of 1954, § 6323(a), 80 Stat. 1125.

33. Uniform Commercial Code §§ 1-201(20), (37).

34. FTLA § 101(a), *adding* § 6323(h)(1) *to* Int. Rev. Code of 1954, 80 Stat. 1129. The House Committee on Ways and Means *Report* indicates that local law determines what becomes part of realty. H.R. Rep. No. 1884, 89th Cong., 2d Sess. 11 n.2 (1966) [hereinafter cited as H.R. Rep. No. 1884]. Presumably, if property is part of the realty under local law, a prior security interest on the realty would prevail over a federal tax lien even if the property were added to the realty after the tax lien filing.

gee); reasonable costs of insuring the obligation itself; and amounts paid by the holder of the security interest to satisfy any lien on the property which is entitled to priority over the federal lien.[35] Since liens for real estate taxes, special assessments, and charges for utilities levied by a governmental authority are, by section 6323(b)(6), given priority over all federal tax liens on the property, the mortgagee's claim for amounts paid to satisfy such real estate tax and similar liens are likewise entitled to this priority.[36]

3. *Protection for Certain Mortgages and Other Security Interests.* Section 6323(c) now affords limited protection for three types of financing transactions, even where some or all of the disbursements made are made after notice of a federal tax lien has been filed.[37] In general, the priority of the competing security interest will only be recognized in "qualified property" covered by the terms of a written agreement entered into before tax lien filing and then only if the competing security interest would be protected under local law against a judgment lien arising as of the time of tax lien filing.

Subsections 6323(c)(1)(A)(i) and (2) are intended to protect a person who finances a commercial transaction in the course of his trade or business.[38] The transaction may take the form of a loan secured by commercial financing security or of a purchase of that security (other than inventory). In either event, protection is afforded only as to disbursements made within forty-five days after a tax lien filing or prior to actual notice of a tax lien. In effect, therefore, the financer must check for tax liens every forty-five days before making disbursements. Subsection 6323(c)(2) also allows the financer to substitute new security for security being released. Here, too, protection is limited to commercial financing security acquired or substituted within forty-five days of tax lien filing. However, such security is "qualified" even if the financer has actual knowledge of the tax lien at the time of acquisition or substitution. "Commercial financing security" is broadly defined as meaning paper of a kind ordinarily arising in commercial transactions, accounts receivable, mortgages on real property, and inventory.[39]

35. FTLA § 101(a), *replacing* INT. REV. CODE OF 1954, § 6323(e), 80 Stat. 1129.
36. FTLA § 101(a), *adding* § 6323(b)(6) *to* INT. REV. CODE OF 1954, 80 Stat. 1126.
37. FTLA § 101(a), *replacing* INT. REV. CODE OF 1954, § 6323(c), 80 Stat. 1127.
38. FTLA § 101(a), *adding* §§ 6323(c)(1)(A)(i), (2) *to* INT. REV. CODE OF 1954, 80 Stat. 1127.
39. FTLA § 101(a), *adding* § 6323(c)(2)(C) *to* INT. REV. CODE OF 1954, 80 Stat. 1127.

Subsections 6323(c)(1)(A)(ii) and (3) afford protection to the mortgagee who makes cash disbursements to finance (i) the construction or improvement of real estate, (ii) a contract to construct or improve real estate, or (iii) the raising or harvesting of a farm crop or the raising of livestock or other animals. Here the disbursements do not have to be made within forty-five days of tax lien filing. But priority is limited to "qualified property," which is, in the respective cases, (i) the real property improved, (ii) the proceeds of the contract for improvement, and (iii) the crop, livestock, or other animals financed and any other property subject to the tax lien at the time of its filing.[40]

Subsections 6323(c)(1)(A)(iii) and (4) protect a person who acquires a security interest as security for disbursements that he may be obligated to make pursuant to a letter of credit, surety bond, or any other obligatory disbursement agreement which he has entered into in the course of his trade or business.[41] Again, the forty-five day limit applicable to commercial financing transactions does not apply. However, disbursements are protected under this subsection against an earlier filed tax lien only if they are required to be made because of the intervention of the rights of a person other than the taxpayer. Protection is also limited to property subject to the tax lien at the time of its filing and to property directly traceable to the disbursements. (The subsection's special definition of "qualified property" for a surety agreement[42] is discussed later in connection with sureties.[43])

4. *Forty-Five-Day Leeway Provision.* Somewhat overlapping but of broader applicability than section 6323(c) is section 6323(d),[44] which gives protection to a holder of a security interest for disbursements made within forty-five days after notice of a federal tax lien has been filed. Again, to qualify, the disbursement must be made pursuant to a written agreement entered into before tax lien filing and must be protected under local law against a judgment lien. The priority for such disbursements extends only to property subject to the tax lien at the time of filing.

5. *Perfection Requirement for Security Interests.* Previously, section 6323 did not specify the degree of perfection necessary

40. FTLA § 101(a), *adding* §§ 6323(c)(1)(A)(ii), (3) *to* INT. REV. CODE OF 1954, 80 Stat. 1127, 1128.

41. FTLA § 101(a), *adding* §§ 6323(c)(1)(A)(iii), (4) *to* INT. REV. CODE OF 1954, 80 Stat. 1127, 1128.

42. FTLA § 101(a), *adding* § 6323(c)(4)(C) *to* INT. REV. CODE OF 1954, 80 Stat. 1128.

43. *See* p. 183 *infra.*

44. FTLA § 101(a), *replacing* INT. REV. CODE OF 1954, § 6323(d), 80 Stat. 1128.

for a mortgage to prevail over an earlier unfiled federal tax lien. It merely indicated that a federal tax lien was invalid against a mortgagee until filed.[45] For this reason, disputes arose in a number of situations in which the mortgage was not recorded — the government taking the position that for the mortgage to prevail, it must be perfected by recordation. Decisions on the point were in conflict.[46] In any event, the FTLA, while not requiring a mortgage to be recorded, does provide that the mortgage does not "exist" until it has become protected under local law against a subsequent judgment lien.[47] In some states, local law would require recordation;[48] in others it would not.[49] The Uniform Commercial Code would require filing for some types of security interests in personal property, but not for others.[50]

6. *Value Requirement.* Another question that had been raised relates to the necessity of the security interest being taken for a presently created debt. Not uncommonly, an unsecured creditor will require his debtor to execute a mortgage to secure his outstanding loans, either when they fall due, as a condition to an extension or forbearance, or pursuant to a right reserved when the loan was originally made. Here again, the prior section 6323 offered no guide, and there was concern that a mortgage taken as security for a pre-existing debt would not prevail as against a later federal tax lien. Now, however, section 6323(h)(1)(B) requires merely that the mortgagee "*has parted* with money or money's worth."[51] Taking a mortgage for a preexisting debt would seem to meet that requirement.

7. *Purchase Money and Security Interests.* One is a purchase money mortgagee if he has sold property to the debtor and taken back a mortgage to secure part or all of its purchase price or if he has supplied money to a purchaser of property to enable him to

45. "Except as otherwise provided in subsections (c) and (d), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate. . . ." Int. Rev. Code of 1954, § 6323(a), 68A Stat. 779.

46. Underwood v. United States, 37 F. Supp. 824 (E.D. Tex. 1939), *aff'd,* 118 F.2d 760 (5th Cir. 1941), and *In re* F. MacKinnon Mfg. Co., 24 F.2d 156 (7th Cir. 1928), both subordinated unrecorded mortgages to tax liens filed after execution of the mortgage. *Contra, In re* Mesa Steel Corp., 229 F. Supp. 669 (D. Ariz. 1964).

47. FTLA § 101(a), *adding* § 6323(h)(1) *to* INT. REV. CODE OF 1954, 80 Stat. 1130.

48. *E.g.,* N.J. STAT. ANN. § 46:22-1 (1940).

49. N.Y. REAL PROPERTY LAW § 291 (McKinney 1961); Sullivan v. Corn Exch. Bank, 154 App. Div. 292, 139 N.Y.S. 97 (2d Dept. 1912).

50. UNIFORM COMMERCIAL CODE § 9-302.

51. FTLA § 101(a), *adding* § 6323(h)(1) *to* INT. REV. CODE OF 1954, 80 Stat. 1130 (emphasis added). *See also* H.R. REP. No. 1884, 11 n.3.

make the purchase and taken a mortgage as security for the loan. The purchase money mortgagee, therefore, either owned the property originally or provided the money for its acquisition. For this reason, such a security interest is usually given priority over earlier liens against the purchaser, including earlier federal tax liens.[52] Neither past law nor the present act refers to purchase money mortgages, and the House Committee on Ways and Means *Report* expressly indicates that the FTLA is not intended to affect the purchase money mortgage concept.[53]

8. *Foreclosure Provisions.* A federal tax lien arising after a mortgage may be cut off at the mortgage foreclosure sale. If state foreclosure procedure requires junior lienors to be made parties to the foreclosure action, the government receives adequate notice of the foreclosure and has a statutory right to redeem from the foreclosure.[54] In some states, however, no notice is required. Since the Supreme Court had ruled that federal tax liens were nevertheless cut off by the foreclosure and that the government's statutory redemption right was inapplicable,[55] the government sought to remedy this problem through legislation.

The FTLA provides that, in the case of foreclosures to which the government does not have to be made a party, notice must be given to the government at least twenty-five days before any foreclosure sale.[56] Such notice is required, however, only if notice of the federal tax lien is on file thirty days before the foreclosure sale. Furthermore, an exception permits perishable goods and other property which storage may greatly reduce in value and property which can only be kept at great expense to be sold on foreclosure without notice to the government. Instead, the proceeds of sale must be held subject to the claims of the United States for thirty days.[57]

Where the government does have to be made a party to a foreclosure, the old rule as to notice is generally retained.[58] But here too the government must be made a party only if notice of its tax lien is on file when the action is commenced.[59] Otherwise,

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52. *See, e.g.,* United States v. Anders Contracting Co., 111 F. Supp. 700 (W.D.S.C. 1953).
53. H.R. REP. No. 1884, 4.
54. Act of Dec. 2, 1942, ch. 656, § 4, 56 Stat. 1026.
55. United States v. Brosnan, 363 U.S. 237, 259 (1960) (dissenting opinion).
56. FTLA § 109, *adding* §§ 7425(b), (c)(1) *to* INT. REV. CODE OF 1954, 80 Stat. 1141.
57. FTLA § 109, *adding* § 7425(c)(3) *to* INT. REV. CODE OF 1954, 80 Stat. 1141.
58. FTLA § 201, *amending* 28 U.S.C. §§ 2410(a), (b), 80 Stat. 1147.
59. FTLA § 109, *adding* § 7425(a) *to* INT. REV. CODE OF 1954, 80 Stat. 1141.

the tax lien is terminated by the sale without joinder of the government.

The government's one-year redemption period from foreclosures to which it is made a party has been changed in the case of internal revenue liens to 120 days or any greater period allowed by state law.[60] In addition, in any case in which, under the provisions of section 505 of the Housing Act of 1950[61] and section 1820(d) of title 38 of the United States Code, the right to redeem does not arise, no right of redemption is conferred by this general provision. The 120-day redemption period is also made applicable to all other types of foreclosures involving revenue liens.[62]

For the first time, the law states the basis of redemption if the government redeems from a foreclosure sale, setting the redemption price at the purchase price plus interest at 6 per cent and the excess of expenses over income (including reasonable rental value if the property is used by the purchaser).[63] If the holder of the lien being foreclosed becomes the purchaser, however, the amount of his obligation *to the extent satisfied by the foreclosure sale* shall be regarded as part of the purchase price. Thus, if a nominal bid is made, the purchase price will nevertheless be regarded as the entire debt, provided that under local law the debt is satisfied by the sale. On the other hand, if the entire debt is not satisfied by the sale, then only the amount bid or such other portion of the debt (such as the fair market value of the property) as is satisfied by the sale will be regarded as the purchase price; and the government's redemption will be based thereon. The act also provides for a revolving fund of $1,000,000 which the government may use for redemption.[64]

9. *Future Rents and Payments.* Because of the general trend of federal tax lien decisions, efforts were made to obtain specific legislative recognition of the validity of an assignment of rents or payments due under an existing lease or contract. There should be little doubt that such an assignment taken as security for an obligation prior to filing of a federal tax lien should entitle the lender to priority in all rental or contract payments made thereafter. Considerable support for this view would seem to be

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60. FTLA § 201, *amending* 28 U.S.C. § 2410(c), 80 Stat. 1147.
61. 12 U.S.C. § 1701k (1964).
62. FTLA § 109, *adding* §§ 7425(d)(1), (2) *to* INT. REV. CODE OF 1954, 80 Stat. 1142.
63. FTLA § 109, *adding* § 7425(d) *to* INT. REV. CODE OF 1954, 80 Stat. 1142.
64. FTLA § 112, *adding* § 7810 *to* INT. REV. CODE OF 1954, 80 Stat. 1145.

contained in the revised section 6323(c)(2)(C),[65] which recognizes mortgages and commercial paper as "commercial financing security," and in the FTLA's legislative history. Commercial paper is said in the House Committee *Report*[66] to include chattel paper, paper giving contract rights, documents, and instruments, such as negotiable instruments and securities, as those terms are defined in the Uniform Commercial Code.[67] Clearly, the essence of many of these species of property is that they involve the right to receive future payments. In fact, by definition, a "contract right" under the Commercial Code means "any right to payment under a contract not yet earned by performance."[68] It would seem to make no sense to take the position that payments falling due under and being paid over to the holder of a security interest in a contract, lease, or other document after a tax lien filing would not be protected as against the tax lien. The security interest would thereby be rendered valueless. Section 6323(c)(2)(C) confers priority under certain circumstances on a person acquiring a security interest in such species of property within forty-five days after notice of a tax lien has been filed.[69] "If notice has not been filed, they will, of course, be protected as security interests against the unfiled federal lien."[70] Thus, the intent necessarily is that the holder of a security interest in an existing contract or lease is entitled to all payments falling due thereunder as against a later federal tax lien.

C. Two Mortgage Problems Not Covered in the FTLA

1. *After-Acquired Property.* Under certain circumstances, a mortgage will be drawn to cover not only property specifically described and then owned by the mortgagor but also property thereafter acquired by the mortgagor. In most states, a mortgagee's priority in after-acquired property, at least as against some third parties, will relate back to the date of the mortgage.[71] It has been held that a federal tax lien likewise attaches to after-acquired property of a taxpaper and that certain other liens cover-

65. FTLA § 101(a), *adding* § 6323(c)(2)(C) *to* Int. Rev. Code of 1954, 80 Stat. 1127.

66. H.R. Rep. No. 1884, 42.

67. Uniform Commercial Code §§ 9-105(b) (chattel paper); 9-106 (contract rights); 9-105(e), 1-201(15) (documents); 9-105(g), 3-104(1), 8-102(1)(a) (instruments, negotiable instruments, and securities, respectively).

68. Uniform Commercial Code § 9-106.

69. *See* p. 169 *infra*

70. Statement by Hon. Stanley S. Surrey, Assistant Secretary of the Treasury, *1966 Hearings* 38.

71. *E.g.,* Uniform Commercial Code §§ 9-108, 9-204(1), (3) & comment 2, 9-312(3), (4); Cal. Civ. Code § 2930 (West 1954).

ing after-acquired property are inchoate vis-à-vis the tax lien as to such property and thus inferior to the tax lien.[72] Although the priority issue involving such an earlier security interest on property acquired after filing of a tax lien has not yet been decided by the Supreme Court and although several solutions to such a priority problem are possible, the FTLA does not seem to deal with the general problem beyond conferring priority on certain liens on after-acquired property.[73] The act does indicate that a security interest is not in existence until the property is in existence.[74] But, presumably, once the property is in existence, that is, once the taxpayer acquires it, the security interest attaches; and that date is also the earliest one on which the federal tax lien can attach to the property. The problem, therefore, seems to be one of simultaneous attachment of liens, not specifically covered by the act.

2. *Escrows.* Mortgages frequently require the mortgagor to make, in addition to payments of principal and interest, periodic payments which the mortgagee accumulates for the payment of real estate taxes and insurance premiums when they fall due. On occasion, the government has attempted to assert its tax lien against these payments in the hands of the mortgagee.[75] Because of these efforts, which have not yet resulted in an appellate court decision, attempts were made by lenders to have the act specifically protect escrows in the mortgagee's hands from the tax lien.[76] As enacted, however, the act contains no such provisions.

III. MECHANICS' LIENS

A person who furnishes labor or material for the improvement of real property is given, under varying circumstances and with considerable differences in detail, a lien under the statutes of all states. The lien may be on the real property itself[77] or, when the person works for a contractor, on the proceeds due

72. Glass City Bank v. United States 326 U.S. 265 (1945); United States v. Phillips, 198 F.2d 634 (5th Cir. 1952).

73. FTLA § 101(a), *replacing* INT. REV. CODE OF 1954, § 6323(c), 80 Stat. 1127. For a number of solutions to the after-acquired property problem, *see* Committee on Relative Priority of Government & Private Liens, *Report,* 1 ABA REAL PROPERTY, PROBATE & TRUST J. 134, 139 (1966).

74. FTLA § 101(a), *adding* § 6323(h)(1) *to* INT. REV. CODE OF 1954, 80 Stat. 1130.

75. Sullivan, *The Impact of the Federal Tax Lien Upon The Massachusetts Mortgage Lender,* 44 B.U.L. REV. 156, 173 (1964).

76. *E.g., 1966 Hearings* 234.

77. *E.g.,* ILL. REV. STAT. ch. 82, § 1 (1963); N.Y. LIEN LAW § 3 (McKinney 1966).

under a contract between the owner and the contractor.[78] This mechanic's lien has been jealously protected by the state courts;[79] and in some instances the lien is given priority by statute over pre-existing liens and mortgages as well.[80]

A. PRIOR LAW

Contrary to expectations, the Supreme Court had, for all practical purposes, nullified the mechanic's lien on real property as far as federal tax liens are concerned.[81] Even where the mechanic lienor had completed his work, filed his lien, and commenced foreclosure before the federal tax lien arose, the mechanic's lien was held inchoate.[82] In effect, then, the government could satisfy a taxpayer's debt by taking property furnished by an unpaid laborer or materialman. Such a harsh result was unfair and undesirable. The criticism leveled at the adverse Supreme Court decisions may have affected the outcome of the cases in which the mechanic's claim was against the proceeds due under a contract between the owner and the contractor for whom the mechanic worked rather than against the real property itself. In any event, the Supreme Court held in two such cases, *Aquilino v. United States*[83] and *United States v. Durham Lumber Co.*,[84] that the mechanic's claim would prevail if, under applicable state law, the delinquent contractor did not have a property interest in the proceeds due under the contract. In the absence of such an interest, the federal tax lien could not attach to the proceeds. In both cases, the mechanic lienor ultimately prevailed over the federal tax lien.[85]

B. PROVISIONS OF THE ACT

Under the 1966 revisions, section 6323 is amended so as to

78. *E.g.*, ILL. REV. STAT. ch. 82, § 23 (1963); N.Y. LIEN LAW § 5 (McKinney 1966).

79. "[T]he purpose of the mechanic's lien law is to give security to mechanics and materialmen for labor and materials furnished and it should be construed as favorably to those persons as its terms will permit." Vasquez v. Village Center, Inc., 362 S.W.2d 588, 591-592 (Mo. 1962).

80. ILL. REV. STAT. ch. 82, § 16 (1963).

81. *E.g.*, United States v. Hulley, 358 U.S. 66, *rev'g per curiam* 102 So. 2d 599 (Fla. 1958); United States v. Vorreiter, 355 U.S. 15, *rev'g per curiam* 134 Colo. 543, 307 P.2d 475 (1957); United States v. White Bear Brewing Co., 350 U.S. 1010 (1956), *rev'g per curiam* 227 F. 2d 359 (7th Cir. 1955); United States v. Colotta, 350 U.S. 808, *rev'g per curiam* 224 Miss. 33, 79 So. 2d 474 (1955).

82. United States v. White Bear Brewing Co., *supra* note 81.

83. 363 U.S. 509 (1960).

84. 363 U.S. 522 (1960).

85. United States v. Durham Lumber Co., *supra* note 84; Aquilino v. United States, 10 N.Y.2d 271, 176 N.E.2d 826, 219 N.Y.S.2d 254 (1961).

protect a mechanic lienor against unfiled federal tax liens.[86] The mechanic's lien is recognized as of the earliest date it becomes valid under local law against a subsequent purchaser of the property without notice — but in no event before the mechanic begins to furnish the labor or material.[87] Here again, this date will vary with the applicable state law.[88]

A special provision has been added to protect the mechanic who repairs or improves a one-to-four-family, owner-occupied dwelling from the fear of earlier filed federal tax liens, provided that the contract price for the repair or improvement does not exceed $1,000.[89] Especially since his work often adds value to the property, the new law confers a superpriority on his lien. Such a mechanic prevails even over earlier, filed federal tax liens against the property. Apart from this exception, however, a mechanic lienor will not be protected against an earlier filed federal tax lien. The mechanic not covered by the special provision must, therefore, search for federal tax liens against the property before performing work or furnishing materials.

The principle of the *Durham Lumber* and *Aquilino* cases, that state law determines whether or not a contractor-taxpayer has a property interest in proceeds due under a contract, is, presumably, unaffected by the FTLA.

IV. PURCHASERS' RIGHTS

A. Prior Law

Section 6323(a) protects a "purchaser" against an unfiled federal tax lien.[90] Under the 1954 provision, the Supreme Court

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86. FTLA § 101(a), *amending* Int. Rev. Code of 1954, § 6323(a), 80 Stat. 1125. It is interesting to note that the FTLA amendments incorporate an error of the House Ways and Means Committee *Report*, which consistently renders the term "mechanic lienor" as "mechanic's lienor." H.R. Rep. No. 1884, 3 *passim*.

87. FTLA § 101(a), *adding* § 6323(h)(2) *to* Int. Rev. Code of 1954, 80 Stat. 1130.

88. *Compare* Cleveland v. Alpine Lumber Co., 75 S.W. 2d 977 (Tex. Civ. App. 1934) (mechanic's lien attaches when contract is made); Benson Hardware Co. v. Jones, 223 Ala. 287, 135 So. 441 (1931), *and* Owens-Parks Lumber Co. v. McCarty, 121 Cal. App. 623, 9 P.2d 310 (1932) (lien attaches at commencement of construction or furnishing of materials); Broderick v. Overhead Door Co., 117 So. 2d 240 (Fla. Dist. Ct. App. 1959) (lien attaches as of visible commencement of operations).

89. FTLA § 101(a), *adding* § 6223(b)(7) *to* Int. Rev. Code of 1954, 80 Stat. 1126.

90. "Except as otherwise provided in subsections (c) and (d), the lien imposed by section 6321 shall not be valid as against any . . . *purchaser* until notice thereof has been filed . . . ." Int. Rev. Code of 1954, § 6323(a), 68A Stat. 779 (emphasis added).

had stated that "purchaser usually means one who acquires title for valuable consideration in the manner of vendor and vendee."[91] Relying on this language, one federal district court refused, in *Leipert v. R. C. Williams & Co.*,[92] to protect a group of purchasers who had contracted to purchase real property, taken possession, and made installment payments toward the purchase price against federal tax liens which arose after the contracts were entered into but were filed before the contracts were filed. Merely because the purchasers had not received their deeds quickly enough, the later federal tax liens prevailed.

The *Leipert* case illustrates a basic misunderstanding of the purpose of section 6323, both as it then was and as it now is. Its purpose is to protect liens and interests arising after a federal tax lien has arisen but before notice of it is filed. Thus, in the *Leipert* case, the contract purchasers were attempting to prevail not over an earlier federal tax lien but over a later one. Under the circumstances, they should have prevailed under the "first in time, first in right" doctrine irrespective of whether they qualified as purchasers under section 6323. As the court indicated, "their possession was constructive notice to all of their rights in the realty they occupied."[93]

B. Provisions of the Act

The revised section specifically states that a "purchaser" is one who acquires an interest in property — including a *contract* to purchase or lease property, a lease, an option to purchase or lease, and an option to extend or renew a lease.[94] The interest must be acquired for adequate and full consideration in money or money's worth and must be valid under local law against subsequent purchasers without actual notice. The purchasers in *Leipert* presumably would have met this test. In fact, the House Committee on Ways and Means *Report* states that the requirement of full consideration is not intended to exclude a contract purchaser who is making installment payments.[95]

Recognizing that it is not customary or feasible for the purchasers of all types of property to check for federal tax liens filed against the seller before purchasing, Congress provided a number of special exceptions to the rule that the filing of a tax lien is constructive notice. Thus, the protection afforded by prior law

91. United States v. Scovil, 348 U.S. 218, 221 (1955).
92. 161 F. Supp. 355 (S.D.N.Y. 1957).
93. *Id.* at 358.
94. FTLA § 101(a), *adding* § 6323(h)(6) *to* Int. Rev. Code of 1954, 80 Stat. 1131.
95. H.R. Rep. No. 1884, 12.

to purchasers of negotiable instruments and similar securities[96] and purchasers of motor vehicles[97] is continued under the new statute, so long as the purchaser does not have actual notice of the filed tax lien.

A new provision has been added to protect the purchaser of tangible personal property at retail in the ordinary course of the seller's business.[98] Even actual notice of the lien will not affect such a purchaser unless he intends to hinder, evade, or defeat collection of a tax. This special protection has not been extended to wholesale purchasers.

Similarly, one who purchases certain tangible personal property for less than $250 in a casual sale is protected against a filed federal tax lien against the seller, but only if the purchaser has no actual notice of the federal tax lien and the sale is not one of a series.[99] The exemption is limited to property described in section 6334(a) of the Code as exempt from levy, *i.e.*, personal and household effects, workman's compensation, and certain annuity and pension payments.[100] Consistent with the limited purpose of this exemption, it is not available to dealers.

V. POSSESSORY LIENS

A. Prior Law

As indicated earlier, at common law the word "lien" was used to describe the right of a person who repaired or improved a chattel to retain possession of the chattel until he was paid for his work.[101] Under the 1954 provision, if a repairman had a possessory lien which arose before a federal tax lien arose, presumably the possessory lienor would prevail over the government under the "first in time, first in right" doctrine — provided that the lien was not found to be inchoate.[102] If the possessory lien arose after the federal lien arose but before notice was filed, however, the government would prevail unless the possessory

96. FTLA § 101(a), *adding* § 6323(b)(1) *to* Int. Rev. Code of 1954, 80 Stat. 1126; H.R. Rep. No. 1884, 36.

97. FTLA § 101(a), *adding* § 6323(b)(2) *to* Int. Rev. Code of 1954, 80 Stat. 1126; H.R. Rep. No. 1884, 36.

98. FTLA § 101(a), *adding* § 6323(b)(3) *to* Int. Rev. Code of 1954, 80 Stat. 1125.

99. FTLA § 101(a), *adding* § 6323(b)(4) *to* Int. Rev. Code of 1954, 80 Stat. 1126.

100. Int. Rev. Code of 1954, § 6334(a), *as amended,* FTLA § 104(c), 80 Stat. 1137.

101. *See* note 9 *supra* and accompanying text.

102. The lien might very well have been found to be inchoate in view of the position of the Supreme Court in the mechanic's lien cases. *See* note 79 *supra* and accompanying text.

lienor could qualify as a mortgagee, pledgee, purchaser, or judgment creditor, the four categories then protected against unfiled federal tax liens under section 6323.[103] Furthermore, if notice of the federal tax lien was filed before the possessory lien arose, the government would prevail in all events.

B. Provision of the Act

Since the typical repairman with a possessory lien on tangible personal property enhances the value of the property by his labor, the FTLA protects the repairman's interest up to the reasonable price of his repairs or improvements even against a federal tax lien filed prior to the repairman's taking possession of the chattel.[104] Protection is afforded despite actual knowledge by the repairman of the federal lien. To qualify for this superpriority, the repairman must be entitled to a lien under local law and must have the property continuously in his possession from the time his lien arose.

VI. ATTORNEYS' LIENS

Under local law, an attorney who performs work for a client may be entitled to a lien on the client's cause of action or upon the amount recovered.[105] The lien may be conferred by statute or by agreement. Since recovery of any amount by the client may result almost solely from the attorney's efforts, the attorney's claim should be entitled to prior consideration.

A. Prior Law

Since a federal tax lien attaches to all property and rights to property belonging to a taxpayer, it also attaches to a taxpayer's causes of action and amounts recovered thereunder. Under prior law, therefore, the attorney whose work produced a judgment or settlement might recover nothing where there existed an earlier[106] or even a later[107] federal tax lien against his client.

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103. Int. Rev. Code of 1954, § 6323(a), 68A Stat. 779.

104. FTLA § 101(a), *adding* § 6323(b)(5) *to* Int. Rev. Code of 1954, 80 Stat. 1126.

105. *E.g.*, N.Y. Judiciary Law § 475 (McKinney 1963).

106. United States v. Goldstein, 256 F.2d 581 (2d Cir.), *aff'g per curiam* United States v. Pay-O-Matic Corp., 162 F. Supp. 154 (S.D.N.Y.), *cert. denied*, 358 U.S. 830 (1958).

107. The earlier attorney's lien might have been held to be inchoate since the amount of the lien might not have been fixed and certain when the federal tax lien arose.

B. PROVISIONS OF THE ACT

The new act confers a superpriority on the attorney who holds a lien or a contract enforceable under local law against a judgment or other amount in settlement of a claim or cause of action.[108] The attorney prevails over all federal tax liens to the extent of his reasonable compensation for obtaining the judgment or settlement. The attorney's superpriority does not, however, apply to judgments obtained for his client against the government. In such actions, the government retains its right to set off against any recovery amounts owed to it by the taxpayer-client.

VII. SURETIES

A specific example might help to elucidate the problem of the surety. The owner of property (*O*) contracts with a contractor (*C*) to have work performed on *O*'s property. As protection against *C*'s failure to perform in accordance with the contract, *O* requires *C* to furnish a payment and performance bond of a surety (*S*). In the bond, *S* assures *O* that if *C* does not perform, *S* will.

If *C* defaults and *S* has to perform, *S* will naturally try to minimize his losses, in particular by attempting to obtain any funds not yet paid by *O* to *C* under the contract. Normally, a building contract will provide that a certain percentage of the contract proceeds will be held back until completion of all work and payment of all mechanics and materialmen. If a federal tax lien is filed against *C*, the government may be competing with *S* in trying to obtain the remaining contract proceeds.

A. PRIOR LAW

Under these circumstances, *S* may have at least three theories in claiming the contract proceeds. Since *C* has defaulted under the contract, *O* would have a right as against *C* to retain such proceeds. When *S* performs, therefore, he can ask to be subrogated to *O*'s right and to have the proceeds paid over. Such subrogation or substitution is fair, since if *S* had not performed, *O* would have had to do so. A federal tax lien against the defaulting contractor *C* will not attach to the sums not yet paid by *O* to *C* under the contract unless *C* is entitled to them. Since he is not, *S*'s rights of subrogation prevail over the tax lien.[109]

108. FTLA § 101(a), *adding* § 6323(b)(8) *to* INT. REV. CODE OF 1954, 80 Stat. 1126.

109. *Cf.* Henningsen v. United States Fid. & Guar. Co., 208 U.S. 404 (1908); Prairie State Bank v. United States, 164 U.S. 227 (1896).

The second theory by which *S*, having performed for *C*, may attempt to recover the contract proceeds is through the mechanics and materialmen whom *S* has paid. If not paid, the mechanics and materialmen will normally be entitled to liens. Since the surety has paid them, he should be entitled to subrogation to or an assignment of their liens. As against a federal tax lien on the contractor, the surety who is subrogated to or has an assignment of a mechanic's claim to proceeds due under the contract between *O* and *C* should be entitled to the same priority as the mechanic would have had. As we have seen earlier,[110] the mechanic's claim to contract proceeds has in some instances been given priority over a federal tax lien, the proceeds being held in such cases not to be property of the defaulting contractor-taxpayer. In many instances the surety can likewise prevail over the federal tax lien on this theory.[111]

The surety's third approach is to claim under an assignment by *C* to *S* of the funds due under the contract; such a provision is usually made a condition of *S*'s bond. Here the surety is claiming not through *O* or the mechanic, but through *C*. Accordingly, under the old law his priority against the federal tax lien was determined by whether or not he had a "choate" lien. As in the case of mortgages, if the disbursements made by *S* in performing the contract were made after a federal tax lien filing, *S*'s lien on the proceeds would be inchoate.[112] Unfortunately, this third theory may be the only one available where the contract proceeds are assigned as security against liabilities incurred by *S* in performance of contracts other than the one under which the proceeds are payable. Thus *C* might assign to *S* contract proceeds due from *O*-1 as security for any liability *S* incurs in performing not only *C*'s contract with *O*-1 but also *C*'s contract with *O*-2. However, if *C* fully performs *O*-1's contract without default, *S* cannot claim the proceeds through *O*-1 or the mechanics on that job. Instead, he must rely completely on the assignment from *C*.

B. Provisions of the Act

The new statute leaves undisturbed the surety's rights of subrogation through the owner and mechanic. Both of these theories depend upon the contract proceeds not being property of the contractor-taxpayer, and this determination is still to be made

110. *See* notes 83-85 *supra* and accompanying text.

111. Fidelity & Deposit Co. v. New York City Housing Authority, 241 F.2d 142 (2d Cir. 1957); United States Fid. & Guar. Co. v. Triborough Bridge Authority, 297 N.Y. 31, 74 N.E.2d 226 (1947).

112. United States v. R.F. Ball Constr. Co., 355 U.S. 587 (1958), *rev'g* 239 F.2d 384 (5th Cir.), *which aff'd* 140 F. Supp. 60 (W.D. Tex. 1956).

under state law. Rather, it expressly indicates that subrogation rights recognized under local law shall be effective as against the federal tax lien.[113]

As far as the third theory is concerned, the act provides limited protection to the surety. As amended, section 6323(c) protects the surety as to those disbursements made after the filing of the tax lien which are made pursuant to a written agreement entered into before the tax lien filing — to the extent that he would be protected under local law against a judgment lien arising as of the date of filing.[114] However, the priority is conferred only as to certain "qualified property." The proceeds of the contract whose performance was ensured are "qualified." Also "qualified" is tangible personal property used by the taxpayer to perform the contract ensured. Otherwise, the property either must be directly traceable to the surety's disbursements or must have been subject to the tax lien as of the time of its filing. To the extent the surety's security is in such qualified property, the principle of *United States v. R.F. Ball Construction Co.*,[115] affording priority to a federal tax lien over disbursements made by the surety after the date of tax lien filing, would be reversed.

On the negative side, sureties and lenders have expressed considerable concern about a different provision in the act. Sureties frequently pay wages to employees of a defaulting contractor, but had not in the past been obligated for the withholding taxes. Now, under section 3505(a),[116] a person who is not an employer of certain persons but who directly pays their wages is liable for the withholding taxes on such wages if the employer fails to pay them. Section 3505(b)[117] similarly makes a person liable for withholding taxes if he supplies funds to an employer for the specific purpose of paying wages with actual knowledge that the employer does not intend to or will not be able to pay the withholding taxes. Here, however, the person's liability is limited to twenty-five per cent of the funds supplied to the employer. It has been suggested that sureties and banks will "almost certainly have to increase their fees to meet these added obligations."[118]

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113. FTLA § 101(a), *adding* § 6323(i)(2) *to* INT. REV. CODE OF 1954, 80 Stat. 1131.

114. FTLA § 101(a), *replacing* INT. REV. CODE OF 1954, § 6323(c), 80 Stat. 1127.

115. 355 U.S. 587 (1958).

116. FTLA § 105(a), *adding* § 3505(a) *to* INT. REV. CODE OF 1954, 80 Stat. 1138.

117. FTLA § 105(a), *adding* § 3505(b) *to* INT. REV. CODE OF 1954, 80 Stat. 1139.

118. 6 P-H 1966 FED. TAX SERV. ¶60,409.

A related provision in the act requires a contractor who has a public works contract with the federal government to furnish a performance bond specifically providing coverage for withholding taxes payable by the contractor in carrying out the contract.[119]

VIII. INSURANCE POLICIES

Although state statutes almost universally exempt the proceeds of a life insurance policy from the claims of the insured's creditors,[120] these statutes cannot affect the rights of the federal government. Under *United States v. Bess*,[121] a federal tax lien may attach to a taxpayer-policy owner's interest in an insurance policy under section 6321 of the Internal Revenue Code, since it is part of his "property and rights to property," which is the test prescribed by the section.[122] Questions then arise concerning its priority as against the policy owner, the beneficiary, and the insurer.

A. Prior Law

As against the taxpayer-owner, the government could obtain whatever interest he had in the policy.[123] If he had the unrestricted right to surrender the policy and obtain the cash surrender value, the government through appropriate procedures could obtain that sum.[124]

The beneficiary's interest in the policy gives him the right to receive the proceeds when the insured dies. Naturally, if the government enforced its lien before the insured died and caused a termination of the policy, the beneficiary's interest would be

119. FTLA § 105(b), *adding* § 270a(d) *to* 40 U.S.C., 80 Stat. 1139.

120. *E.g.*, Ill. Rev. Stat. ch. 73, § 850 (1963); Mich. Stat. Ann. § 24.12207 (1957); N.Y. Insurance Law § 166 (McKinney 1966). At this point it should be noted that the discussion in this section applies generally to endowment and annuity contracts as well as life insurance policies.

121. 357 U.S. 51 (1958).

122. *Accord,* Knox v. Great Life Assur. Co., 109 F. Supp. 207 (E.D. Mich. 1952), *aff'd,* 212 F.2d 784 (6th Cir. 1954).

Generally, the question of whether or not a person has a property interest is determined under state law. *See* United States v. Durham Lumber Co., 363 U.S. 522 (1960). It is after this issue is decided in the affirmative that the tax lien attaches to the taxpayer's interest and establishes the priorities thereto. United States v. Bess, 357 U.S. 51 (1958).

123. United States v. Bess, *supra* note 122. *See also* Meyer v. United States, 375 U.S. 233 (1963), which held that where the taxpayer had assigned his rights in the policy to a bank, the federal tax lien on the cash surrender value is inferior to that assignment and may not be enforced against the beneficiary's share of the insurance proceeds.

124. Mutual Life Ins. Co. v. United States, 343 F.2d 71 (1965); Smith v. Donnelly, 65 F. Supp. 415 (E.D. La. 1946).

terminated. On the other hand, if the government's lien attached before the insured died but was not enforced until after death, the beneficiary's interest would not be terminated. In that event, the Supreme Court held, the government is entitled to an amount equal to the cash surrender value of the policy as of the date of death, and the beneficiary is entitled to the remainder of the proceeds.[125] If the government's lien did not arise against the insured until after his death, then, under *Commissioner v. Stern*,[126] state law determined whether or not the government, as a creditor, would prevail against the beneficiary. Usually it would not.[127]

The insurance company cannot object to the government's collecting its taxes, when all else fails, by proceeding against a taxpayer's insurance policy. The company does want to be protected, however, against double liability in the event the government is mistaken in its position — which has been known to happen.[128] Furthermore, while recognizing the government's right to any money which the taxpayer himself could demand under the policy, the insurer, as a matter of public policy, would often prefer to avoid having the insurance policy terminated. Frequently, the taxpayer may have become uninsurable since the policy was originally issued, and termination of the policy may deprive his beneficiaries — often his wife and children — of all insurance on his life.

To avoid the problem of double liability and the termination of policies through mistake, insurance companies maintained under the old provision that the government could not demand the cash surrender value of a policy and force its termination unless the government conducted a regular foreclosure action, to which all interested persons would be made parties. The government, on the other hand, maintained that a levy served on the insurer should be sufficient to entitle it to the cash surrender value. The courts sustained the insurance companies.[129] The

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125. United States v. Bess, 357 U.S. 51 (1958). It is assumed that the insured policy owner is the delinquent taxpayer. Where the taxpayer is the beneficiary under the policy, the tax lien attaches to his interest, and on the death of the insured the government can levy on the proceeds.

126. 357 U.S. 39 (1958).

127. *E.g.*, Commissioner v. Stern, 357 U.S. 39 (1958); Rowan v. Commissioner, 215 F.2d 641 (2d Cir. 1954).

128. *See, e.g.*, United States v. Sullivan, 333 F.2d 100 (3d Cir. 1964).

129. United States v. Pennsylvania Mut. Life Ins. Co., 130 F.2d 495 (3d Cir. 1942); United States v. Metropolitan Life Ins. Co., 130 F.2d 149 (2d Cir. 1942); United States v. Massachusetts Mut. Life Ins. Co., 127 F.2d 880 (1st Cir. 1942).

result, however, was that the necessary procedure, while safe, was costly and time-consuming for all concerned.[130]

Even where the government proceeded by way of foreclosure and established its right to cause the insurance policy to be surrendered, disputes arose concerning the amount due. At one extreme, the government could claim that it was entitled to the cash surrender value as of the day its lien arose plus all additions to such value up to the date of surrender. At the other extreme, the insurer could take the position that the government could only receive what the taxpayer could receive — namely, the cash surrender value less policy loans, interest thereon, and all other amounts disbursed or chargeable up to the date of surrender.

The government had conceded, at least on occasion, that the insurance company could deduct all disbursements and charges made up to the date on which the insurer received actual notice of the tax lien (rather than the date on which the lien arose).[131] The insurance companies had conceded that they could not deduct voluntary payments made after they received actual notice of the lien. The remaining, relatively narrow area of dispute involved disbursements or charges made after the company had received notice of the lien but which were made pursuant to requirements in the policy or agreements made before receipt of the notice. The focal point of the dispute was the so-called automatic premium loan — which in reality is a deduction from the cash surrender value made by the insurer pursuant to a requirement in the policy. The "loan" is used to pay for a premium which the insured has neglected to pay so that the policy will be kept in force. Here, too, under prior law, the insurance companies' position had been sustained.[132] Thus the automatic premium loan was deducted from the cash surrender value the government received (just as it would be deducted from what the insured would receive if he surrendered the policy).

B. Provisions of the Act

The FTLA in no way changes the rule of the *Bess* case that the tax lien attaches to the cash surrender value or the *Stern*

130. An examination of the files of the Metropolitan Life Insurance Company indicates that a foreclosure suit may last from three months to ten years and that the average length of a suit is about three years.

131. Rev. Rul. 48, 1956-1 Cum. Bull. 561.

132. United States v. Sullivan, 333 F.2d 100 (3d Cir. 1964); United States v. Wilson, 333 F.2d 137 (3d Cir. 1964).

holding that a lien arising after death does not attach to policy proceeds payable to a beneficiary other than the insured's estate. Likewise untouched are the rules protecting the insurer for disbursements made before it has actual notice of a filed federal tax lien and for any automatic premium loans required in order to keep the insurance in force under a pre-tax-lien-filing contract, even if made after receipt of notice.[133]

However, the act reverses prior law by providing that the government no longer has to resort to foreclosure in order to obtain the cash loan value (which is equal to the guaranteed cash surrender value).[134] Instead it may simply serve notice of levy upon the insurer. Payment must be made within ninety days, but it is contemplated that the Internal Revenue Service will develop a procedure to inform the insurance company before the end of the ninety days of payments made on the tax liability that serve to reduce the amount of the levy during that interval.[135] The government need not surrender the policy, but it must certify that notice of the levy has been mailed to the taxpayer. Despite the levy procedure, the government may nevertheless foreclose if it chooses.[136]

Some protection against double liability is afforded the insurer by section 6332(d),[137] which expressly protects the insurer who pays the government in response to a levy against liability to the delinquent taxpayer as well as to the beneficiary. Included is the case where the government levies on property under an assessment which is incorrectly determined.[138] Of course, if the insurer mistakenly pays the government, its liability to the insured and beneficiary is unaffected.[139] In that event, administrative[140] or judicial[141] relief is available for recovery from the government.

133. FTLA § 101(a), *adding* §§ 6323(b)(9)(A), (B) *to* INT. REV. CODE OF 1954, 80 Stat. 1126.

134. FTLA § 104(b)(2), *adding* §§ 6332(b)(1), (2) *to* INT. REV. CODE of 1954, 80 Stat. 1136. Note that this levy procedure does not apply to annuity contracts.

135. H.R. REP. No. 1884, 17.

136. FTLA § 104(b)(2), *adding* § 6332(b)(3) *to* INT. REV. CODE OF 1954, 80 Stat. 1136.

137. FTLA § 104(b)(4), *adding* § 6332(d) *to* INT. REV. CODE OF 1954, 80 Stat. 1136.

138. H.R. REP. No. 1884, 17-18.

139. *Id.*

140. FTLA § 104(i)(3), *adding* § 6343(b) *to* INT. REV. CODE OF 1954, 80 Stat. 1138, empowers the Internal Revenue Service to return property or the money equivalent of property wrongfully levied upon.

141. FTLA § 110(a), *adding* § 7426 *to* INT. REV. CODE OF 1954, 80 Stat. 1143, creates an action against the United States for those persons (other than the person assessed for taxes) who claim that the government made a wrongful levy on property in which they have an interest. See notes 185-95 *infra* and accompanying text.

The act's levy procedure should permit a taxpayer to continue his insurance in force[142] even where the government has demanded and received the full cash loan value payable under the policy. The levy procedure does not involve a surrender of the policy and termination of the insurance; rather it operates as if the insured had obtained a maximum loan but elected to continue the policy in force. Thus, as long as interest on the "loan" and future premiums are paid when due, the insurance policy will continue in force. After the levy has been satisfied, it would be possible for the delinquent taxpayer to transfer the policy to the beneficiary of someone else who could pay future premiums free of the federal tax lien.

The act specifically provides that once a levy has been satisfied by delivery to the government of the loan value of the policy, the insurer may ignore the federal tax lien unless the government delivers another notice to the insurer.[143] This provision means that the insurer does not have to check on whether the tax liability has been satisfied before undertaking subsequent transactions. It also should facilitate any transfer of the policy which the taxpayer may choose to make.

Many insurance policies provide that upon default in the payment of premiums, the policy shall be continued as extended term insurance, unless the policyholder otherwise elects. Thus, the cash surrender value is used to purchase insurance in the same amount as the policy on a term insurance basis for a period of time specified in the policy. If a policy is placed on an extended term insurance basis, ordinarily the policy loan provisions become inoperative. Thus, the policyholder could not have any amount "advanced to him," which is the language used in the new levy provision.[144] In these circumstances, then, the levy procedure would not appear to be available to the government. Instead, foreclosure would be necessary. Upon foreclosure, the government would receive the amount of the unused premium.

IX. OTHER FAVORED LIENS

A few major types of competing interests with which the FTLA deals should be noted.

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142. H.R. Rep. No. 1884, 16.

143. FTLA § 101(a), *adding* § 6323(b)(9)(C) *to* Int. Rev. Code of 1954, 80 Stat. 1126.

144. FTLA § 104(b)(2), *replacing* Int. Rev. Code of 1954, § 6332(b)(2), 80 Stat. 1136.

As was already mentioned in connection with mortgages,[145] the superpriority afforded by the act to state and local tax liens[146] gives liens of taxing authorities on real property for ad valorem taxes and special assessments priority over an earlier federal tax lien if they are entitled under local law to priority over earlier security interests. Similar protection is conferred on liens for charges for utilities or public services furnished by governmental instrumentalities. This change will eliminate many circular priority problems heretofore encountered by real property mortgagees.[147]

A superpriority is also conferred by the act on banks and similar institutions which make a passbook loan without actual knowledge of a filed federal tax lien.[148] If possession of the passbook is continuously kept by the lender and the loan is secured thereby, the institution's lien on the account will prevail over an earlier filed federal tax lien against the borrower.

X. ACTUAL NOTICE RULE

Several provisions in the act afford protection against a federal tax lien as long as the competing party does not have "actual notice."[149] The act's definition of "actual notice or knowledge"[150] is patterned after that in the Uniform Commercial Code.[151] Thus, an organization does not have notice or knowledge of a fact unless the fact is or, if the organization had exercised due diligence, would have been, brought to the attention of the individual conducting the transaction. Due diligence is also carefully defined.[152] The government has the burden of showing that the taxpayer had actual notice or knowledge.[153]

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145. *See* notes 35-36 *supra* and accompanying text.

146. FTLA § 101(a), *adding* § 6323(b)(6) *to* INT. REV. CODE OF 1954, 80 Stat. 1126.

147. *See, e.g.*, the discussion in note 27 *supra*.

148. FTLA § 101(a), *adding* § 6323(b)(10) *to* INT. REV. CODE OF 1954, 80 Stat. 1127.

149. *E.g.*, FTLA § 101(a), *adding* §§ 6323(b)(1), (2), (10) *to* INT. REV. CODE OF 1954, 80 Stat. 1126, 1127.

150. FTLA § 101(a), *adding* § 6323(i)(1) *to* INT. REV. CODE OF 1954, 80 Stat. 1131.

151. UNIFORM COMMERCIAL CODE §§ 1-201(25)-(27).

152. FTLA § 101(a), *adding* § 6323(i)(1) *to* INT. REV. CODE OF 1954, 80 Stat. 1131. Due diligence means complying with the reasonable internal routines of the organization for communicating significant information, but the standard of due diligence does not require a person to communicate information unless he is charged with this responsibility as part of his regular duties or unless he has reason to know the information would materially affect the transaction.

153. H.R. REP. NO. 1884, 12.

XI. FILING AND REFILING PROVISIONS

A. Filing

Under prior law, it was necessary to file notice of the tax lien in the office designated by the state in which the property was situated or, if none was designated, in the office of the clerk of the United States district court for the judicial district in which the property was situated.[154] Several problems arose under these provisions. First, the government maintained, for the most part successfully, that the state could designate only one office for filing. Thus it could not require filing for real property in the county clerk's office generally but in the Torrens office if the particular real property was registered.[155] Second, while the place where property was "situated" could be readily determined for real property, personal property, especially intangible personalty, created problems as to the proper place of filing.[156]

The FTLA codifies the government's position that the state may designate only one place for filing within the state, or within the appropriate county or other geographical subdivision, though it may designate different offices for realty and personalty; the act retains the prior rule for states which do not designate an office satisfying this test.[157] Jurisdictional conflicts as to the proper place for filing on personal property and the necessity of multiple filing are avoided by making the residence of the taxpayer at the time of the filing of the notice of lien the test of jurisdiction.[158] For this purpose, the residence of a corporation is the place where it has its principal executive office, and the residence of a person outside the United States is the District of Columbia.

B. Refiling

Under prior law, a filed notice of tax lien continued as constructive notice of the lien as long as the tax liability could be enforced.[159] No refiling was required. Now refiling is required during the one-year period from the sixty-second through the seventy-third months after the date of assessment of the tax and

154. Int. Rev. Code of 1954, § 6323(a), 68A Stat. 779.
155. United States v. Rasmuson, 253 F.2d 944 (8th Cir. 1958).
156. S. Rep. No. 1708, 89th Cong., 2d Sess. 11 (1966).
157. FTLA § 101(a), *adding* § 6323(f) *to* Int. Rev. Code of 1954, 80 Stat. 1129; S. Rep. No. 1708, 89th Cong., 2d Sess. 11 (1966).
158. FTLA § 101(a), *adding* § 6323(f)(2) *to* Int. Rev. Code of 1954, 80 Stat. 1129.
159. Int. Rev. Code of 1954, § 6322, 68A Stat. 779; Act of Feb. 26, 1964, Pub. L. 88-272, tit. II, §§ 23(a), (c)(1), 78 Stat. 127, 128; H.R. Rep. No. 1884, 10.

during the last one-year period of every six years after the end of such seventy-third month.[160] A special transitional rule makes the calendar year 1967 the first required refiling period for taxes assessed before January 1, 1962.[161]

XII. OTHER PROCEDURAL CHANGES

The act makes a substantial number of procedural changes designed to facilitate both the transaction of business relating to federal tax liens and levies by either the government or third parties. The more important changes not already examined can be briefly summarized.

A. Certificates Relating to Liens

The act continues in effect the substance of section 6325(a) of the 1954 Code relating to release of liens,[162] but it amends section 6325 to provide modified rules for the discharge of property from a tax lien,[163] to authorize the subordination and the issuance of certificates of nonattachment of tax liens,[164] and to provide new rules concerning the legal effect of the issuance[165] or revocation[166] of all such certificates.

B. Seizure of Property for Collection of Taxes

The act amends section 6331(b) of the Code to make it clear that if the United States levies on property of a taxpayer in the hands of a third party, the "levy shall extend only to property possessed and obligations existing at the time thereof."[167] Provisions are also included making a person who fails to respond

160. FTLA § 101(a), *adding* § 6323(g)(3) *to* Int. Rev. Code of 1954, 80 Stat. 1130.

161. FTLA § 101(a), *adding* § 6323(g)(4) *to* Int. Rev. Code of 1954, 80 Stat. 1130.

162. FTLA § 103(a), *amending* Int. Rev. Code of 1954, § 6325(a), 80 Stat. 1133; H.R. Rep. No. 1884, 52.

163. FTLA § 103 (a), *amending* Int. Rev. Code of 1954, § 6325(b)(2), 80 Stat. 1133. The amendment of § 6325(b)(2) allows the Internal Revenue Service a degree of flexibility it did not have under the 1954 version of the subsection, 68A Stat. 782 (1954); now the presumably lower forced sale value of the property can be considered in determining the government's interest, whereas prior law restricted consideration to the fair market value. H.R. Rep. No. 1884, 14, 53.

164. FTLA § 103(a), *replacing* Int. Rev. Code of 1954, §§ 6325(d),(e), 80 Stat. 1134.

165. FTLA § 103(a), *adding* § 6325(f)(1) *to* Int. Rev. Code of 1954, 80 Stat. 1134.

166. FTLA § 103(a), *adding* §§ 6325(f)(2),(3) *to* Int. Rev. Code of 1954, 80 Stat. 1135.

167. FTLA § 104(a), *amending* Int. Rev. Code of 1954, § 6331(b), 80 Stat. 1135.

to a levy personally liable to the extent of the value of the property involved.[168] While this amount, when paid, is credited against the delinquent tax liability, a fifty per cent penalty is imposed on anyone who fails to respond to a levy without reasonable cause, and the penalty amount is not so credited. One who honors a levy, on the other hand, is expressly discharged from liability to the taxpayer, even if the government levy is under an assessment which is incorrectly determined.[169]

When property is seized by the Treasury, notice of the sale may now be published in a newspaper generally *circulated* in the county in which the property is seized and not only, as under prior law, in a newspaper *published* in such county.[170] Where real property is seized and sold by the government for delinquent taxes, the owner now has only 120 days rather than a year within which to redeem.[171] If the real property is purchased by the government at such a sale, the deed prepared by the Treasury no longer needs the approval as to form of the local U.S. attorney.[172] The act codifies the rule that, after a tax sale by the government, a certificate of sale for personal property or a deed of real property operates to discharge all junior liens, encumbrances, and titles from the property.[173] It also makes the rules concerning the application of proceeds of a levy and sale applicable to a sale following a redemption of real property by the government.[174] Finally, the act sets forth detailed rules governing the return of property after a wrongful levy by the government.[175]

C. Suspension of Running of Period of Limitations

Under the general rule, the running of the statute of limitations against a tax liability is suspended during any period that assets

168. FTLA § 104(b)(4), *replacing* Int. Rev. Code of 1954, § 6332(c), 80 Stat. 1135.

169. FTLA § 104(b)(4), *adding* § 6332(d) *to* Int. Rev. Code of 1954, 80 Stat. 1136.

170. FTLA § 104(d), *amending* Int. Rev. Code of 1954, § 6335(b), 80 Stat. 1137; H.R. Rep. No. 1884, 18.

171. FTLA § 104(e), *amending* Int. Rev. Code of 1954, § 6337(b)(1), 80 Stat. 1137.

172. FTLA § 104(f), *amending* Int. Rev. Code of 1954, § 6338(c), 80 Stat. 1137; H.R. Rep. No. 1884, 18-19.

173. FTLA § 104(g), *amending* Int. Rev. Code of 1954, § 6339(c), 80 Stat. 1137. This section, the legislative history notes, H.R. Rep. No. 1884, 62, codifies the holding of Commercial Credit Corp. v. Schwartz, 130 F. Supp. 524 (E.D. Ark. 1955).

174. FTLA § 104(h), *amending* Int. Rev. Code of 1954, § 6342(a), 80 Stat. 1137.

175. FTLA § 104(i)(3), *adding* § 6343(b) *to* Int. Rev. Code of 1954, 80 Stat. 1138.

subject to a tax lien are in the control or custody of a court and for six months thereafter.[176] Prior law did not so toll the statute where the estate of a decedent or an incompetent was involved.[177] The act eliminates this exception.[178]

The act also changes the law in providing that the absence of the taxpayer from the United States, rather than the absence of his property,[179] suspends the running of the period of limitations.[180] Suspension only occurs, however, if the taxpayer is absent for at least six months. If so suspended, the period shall not then expire for at least six months after his return.

Another new provision operates to suspend the running of the period during any time that property of a third party is wrongfully seized or received by the government and prior to either its return or the expiration of thirty days after a final judgment in favor of the third party.[181] The latter suspension applies, however, only to a portion of the tax owed equal to the value of the specific property returned to the third party.

D. Proceedings Where the United States Has Title to Property

The FTLA removes doubt heretofore existing that the government has the authority to bring an action to quiet title to property acquired through enforcement of a tax lien, by conferring jurisdiction of such an action on the United States district courts.[182] It also codifies the rule that the government may bid up to the amount of its lien and selling expenses at its own tax sales.[183]

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176. Int. Rev. Code of 1954, § 6503(b).
177. Int. Rev. Code of 1954, § 6503(b), 68A Stat. 806.
178. FTLA § 106(a), *amending* Int. Rev. Code of 1954, § 6503(b), 80 Stat. 1139.
179. Int. Rev. Code of 1954, § 6503(c), 68A Stat. 806.
180. FTLA § 106(b), *amending* Int. Rev. Code of 1954, § 6503(c), 80 Stat. 1139.
181. FTLA § 106(c), *adding* § 6503(g) *to* Int. Rev. Code of 1954, 80 Stat. 1140. The purpose of this provision may not be apparent. The legislative history indicates that it corrects a situation prejudicial to the government: where the Internal Revenue Service had no indication that it had wrongfully seized *X*'s property to satisfy *Y*'s tax liability, it would halt the collection process. *Y* would persuade *X* to desist from immediately claiming his property and then help him collect it after the statute of limitations on *Y*'s liability had run. H.R. Rep. No. 1884, 23-24.
182. FTLA § 107(a), *adding* § 7402(e) *to* Int. Rev. Code of 1954, 80 Stat. 1140.
183. FTLA § 107(b), *amending* Int. Rev. Code of 1954, § 7403(c), 80 Stat. 1140.

E. INTERVENTION BY THE UNITED STATES

Section 7424, added in this revision, removes doubt existing under prior law in providing that if the United States is not a party to a civil action, it may intervene to assert a revenue lien on the property which is the subject of the action.[184] When the government intervenes, the procedural rules applicable when it is joined as a party are made to apply. If an application to intervene is denied, the government's lien is unaffected by the action.

F. PROCEEDINGS BY THIRD PARTIES AGAINST THE UNITED STATES

Section 7426, another new section, permits a person whose property has been wrongfully levied upon to sue the United States.[185] Similarly, a person with a junior lien on the property sold pursuant to a levy by the government may bring an action for any surplus proceeds,[186] and a person may sue the government if he claims to be entitled to a fund being held as a substitute for property released from a tax lien.[187]

In all these cases, however, the court may grant only limited forms of appropriate relief. Thus, a levy or sale may be enjoined;[188] specific property still held may be ordered returned;[189] or a money judgment may be granted for the amount levied upon,[190] for the amount received by the government from the sale of the property,[191] for the amount of any surplus proceeds,[192] or for the amount of any interest in substituted proceeds of sale.[193]

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184. FTLA § 108, *replacing* INT. REV. CODE OF 1954, § 7424, 80 Stat. 1140.

185. FTLA § 110(a), *adding*, § 7426(a)(1) *to* INT. REV. CODE OF 1954, 80 Stat. 1143. FTLA § 202(a), *adding* § 1346(e) *to* 28 U.S.C., 80 Stat. 1148, confers upon the district courts original jurisdiction over actions brought underINT. REV. CODE OF 1954, § 7426. FTLA § 202(b), *adding* § 1402(c) *to* 28 U.S.C., 80 Stat. 1149, provides that venue in such actions will lie only in the district where the property is situated at the time of levy or, if no levy is made, in the district where the event giving rise to the cause of action occurred.

186. FTLA § 110(a), *adding* § 7426(a)(2) *to* INT. REV. CODE OF 1954, 80 Stat. 1143.

187. FTLA § 110(a), *adding* § 7426(a)(3) *to* INT. REV. CODE OF 1954, 80 Stat. 1143.

188. FTLA § 110(a), *adding* § 7426(b)(1) to INT. REV. CODE OF 1954, 80 Stat. 1143.

189. FTLA § 110(a), *adding* § 7426(b)(2)(A) *to* INT. REV. CODE OF 1954, 80 Stat. 1143.

190. FTLA § 110(a), *adding* § 7426(b)(2)(B) *to* INT. REV. CODE OF 1954, 80 Stat. 1143.

191. FTLA § 110(a), *adding* § 7426(b)(2)(C) *to* INT. REV. CODE OF 1954, 80 Stat. 1143.

192. FTLA § 110(a), *adding* § 7426(b)(3) *to* INT. REV. CODE OF 1954, 80 Stat. 1143.

193. FTLA § 110(a), *adding* § 7426(b)(4) *to* INT. REV. CODE OF 1954, 80 Stat. 1143.

A third party may not contest a tax assessment upon which the government's lien is based in an action under section 7426.[194] Neither may an action be brought against an officer or employee of the United States.[195] Any suit under this section must be brought within nine months after the date of the levy or agreement giving rise to the action.[196] This period may be extended for twelve months from the date of filing a timely request for the return of property wrongfully levied upon or for six months from the date of disallowance of such request, whichever is shorter.[197]

G. Effect of Judgment on Tax Lien and Levy

Doubt existed under prior law about the effect on the tax lien if the government prosecuted its tax claim to judgment.[198] Section 6322 now makes it clear that the tax lien is not merged into the judgment.[199] The House Ways and Means Committee *Report* specifically recognizes that this portion of the new law applies only to judgments becoming final after enactment of the bill;[200] cases on appeal[201] are unaffected by this provision. The act also provides that obtaining a judgment will neither extend nor curtail the period during which the government may utilize its administrative levy procedure.[202]

H. Joinder of the United States in Certain Actions

Under the act, the government's consent to suit under section 2410 of the Judicial Code is expanded to include partition, condemnation, and interpleader suits.[203] All pleadings in actions under section 2410 must specify the nature of the government's interest and, where it is a revenue lien, must provide specified information with respect thereto.[204] If the action is one to fore-

194. FTLA § 110(a), *adding* § 7426(c) *to* Int. Rev. Code of 1954, 80 Stat. 1144.
195. FTLA § 110(a), *adding* § 7426(d) *to* Int. Rev. Code of 1954, 80 Stat. 1144.
196. FTLA § 110(b), *adding* § 6532(c)(1) *to* Int. Rev. Code of 1954, 80 Stat. 1144.
197. FTLA § 110(b), *adding* § 6532(c)(2) *to* Int. Rev. Code of 1954, 80 Stat. 1144.
198. H.R. Rep. No. 1884, 30-31.
199. FTLA § 113(a), *amending* Int. Rev. Code of 1954, § 6322(a), 80 Stat. 1146.
200. H.R. Rep. No. 1884, 81.
201. *E.g.*, United States v. Hodes, 355 F.2d 746, *cert. granted*, 384 U.S. 968 (1966).
202. FTLA § 113(b), *amending* Int. Rev. Code of 1954, § 6502(a), 80 Stat. 1145.
203. FTLA § 201, *adding* §§ 2410(a)(3)-(5) *to* 28 U.S.C., 80 Stat. 1147.
204. FTLA § 201, *adding* § 2410(b) *to* 28 U.S.C., 80 Stat. 1147.

close a mortgage or other lien, the person suing must seek a judicial sale.[205]

XIII. SPECIAL ESTATE AND GIFT TAX LIEN PROVISIONS

The provisions considered thus far all relate to the priority of a *general* federal tax lien. That lien arises whenever a tax assessment is made.[206] Section 6324 of the Internal Revenue Code also creates a *special* lien for estate and gift taxes (without tax lien filing) which may continue for ten years from the date of the death or gift. The act makes it clear that the special lien does not continue if the tax "becomes unenforceable by reason of lapse of time" (usually six years after *assessment*).[207] Likewise, it changes section 6324 to conform in certain respects with the general tax lien provisions in section 6323. Thus, whenever the words "mortgagee" and "pledgee" were used, the phrase "holder of a security interest" has been substituted.[208] Similarly, the mechanic lienor is now specifically protected.[209] The classes of person entitled to superpriority over the general tax lien[210] (exclusive of commercial transactions financing agreements and other security interests protected by subsection (c) of section 6323[211]) also enjoy such priority over the special estate and gift tax lien.[212] Finally, if a lien or security interest is entitled to priority over a special estate or gift tax lien, the priority is made to extend to interest and expenses relating to such lien or security interest.[213]

XIV. EFFECTIVE DATE

In general, the FTLA became effective the day after the date

205. FTLA § 201, *adding* § 2410(c) *to* 28 U.S.C., 80 Stat. 1148.

206. INT. REV. CODE OF 1954, § 6322.

207. FTLA § 102, *amending* INT. REV. CODE OF 1954, §§ 6324(a)(1),(b), 80 Stat. 1132; H.R. REP. NO. 1884, 13.

208. FTLA § 102, *amending* INT. REV. CODE OF 1954, §§ 6324(a)(2),(3),(b), 80 Stat. 1132; *see* notes 31-32 *supra* and accompanying text.

209. FTLA § 102, *adding* § 6324(c)(1) *to* INT. REV. CODE OF 1954, 80 Stat. 1133; *see* notes 86-87 *supra* and accompaying text.

210. *I.e.*, those interests described in INT. REV. CODE OF 1954, § 6323(b), *added by* FTLA § 101(a), 80 Stat. 1125.

211. FTLA § 101(a), *replacing* INT. REV. CODE OF 1954, § 6323(c), 80 Stat. 1127.

212. FTLA § 102, *adding* § 6324(c)(1) *to* INT. REV. CODE OF 1954, 80 Stat. 1133.

213. FTLA § 102, *adding* § 6324(c)(2) *to* INT. REV. CODE OF 1954, 80 Stat. 1133.

of approval, November 2, 1966.[214] There are, however, several exceptions. First, if the government has already enforced a lien by an action which became final before November 3, 1966, the changes in title one of the act have no effect.[215] Neither do the changes in that title impair a priority of anyone holding a lien or interest prior to November 3, 1966; operate to increase the liability of such a person; or shorten the time for bringing suit with respect to transactions occurring before November 3, 1966.[216] The amendments imposing liability for withholding taxes on a third person paying, or supplying funds for the payment of, wages of an employee only apply with respect to wages paid on or after January 1, 1967.[217] The related requirement that performance bonds of contractors for public works provide coverage for withholding taxes will apply only to contracts made pursuant to invitations for bids issued after June 30, 1967.[218] Finally, if, prior to November 3, 1966, a person has started an action to clear title to property under former section 7424 of the Internal Revenue Code,[219] the action will not be affected by amendments in the act.[220]

XV. SOME INTERESTS NOT COVERED BY THE ACT

Except as otherwise specifically provided, the act does not basically change the requirement that a competing lien be "choate." Thus, since there is no specific provision concerning attachment liens, the law concerning them is not changed. Similarly, other types of liens not specifically embraced by the act continue to be governed by earlier court pronouncements.

A. Set-Off

Generally, a debtor may set off against any amount that he owes to his creditor amounts owed by his creditor to him.[221] This right of set-off has been denied, however, where a bank tried to assert it after notice of a federal tax lien.[222] Although the American Bar Association recommended a provision recognizing the

214. FTLA §§ 114, 203, 80 Stat. 1146, 1149.
215. FTLA § 114(b)(1), 80 Stat. 1146.
216. FTLA § 114(b)(2), 80 Stat. 1146-47.
217. FTLA § 114(c)(1), 80 Stat. 1147.
218. FTLA § 114(c)(2), 80 Stat. 1147.
219. 68A Stat. 877 (1954).
220. FTLA § 114(d), 80 Stat. 1147.
221. *E.g.*, N.Y. Debtor and Creditor Law § 151 (McKinney Supp., 1966).
222. Bank of Nevada v. United States, 251 F.2d 820 (9th Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).

right of set-off as to all debtors of a taxpayer,[223] the act contains no such provision.

B. Landlords' Liens

The American Bar Association also recommended that specific provisions be incorporated in the law to protect landlords with statutory or contractual liens against federal tax liens arising after the lease contract was made.[224] Since the act does not contain such provisions, the landlord would seem to be protected only to the extent that his interest in the tenant's property qualifies as a "security interest" as defined in the act.[225]

C. Insolvency Priority Statute

Also included in the recommendations of the American Bar Association were provisions which would have brought the priority rules applicable under the so-called Insolvency Priority Statute[226] into conformity with those applicable in bankruptcy.[227] The recommended provisions would have made it clear that valid liens and security interests would not be defeated by the government's priority under the statute. While the act, because of jurisdictional problems among the Congressional committees, does not contain the recommended amendment to section 3466, it is hoped that such an amendment will be readily passed when referred to the appropriate committees.

223. ABA Report 17-18.
224. *Id.* at 24-25.
225. FTLA § 101(a), *adding* § 6323(h)(1) *to* Int. Rev. Code of 1954, 80 Stat. 1130.
226. 31 U.S.C. § 191 (1964).
227. ABA Report 43-44.

APPENDIX

FEDERAL TAX LIEN ACT OF 1966

. . . .

SEC. 101. PRIORITY OF LIENS.

(a) Amendment of Section 6323. — Section 6323 . . . is amended to read as follows:

"SEC. 6323. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

"(a) Purchases, Holders of Security Interests, Mechanic's Lienors, and Judgment Lien Creditors. — The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof

which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.

"(b) PROTECTION FOR CERTAIN INTERESTS EVEN THOUGH NOTICE FILED. — Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid —

. . . .

"(3) PERSONAL PROPERTY PURCHASED AT RETAIL. — With respect to tangible personal property purchased at retail, as against a purchaser in the ordinary course of the seller's trade or business, unless at the time of such purchase such purchaser intends such purchase to (or knows such purchase will) hinder, evade, or defeat the collection of any tax under this title.

. . . .

"(5) PERSONAL PROPERTY SUBJECT TO POSSESSORY LIEN. — With respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose.

"(6) REAL PROPERTY TAX AND SPECIAL ASSESSMENT LIENS. — With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interests in such property which are prior in time, and such lien secures payment of —

"(A) a tax of general application levied by any taxing authority based upon the value of such property;

"(B) a special assessment imposed directly upon such property by any taxing authority, if such assessment is imposed for the purpose of defraying the cost of any public improvement; or

"(C) charges for utilities or public services furnished to such property by the United States, a State or political subdivision thereof, or an instrumentality of any one or more of the foregoing.

"(7) RESIDENTIAL PROPERTY SUBJECT TO A MECHANIC'S LIEN FOR CERTAIN REPAIRS AND IMPROVEMENTS. — With respect to real property subject to a lien for repair or improvement of a personal residence (containing not more than foud dwelling units) occupied by the owner of such residence, as against a mechanic's lienor, but only if the contract price on the contract with the owner is not more than $1,000.

"(8) ATTORNEYS' LIENS. — With respect to a judgment or other amount in settlement of a claim or of a cause of action, as against an attorney who, under local law, holds a lien upon or a contract enforcible against such judgment or amount, to the extent of his reasonable compensation for obtaining such judgment or procuring such settlement, except that this paragraph shall not apply to any judgment or amount in settlement of a claim or of a cause of action against the United States to the extent that the United States offsets such judgment or amount against any liability of the taxpayer to the United States.

"(9) CERTAIN INSURANCE CONTRACTS. — With respect to a life insurance, endowment, or annuity contract, as against the organization which is the insurer under such contract, at any time —

"(A) before such organization had actual notice or knowledge of the existence of such lien;

"(B) after such organization had such notice or knowledge, with respect to advances required to be made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge; or

"(C) after satisfaction of a levy pursuant to section 6332(b), unless and until the Secretary or his delegate delivers to such organization a notice, executed after the date of such satisfaction, of the existence of such lien.

. . . .

"(c) PROTECTION FOR CERTAIN COMMERCIAL TRANSACTIONS FINANCING AGREEMENTS, ETC. —

"(1) IN GENERAL. — To the extent provided in this subsection, even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which —

"(A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting —

"(i) a commercial transactions financing agreement,

"(ii) a real property construction or improvement financing agreement, or

"(iii) an obligatory disbursement agreement, and

"(B) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

"(2) COMMERCIAL TRANSACTIONS FINANCING AGREEMENT. — For purposes of this subsection —

"(A) DEFINITION. — The term 'commercial transactions financing agreement' means an agreement (entered into by a person in the course of his trade or business) —

"(i) to make loans to the taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

"(ii) to purchase commercial financing security (other than inventory) acquired by the taxpayer in the ordinary course of his trade or business;

but such an agreement shall be treated as coming within the term only to the extent that such loan or purchase is made before the 46th day after the date of tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing.

"(B) LIMITATION ON QUALIFIED PROPERTY. — The term 'qualified property', when used with respect to a commercial transactions financing agreement, includes only commercial financing security acquired

by the taxpayer before the 46th day after the date of tax lien filing.

"(C) COMMERCIAL FINANCING SECURITY DEFINED. — The term 'commercial financing security' means (i) paper of a kind ordinarily arising in commercial transactions, (ii) accounts receivable, (iii) mortgages on real property, and (iv) inventory.

"(D) PURCHASER TREATED AS ACQUIRING SECURITY INTEREST. — A person who satisfies subparagraph (A) by reason of clause (ii) thereof shall be treated as having acquired a security interest in commercial financing security.

"(3) REAL PROPERTY CONSTRUCTION OR IMPROVEMENT FINANCING AGREEMENT. — For purposes of this subsection —

"(A) DEFINITION. — The term 'real property construction or improvement financing agreement' means an agreement to make cash disbursements to finance —

"(i) the construction or improvement of real property,

"(ii) a contract to construct or improve real property, or

"(iii) the raising or harvesting of a farm crop or the raising of livestock or other animals.

For purposes of clause (iii), the furnishing of goods and services shall be treated as the disbursement of cash.

"(B) LIMITATION ON QUALIFIED PROPERTY. — The term 'qualified property', when used with respect to a real property construction or improvement financing agreement, includes only —

"(i) in the case of subparagraph (A) (i), the real property with respect to which the construction or improvement has been or is to be made,

"(ii) in the case of subparagraph (A) (ii), the proceeds of the contract described therein, and

"(iii) in the case of subparagraph (A) (iii), property subject to the lien imposed by section 6321 at the time of tax lien filing and the crop or the livestock or other animals referred to in subparagraph (A) (iii).

"(4) OBLIGATORY DISBURSEMENT AGREEMENT. — For purposes of this subsection —

"(A) DEFINITION. — The term 'obligatory disbursement agreement' means an agreement (entered into by a person in the course of his trade or business) to make disbursements, but such an agreement shall be treated as coming within the term only to the extent of disbursements which are required to be made by reason of the intervention of the rights of a person other than the taxpayer.

"(B) LIMITATION ON QUALIFIED PROPERTY. — The term 'qualified property', when used with respect to an obligatory disbursement agreement, means property subject to the lien imposed by section 6321 at the time of tax lien filing and (to the extent that the acquisition is directly traceable to the disbursements referred to in subparagraph

(A)) property acquired by the taxpayer after tax lien filing.

"(C) SPECIAL RULES FOR SURETY AGREEMENTS. — Where the obligatory disbursement agreement is an agreement ensuring the performance of a contract between the taxpayer and another person —

"(i) the term 'qualified property' shall be treated as also including the proceeds of the contract the performance of which was ensured, and

"(ii) if the contract the performance of which was ensured was a contract to construct or improve real property, to produce goods, or to furnish services, the term 'qualified property' shall be treated as also including any tangible personal property used by the taxpayer in the performance of such ensured contract.

"(d) 45-DAY PERIOD FOR MAKING DISBURSEMENTS. — Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing by reason of disbursements made before the 46th day after the date of tax lien filing, or (if earlier) before the person making such disbursements had actual notice or knowledge of tax lien filing, but only if such security interest —

"(1) is in property (A) subject, at the time of tax lien filing, to the lien imposed by section 6321, and (B) covered by the terms of a written agreement entered into before tax lien filing, and

"(2) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

"(e) PRIORITY OF INTEREST AND EXPENSES. — If the lien imposed by section 6321 is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to —

"(1) any interest or carrying charges upon the obligation secured,

"(2) the reasonable charges and expenses of an indenture trustee or agent holding the security interest for the benefit of the holder of the security interest,

"(3) the reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured,

"(4) the reasonable costs of insuring, preserving, or repairing the property to which the lien or security interest relates,

"(5) the reasonable costs of insuring payment of the obligation secured, and

"(6) amounts paid to satisfy any lien on the property to which the lien or security interest relates, but only if the lien so satisfied is entitled to priority over the lien imposed by section 6321,

to the extent that, under local law, any such item has the same priority as the lien or security interest to which it relates.

. . . .

"(h) DEFINITIONS. — For purposes of this section and section 6324 —

"(1) SECURITY INTEREST. — The term 'security interest' means any interest in property acquired by contract for the purpose of securing pay-

ment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

"(2) MECHANIC'S LIENOR. — The term 'mechanic's lienor' means any person who under local law has a lien on real property (or on the proceeds of a contract relating to real property) for services, labor, or materials furnished in connection with the construction or improvement of such property. For purposes of the preceding sentence, a person has a lien on the earliest date such lien becomes valid under local law against subsequent purchasers without actual notice, but not before he begins to furnish the services, labor, or materials.

. . . .

"(6) PURCHASER. — The term 'purchaser' means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchases without actual notice. In applying the preceding sentence for purposes of subsection (a) of this section, and for purposes of section 6324 —

"(A) a lease of property,

"(B) a written executory contract to purchase or lease property,

"(C) an option to purchase or lease property or any interest therein, or

"(D) an option to renew or extend a lease of property,

which is not a lien or security interest shall be treated as an interest in property.

"(i) SPECIAL RULES. —

"(1) ACTUAL NOTICE OR KNOWLEDGE. — For purposes of this subchapter, an organization shall be deemed for purposes of a particular transaction to have actual notice or knowledge of any fact from the time such fact is brought to the attention of the individual conducting such transaction, and in any event from the time such fact would have been brought to such individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routine. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

"(2) SUBROGATION. — Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324.

. . . .

SEC. 102. SPECIAL LIENS FOR ESTATE AND GIFT TAXES.

Section 6324 . . . is amended to read as follows:

"SEC. 6324. SPECIAL LIENS FOR ESTATE AND GIFT TAXES.

"(a) LIENS FOR ESTATE TAX. — Except as otherwise provided in subsection (c) —

"(1) UPON GROSS ESTATE. — Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

. . . .

"(b) LIEN FOR GIFT TAX. — Except as otherwise provided in subsection (c), unless the gift tax imposed by chapter 12 is sooner paid in full or becomes unenforceable by reason of lapse of time, such tax shall be a lien upon all gifts made during the calendar year, for 10 years from the date the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift transferred by the donee (or by a transferee of the donee) to a purchaser or holder of a security interest shall be divested of the lien imposed by this subsection and such lien, to the extent of the value of such gift, shall attach to all the property (including after-acquired property) of the donee (or the transferee) except any part transferred to a purchaser or holder of a security interest.

. . . .

SEC. 103. CERTIFICATES RELATING TO LIENS.

(a) AMENDMENT OF SECTION 6325. — Section 6325 . . . is amended to read as follows:

. . . .

"(b) DISCHARGE OF PROPERTY. —

. . . . .

"(2) PART PAYMENT; INTEREST OF UNITED STATES VALUELESS. — Subject to such regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if —

"(A) there is paid over to the Secretary or his delegate in partial satisfaction of the liability secured by the lien an amount determined by the Secretary or his delegate, which shall not be less than the value, as determined by the Secretary or his delegate, of the interest of the United States in the part to be so discharged, or

"(B) the Secretary or his delegate determines at any time that the interest of the United States in the part to be so discharged has no value.

In determining the value of the interest of the United States in the part to be so discharged, the Secretary or his delegate shall give consideration

to the value of such part and to such liens thereon as have priority over the lien of the United States.

. . . .

"(d) SUBORDINATION OF LIEN. — Subject to such regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of subordination of any lien imposed by this chapter upon any part of the property subject to such lien if —

"(1) there is paid over to the Secretary or his delegate an amount equal to the amount of the lien or interest to which the certificate subordinates the lien of the United States, or

"(2) the Secretary or his delegate believes that the amount realizable by the United States from the property to which the certificate relates, or from any other property subject to the lien, will ultimately be increased by reason of the issuance of such certificate and that the ultimate collection of the tax liability will be facilitated by such subordination.

"(e) NONATTACHMENT OF LIEN. — If the Secretary or his delegate determines that, because of confusion of names or otherwise, any person (other than the person against whom the tax was assessed) is or may be injured by the appearance that a notice of lien filed under section 6323 refers to such person, the Secretary or his delegate may issue a certificate that the lien does not attach to the property of such person.

"(f) EFFECT OF CERTIFICATE. —

"(1) CONCLUSIVENESS. — Except as provided in paragraphs (2) and (3), if a certificate is issued pursuant to this section by the Secretary or his delegate and is filed in the same office as the notice of lien to which it relates (if such notice of lien has been filed) such certificate shall have the following effect:

"(A) in the case of a certificate of release, such certificate shall be conclusive that the lien referred to in such certificate is extinguished;

"(B) in the case of a certificate of discharge, such certificate shall be conclusive that the property covered by such certificate is discharged from the lien;

"(C) in the case of a certificate of subordination, such certificate shall be conclusive that the lien or interest to which the lien of the United States is subordinated is superior to the lien of the United States; and

"(D) in the case of a certificate of nonattachment, such certificate shall be conclusive that the lien of the United States does not attach to the property of the person referred to in such certificate.

"(2) REVOCATION OF CERTIFICATE OF RELEASE OR NONATTACHMENT. — If the Secretary or his delegate determines that a certificate of release or nonattachment of a lien imposed by section 6321 was issued erroneously or improvidently, or if a certificate of release of such lien was issued pursuant to a collateral agreement entered into in connection with a compromise under section 7122 which has been breached, and if the period of limitation on collection after assessment has not expired, the Secretary or his delegate may revoke such certificate and reinstate the lien —

"(A) by mailing notice of such revocation to the person against whom the tax was assessed at his last known address, and

"(B) by filing notice of such revocation in the same office in which the notice of lien to which it relates was filed (if such notice of lien had been filed).

Such reinstated lien (i) shall be effective on the date notice of revocation is mailed to the taxpayer in accordance with the provisions of subparagraph (A), but not earlier than the date on which any required filing of notice of revocation is filed in accordance with the provisions of subparagraph (B), and (ii) shall have the same force and effect (as of such date), until the expiration of the period of limitation on collection after assessment, as a lien imposed by section 6321 (relating to lien for taxes).

"(3) CERTIFICATES VOID UNDER CERTAIN CONDITIONS. — Notwithstanding any other provision of this subtitle, any lien imposed by this chapter shall attach to any property with respect to which a certificate of discharge has been issued if the person liable for the tax reacquires such property after such certificate has been issued.

. . . .

SEC. 104. SEIZURE OF PROPERTY FOR COLLECTION OF TAXES.

. . . .

(b) SURRENDER OF PROPERTY SUBJECT TO LEVY. — Section 6332 . . . is amended —

. . . .

(2) by amending subsection (b) to read as follows:

"(b) SPECIAL RULE FOR LIFE INSURANCE AND ENDOWMENT CONTRACTS. —

"(1) IN GENERAL. — A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary or his delegate for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary or his delegate that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

"(2) SATISFACTION OF LEVY. — Such levy shall be deemed to be satisfied if such organization pays over to the Secretary or his delegate the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i) (1)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to

maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

"(3) ENFORCEMENT PROCEEDINGS. — The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.";

(3) by redesignating subsection (c) as subsection (e) . . .

. . . .

SEC. 109. DISCHARGE OF LIENS HELD BY UNITED STATES.

Subchapter B of chapter 76 . . . is amended by redesignating section 7425 as section 7427 and by inserting after section 7424 the following new section:

"SEC. 7425. DISCHARGE OF LIENS.

"(a) JUDICIAL PROCEEDINGS. — If the United States is not joined as a party, a judgment in any civil action or suit described in subsection (a) of section 2410 of title 28 of the United States Code, or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title —

"(1) shall be made subject to and without disturbing the lien of the United States, if notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced, or

"(2) shall have the same effect with respect to the discharge or divestment of such lien of the United States as may be provided with respect to such matters by the local law of the place where such property is situated, if no notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced or if the law makes no provision for such filing.

If a judicial sale of property pursuant to a judgment in any civil action or suit to which the United States is not a party discharges a lien of the United States arising under the provisions of this title, the United States may claim, with the same priority as its lien had against the property sold, the proceeds (exclusive of costs) of such sale at any time before the distribution of such proceeds is ordered.

"(b) OTHER SALES. — Notwithstanding subsection (a) a sale of property on which the United States has or claims a lien, or a title derived from enforcement of a lien, under the provisions of this title, made pursuant to an instrument creating a lien on such property, pursuant to a confession of judgment on the obligation secured by such an instrument, or pursuant to a nonjudicial sale under a statutory lien on such property —

"(1) shall, except as otherwise provided, be made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or recording more than 30 days before such sale and the United States is not given notice of such sale in the manner prescribed in subsection (c) (1); or

"(2) shall have the same effect with respect to the discharge or divestment of such lien or such title of the United States, as may be provided with respect to such matters by the local law of the place where such property is situated, if —

"(A) notice of such lien or such title was not filed or recorded in the place provided by law for such filing more than 30 days before such sale,

"(B) the law makes no provision for such filing, or

"(C) notice of such sale is given in the manner prescribed in subsection (c) (1).

"(c) SPECIAL RULES. —

"(1) NOTICE OF SALE. — Notice of a sale to which subsection (b) applies shall be given (in accordance with regulations prescribed by the Secretary or his delegate) in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary or his delegate.

"(2) CONSENT TO SALE. — Notwithstanding the notice requirement of subsection (b) (2) (C), a sale described in subsection (b) of property shall discharge or divest such property of the lien or title of the United States if the United States consents to the sale of such property free of such lien or title.

"(3) SALE OF PERISHABLE GOODS. — Notwithstanding the notice requirement of subsection (b) (2) (C), a sale described in subsection (b) of property liable to perish or become greatly reduced in price or value by keeping, or which cannot be kept without great expense, shall discharge or divest such property of the lien or title of the United States if notice of such sale is given (in accordance with regulations prescribed by the Secretary or his delegate) in writing, by registered or certified mail or by personal service, to the Secretary or his delegate before such sale. The proceeds (exclusive of costs) of such sale shall be held as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the property sold, for not less than 30 days after the date of such sale.

"(d) REDEMPTION BY UNITED STATES. —

"(1) RIGHT TO REDEEM. — In the case of a sale of real property to which subsection (b) applies to satisfy a lien prior to that of the United States, the Secretary or his delegate may redeem such property within the period of 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer.

"(2) AMOUNT TO BE PAID. — In any case in which the United States redeems real property pursuant to paragraph (1), the amount to be paid for such property shall be the amount prescribed by subsection (d) of section 2410 of title 28 of the United States Code.

. . . .

SEC. 110. PROCEEDINGS BY THIRD PARTIES AGAINST THE UNITED STATES

(a) ACTIONS BY THIRD PARTIES.— Subchapter B of chapter 76 . . . is amended by inserting after section 7425 . . . the following new section:

"SEC. 7426. CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS.

"(a) ACTIONS PERMITTED. —

"(1) WRONGFUL LEVY. — If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

"(2) SURPLUS PROCEEDS. — If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.

"(3) SUBSTITUTED SALE PROCEEDS. — If property has been sold pursuant to an agreement described in section 6325(b) (3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.

"(b) ADJUDICATION. — The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

"(1) INJUNCTION. — If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

"(2) RECOVERY OF PROPERTY. — If the court determines that such property has been wrongfully levied upon, the court may —

"(A) order the return of specific property if the United States is in possession of such property;

"(B) grant a judgment for the amount of money levied upon; or

"(C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

"(3) SURPLUS PROCEEDS. — If the court determines that the interest or lien of any party to an action under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount equal to all or any part of the amount of the surplus proceeds of such sale.

"(4) SUBSTITUTED SALE PROCEEDS. — If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b) (3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

. . . .

SEC. 112. FUND FOR REDEMPTION OF REAL PROPERTY BY UNITED STATES.

(a) CREATION OF FUND FOR REDEMPTION OF REAL PROPERTY. — Subchapter A of chapter 80 . . . is amended by adding at the end thereof the following new section:

"SEC. 7810. REVOLVING FUND FOR REDEMPTION OF REAL PROPERTY.

"(a) ESTABLISHMENT OF FUND. — There is established a revolving fund, under the control of the Secretary or his delegate, which shall be available without fiscal year limitation for all expenses necessary for the redemption (by the Secretary or his delegate) of real property as provided in section 7425(d) and section 2410 of title 28 of the United States Code. There are authorized to be appropriated from time to time such sums (not to exceed $1,000,000 in the aggregate) as may be necessary to carry out the purposes of this section.

"(b) REIMBURSEMENT OF FUND. — The fund shall be reimbursed from the proceeds of a subsequent sale of real property redeemed by the United States in an amount equal to the amount expended out of such fund for such redemption.

. . . .

SEC. 113. EFFECT OF JUDGMENT ON TAX LIEN AND LEVY.

(a) LIEN NOT MERGED IN JUDGMENT. — Section 6322 . . . is amended by inserting after "liability for the amount so assessed" the following: "(or a judgment against the taxpayer arising out of such liability)".

. . . .

SEC. 201. JOINDER OF UNITED STATES IN CERTAIN PROCEEDINGS.

Section 2410 of title 28 of the United States Code is amended by redesignating subsection (d) as subsection (e) and by striking out subsections (a), (b), and (c) and inserting in lieu thereof the following new subsections:

. . . .

"(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical

employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

"(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k), and subsection (d) of section 1820 of title 38 of the United States Code, the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises.

"(d) In any case in which the United States redeems real property under this section or section 7425 of the Internal Revenue Code of 1954, the amount to be paid for such property shall be the sum of —

"(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),

"(2) interest on the amount paid (as determined under paragraph (1)) at 6 percent per annum from the date of such sale, and

"(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property."

THE MODEL ANTI-DISCRIMINATION ACT

The Civil Rights Act of 1964 challenged the states to participate in the development of standards and procedures to end various forms of discrimination by giving the states the option of enacting their own anti-discrimination laws or allowing the federal statute to occupy the field. This act is an attempt to formulate model legislation for states wishing to exercise broadly that power reserved them by the Civil Rights Act to require of their citizens adherence to certain standards of fairness in the principal areas in which discrimination causes serious social friction. The act also sets forth in detail procedures for administrative and judicial redress of violations of the act.

In his introduction, Professor Dorsen provides an insight into the problems encountered in the drafting of the act and a guide to its solutions to those problems.

INTRODUCTION

NORMAN DORSEN*

The Model Anti-Discrimination Act,[1] including the prefatory note and sectional commentary, should be able to stand on its own footing, and this introduction may therefore be superfluous. Despite some reservations along this line, I have agreed to present to readers of this *Journal* a brief history of the drafting process, a discussion of the general statutory plan and certain key provisions, and an explanation of the original decision to prepare a statute with a claim to general adoption by states whose citizenry harbors sharply divided views on the proper role of law in protecting minority groups against discrimination.

I. THE BACKGROUND OF THE ACT

The first suggestion for the act came from Governor Otto Kerner of Illinois at the August 1963 annual meeting of the National Conference of Commissioners on Uniform State Laws.[2] The Conference reacted by forming a Special Committee, under the

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1. Approved by the National Conference of Commissioners on Uniform State Laws at its annual meeting, July 30-Aug. 5, 1966.

2. 1963 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS HANDBOOK 45-46 [hereinafter cited as 1963 HANDBOOK].

chairmanship of Professor Robert Braucher,[3] which was authorized to study the existing laws in the field of civil rights to see whether there were any areas which should be made the subject of a uniform or model act. After preliminary investigation, the Committee in April 1964 requested me to prepare for it a memorandum of advice. This memorandum, *The Prospects for a Model or Uniform Civil Rights Act,* was duly submitted in September 1964, and its advice was to proceed. The Committee approved this recommendation in November and asked me to serve as Reporter-Draftsman.

From this point the pace quickened, the objective being to complete the work in time for submission of an act to state legislatures during their 1967 sessions. The Committee of the Conference reviewed a preliminary draft in April 1965; and, after revisions, this draft was submitted to the August 1965 annual meeting of the Conference as the First Tenative Draft. The Conference approved the basic policy choices of the Committee and authorized further work. A Second Tentative Draft was prepared soon thereafter and circulated widely for comment.[4] The responses to this circulation were considered by the Committee at meetings in November 1965 and January 1966, from which a Third Tentative Draft emerged. This draft was in turn reviewed by the Committee in March 1966, and a Fourth Tentative Draft was prepared and submitted to the annual meeting of the Conference in August 1966. At the meeting there was consideration of the draft by a Section of the Conference and by the Committee of the Whole. A motion to denominate the act "model" rather than "uniform" was voted on by states and carried twenty-one to seventeen.[5] Subsequently, the Model Anti-Discrimination Act

3. Harvard Law School, Cambridge, Mass. The other Commissioners who were members of the Special Committee acting for the Conference are Joe C. Barrett, Jonesboro, Ark.; John B. Boatwright, Jr., Richmond, Va.; Martin J. Dinkelspiel, San Francisco, Cal.; Floyd R. Gibson, Kansas City, Mo.; John W. Wade, Nashville, Tenn.; Sterry R. Waterman, St. Johnsbury, Vt.; James P. White, Grand Forks, N.D.; and Robert A. Leflar, Fayetteville, Ark., *ex-officio.*

4. A thoughtful student analysis of the Second Draft is contained in Note, *The Proposed Uniform State Civil Rights Act: An Analysis with Recommendations,* 7 B.C. IND. & COM. L. REV. 666 (1966).

5. The designations given by the Conference to its proposed legislation have distinct meanings.

> The designation "Uniform Act" should have special significance and should normally be limited to acts which have a reasonable possibility of ultimate enactment in a substantial number of jurisdictions. The designation should normally not be applied to any act which Commissioners from a substantial number of states oppose as unsuitable or impracticable for enactment in their states.

1965 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM HANDBOOK 268 [here-

was officially promulgated by a vote of thirty-seven to two, Alabama and Mississippi dissenting.

II. PROBLEMS ENCOUNTERED AND THEIR RESOLUTION

The decision to draft an anti-discrimination act was reached only after consideration of a number of issues relating to both the desirability and the feasibility of the project.

The project's essential premises were that the problem of civil rights would continue to be a fundamental domestic issue in the United States and that minority groups would continue to press their goal of parity in diverse ways, employing among other means the levers of fear, persuasion, and law. Further, it is plain that the problems spawned by discrimination in employment, public accommodations, housing, and education profoundly affect not only those immediately disadvantaged but the rest of the nation as well; and the manner in which the civic conflict proceeds will influence both community life and the nation's moral consensus fully as profoundly as its eventual resolution. To the extent that there exist effective legislative means to redress wrongs, it is reasonable to suppose that law rather than force will be the agency of change. The development of an effective act, therefore, could beneficially influence the course of the national movement to assure all persons equal treatment. In any event, the Conference decided that this hypothesis deserved a chance to prove itself.

Also supporting the drafting of an act was a widely-shared belief that the states would play a critical role in the long-range effort to safeguard individuals from discrimination. Laws already were on the books in more than half the states;[6] and, al-

inafter cited as 1965 HANDBOOK]. Those Commissioners voting in favor of the "Uniform" label maintained that the deferral provisions of sections 204(c) and 706(c) of the federal Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(c), 2000e-5(c) (1964), made it likely that almost all states would eventually join the approximately thirty jurisdictions that already had antidiscrimination legislation enforced by commissions. Those supporting the "Model" label claimed that a substantial number of jurisdictions would not in the foreseeable future pass a statute banning discrimination and that, in any event, the sensitive nature of the subject matter as well as the "two-act" concept, discussed at page 219, *infra,* argued against a designation that implied that maximum uniformity would be possible. It seemed to me at the time that even had the vote gone the other way by the same margin, the Conference would have resolved the issue in favor of the "Model" Act in deference to the substantial opposition to the "Uniform" label.

6. As of October 1964, when the decision to draft an act was reached, twenty-seven states prohibited discrimination in employment, thirty-three states in public accommodations, eighteen in housing (including eleven in private housing), and

though the impact of these statutes has been on the whole disappointing,[7] many of the problems associated with their enforcement can more easily be solved at the state than at the federal level, provided there exist both effective legislation and the will to do the job. In short, the Conference concluded for itself, and in so doing believed it reflected a broad consensus, that the law relating to racial and religious discrimination, affecting as it does delicate areas of human relations, should if possible be administered on a decentralized basis. This philosophy reflected Dean Griswold's testimony before Congress in support of the federal Civil Rights Act of 1964: ". . . I would be very much in favor of having this whole area administered by State agencies to the extent that they are willing and able to carry out that responsibility."[8]

Despite these considerations, the Conference had to dispose of two objections levelled at the enterprise. The first, in the words of one critic, was that "the effort to achieve uniformity in this field is misdirected [because] it tends to obscure the differences among the states that the draftsmen of civil rights legislation should take into account."[9] This point was elaborated by such questions as how strong a law each legislature would adopt; how large a budget would be allocated for administration; how many functions in addition to anti-discrimination (*e.g.*, "consumer protection," "tension control," "police-community relations")[10] the agency would perform; whether it would be feasible to give the agency a general counsel who could go to court independently of the state attorney general; and what the role of local anti-discrimination agencies would be.[11]

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ten in private schools. Twenty-two states had established commissions to enforce one or more of its anti-discrimination laws. The introductory comments to the chapters of the act and the footnotes thereto contain corresponding figures as of December 1, 1966 and citations to the relevant statutory provisions. See pp. 229, *infra*.

7. *See generally Symposium,* 14 BUFFALO L. REV. 1 (1964).

8. *Hearings on S. 773 and other bills before the Senate Subcomm. on Employment and Manpower of the Comm. on Labor and Public Welfare,* 88th Cong., 1st Sess. 490 (1963).

9. Memorandum from Professor Robert Harris, University of Michigan Law School, to Professor William Pierce, University of Michigan Law School, Chairman, Executive Committee, National Conference of Commissioners on Uniform State Laws, July 14, 1965, at 1 [hereinafter cited as Memorandum].

10. *Id.*

11. Apart from the points relating to administration that are discussed in the text, these questions are largely disposed of in the Model Act. Through the use of bracketed language, section 702(3) gives states an option as to the power of attorneys to represent the Commission in court. Chapter 9 sets out a comprehensive plan for local commissions. The remaining question deals with additional

This argument was weighed and found wanting. Much of its thrust was seen to involve problems of administration rather than substance — that the inevitably large differences among the states in their administrative and political support for civil rights laws militate against drafting a model act. The Conference did not discount the importance of enthusiastic and properly financed administration. Rather, it refused to believe these problems should be dispositive. In other words, the lesson to be derived from the undoubted fact that administrative vigor and political support are important is not that a good law is irrelevant or unimportant, but that it may not be enough.

More troubling than the administrative point is the fact that uniformity among state anti-discrimination laws is desirable as a matter of policy. It is true, of course, that, unlike the commercial area, where it is highly disruptive for inconsistent state laws to apply to the same transaction, there may be no compelling necessity for consistency in civil rights legislation. But the same observation is pertinent to matters that have in the past been subjects of model acts, some of which, such as the State Administrative Procedure Act and the Act to Provide for the Appointment of Commissioners, have been enacted by a substantial number of states.[12] Furthermore, civil rights legislation regarding public accommodations and hospitals affects citizens who travel from state to state, and fair housing and employment laws protect citizens who may wish to change their residence from one state to another. These facts involve the official Conference criteria for determining the propriety of drafting uniform or model laws; such laws are appropriate where existing state statutes "tend to . . . prejudice, inconvenience or otherwise adversely affect the citizens of the states in their activities or dealings in other states or : . . in moving from state to state."[13] Finally, a broader approach may be taken. Because moral values presumably underlie civil rights legislation, it would seem desirable to try to translate

functions of the Commission. Whether these should include consumer protection, tension control, and police-community relations, assuming that a government agency undertakes these responsibilities, is an arguable question. My own view is that they should not. However, the decision of this issue seems to me irrelevant to the issue of the proper responsibilities of the Commission in the area of discrimination.

12. As of December 1, 1965, the State Administrative Procedure Act was in effect in Georgia, Hawaii, Maryland, Michigan, Missouri, Oklahoma, Oregon, Rhode Island, Washington, and Wisconsin; the Act to Provide for the Appointment of Commissioners had been adopted in Alabama, Arizona, Arkansas, Iowa, Kansas, Kentucky, Maine, Mississippi, Montana, Nebraska, New Hampshire, Oklahoma, Oregon, Texas, and Wisconsin. 1965 HANDBOOK 300-01.

13. *Id.* at 267.

what common attitudes do exist throughout the United States into legislation that will establish uniform civil rights in the states. The American Law Institute responded to similar considerations in drafting the Model Penal Code.[14]

Examination of existing anti-discrimination laws suggested that there were good prospects for adoption of major portions of a model act by a substantial number of jurisdictions that now have disparate legislation. For example, many states prohibit advertising that refers to race and religion;[15] others do not. Some prohibit efforts to aid or abet a violation;[16] others lack such laws. A few states require the prominent posting of notices that discrimination is not practiced.[17] Some statutes are more generous than others with exemptions; most exclude relatives, domestic servants, or employees of educational, social, and religious organizations;[18] but some do not. Housing statutes vary in whether they include private dwellings as well as publicly-suppported ones,[19] and there are differences in whether they forbid advertising directed to biased rental or sale[20] and whether they apply to mortgage lenders and other financial institutions.[21] There are countless other examples of variations among existing state laws. While it would be unrealistic to assume that all states would be disposed to enact any one of these provisions or that any single state would enact all of them, particularly in identical form, there was reason to believe that a model act supported by reasoned explication and responsible sponsorship could well encourage uniformity.

Whatever the likelihood for achieving uniformity with respect to substantive anti-discrimination provisions, the prospects for procedural and remedial rules seemed far brighter, since, once a state decided to legislate against discrimination, it presumably would want an effective law. There will, of course, be cases

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14. *See Wechsler, The Challenge of a Model Penal Code,* 65 HARV. L. REV. 1097, 1098-1101 (1952).

15. *Cf.* MODEL ANTI-DISCRIMINATION ACT, §§ 306, 307 *infra* and accompanying footnotes [hereinafter cited only by section numbers].

16. *Cf.* § 801(2) *infra* and accompanying footnotes.

17. *Cf.* § 702(12) *infra* and accompanying footnotes.

18. *Cf.* § 302(b) *infra* and accompanying footnotes.

19. *Cf.* §§ 602, 603 *infra* and accompanying footnotes.

20. COLO. REV. STAT. ANN. § 69-7-5(e) (1963); IOWA CODE ANN. § 105A.6(1)(b) (Supp. 1966); MINN. STAT. § 363.03, subd. 2(1)(c), (2)(c) (1965); N.J. STAT. ANN. § 18:25-12(g)(3) (Supp. 1966); N.Y. EXEC. LAW §§ 296(2), (5)(a)(3), (b)(3), (c)(3) (McKinney Supp. 1966); ORE. REV. STAT. § 659.033 (1965); R.I. GEN. LAWS ANN. § 34-37-4(A) (Supp. 1965); WASH. REV. CODE § 49.60.217(4) (1959). *Cf.* § 602(b) *infra.*

21. *Cf.* § 604 *infra* and accompanying footnotes.

where a legislature will be reluctant to invest its commission with particular powers (*e.g.*, the right to appeal a finding of no probable cause). But ordinarily, it seemed fair to assume, a state would want to take advantage of legislative techniques that will effectuate its enacted policy.

Upon inspection, it seemed that many variations in existing law could be resolved through a model provision. For example, some statutes deny human rights commissions the power to initiate complaints,[22] although commentators have concluded that private individuals are frequently deterred from bringing complaints through ignorance of the remedy or awareness of the time, trouble, and expense involved.[23] Again, states divide over whether judicial rules of evidence apply to the hearing.[24] And there are differences in the extent to which conciliation proceedings are required to be confidential.[25] Many other examples of this kind presented themselves; taken together, they suggested that the goal of uniformity could be furthered by a reasoned model act.

This conclusion led the Conference to consider the second objection to the venture. It was argued that "uniformity comes at too high a price if it involves obstructing efforts in the most progressive cities and states to evolve legal devices more effective than the cease and desist commission."[26] In part this was a contention that the traditional fair employment practices commission, pioneered by New York in 1945,[27] was a bad model to hold before the advanced states because it was not the best legal approach that might be politically feasible during the coming decade. And in part it was a claim that there was "no one good model" that could be placed before reformers in states as diverse, for example, as Virginia and Massachusetts. "Setting the sights low to help in the South may do real harm in the North."[28]

The first part of the issue, which, strictly speaking, was less a plea not to proceed with a model act than a recommendation

22. *E.g.*, IOWA CODE ANN. § 105A.5 (Supp. 1966); MD. ANN. CODE art. 49B, § 12 (1964).

23. *E.g.*, Girard & Jaffe, *Some General Observations on Administration of State Fair Employment Practice Laws*, 14 BUFFALO L. REV. 114 (1964).

24. Most states either make no provision for rules of evidence or authorize the commission to make appropriate rules. *E.g.*, CAL. LABOR CODE § 1427 (West Supp. 1966); CONN. GEN. STAT. ANN. § 31-125 (1960); MICH. STAT. ANN. § 3.548(5) (Supp. 1965). Some states explicitly waive judicial rules of evidence by statute. *E.g.*, IOWA CODE ANN. § 105A.11 (Supp. 1966); N.J. STAT. ANN. § 18:25-16 (Supp. 1964); N.Y. EXEC. LAW § 297(2)(b) (McKinney Supp. 1966).

25. *Cf.* § 703(d) and accompanying footnotes.

26. Memorandum at 2.

27. N.Y. EXEC. LAW § 290, *as amended* (McKinney Supp. 1966).

28. Memorandum at 3.

for its content, finally yielded to a comparative analysis of the traditional multi-member commission and the chief rival form of agency — an executive department with a single head, either as an independent body or as part of an existing department. It was eventually concluded that, whatever the advantages of an executive agency if only enforcement functions were involved, the commission pattern was desirable if judicial functions were also to be performed. The fact that the commission would have a chairman and executive director, who would be authorized to take vigorous administrative action, clinched the argument in favor of a commission structure for the majority of outside consultants as well as for the members of the Conference.

The second part of the issue was more perplexing. How indeed to fashion a statute that would satisfy the more liberal jurisdictions, which would be building upon up to twenty years of experience with anti-discrimination legislation and were strongly responsive to the claims of minority groups, and that would simultaneously provide a model both for states, such as Nevada and North Dakota, with no history of such laws and no vocal minority constituency, and for the southern states, with their quite different traditions. Eventually a solution was hit upon — two separate laws would be drafted. One would be, as the prefatory note points out, "a complete and strong law" embodying "the best features of existing laws against discrimination as well as several new provisions that are designed to facilitate efficient and effective state action."[29] The other would have more limited aims. The trouble was in determining precisely what these would be. Happily, this problem along with several others was solved by the enactment of the federal Civil Rights Act of 1964[30] just as plans for the Model Act were being formulated.

III. THE IMPACT OF THE CIVIL RIGHTS ACT OF 1964

The Civil Rights Act in two distinct ways assured the continued importance of state laws against discrimination and provided impetus and direction for the model act. In the first place, the federal law carefully preserved all state remedies. For example, section 708 provides:[31]

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29. MODEL ANTI-DISCRIMINATION ACT, prefatory note, p. 225 *infra*.
30. 42 U.S.C. §§ 2000a-2000h-6 (1964).
31. 42 U.S.C. § 2000e-7 (1964).

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Similarly, section 207(b)[32] preserves state remedies against discrimination in public accommodations, and section 1104[33] provides generally, "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field . . . to the exclusion of State laws on the same subject matter."[34]

Even more important to the Model Act than these provisions were sections 204(c)[35] and 706(c),[36] which prohibit for stipulated periods any federal action against discrimination in public accommodations and employment, respectively, in states or their political subdivisions having effective laws against the alleged discriminatory practice. Two important consequences flowed from these provisions. In the first place, the very attractive bait of a hiatus in federal enforcement encouraged the states to develop legislation to combat discrimination. Second, because these sections apply only when state or local laws prohibit the specific discriminatory practices forbidden by the Civil Rights Act, every state had a strong incentive to assure that its law forbidding discrimination in these two areas was at least as broad as the Civil Rights Act. It was not easy to forget that, absent such coverage, action against respondents would be taken by federal rather than state officials.

Accordingly, these provisions spurred state legislative action and, because there was now a standard to be met, spurred *uniform* state action. Other sections of the Civil Rights Act had similar consequences. For example, section 706(b)[37] provides for agreements between the federal Equal Employment Opportunity Commission and state and local agencies for the purpose of utilizing the services and personnel of such agencies in the enforcement of federal law; section 709(c)[38] requires detailed

32. 42 U.S.C. § 2000a-6(b) (1964).
33. 42 U.S.C. § 2000h-4 (1964).
34. Section 410 of the aborted Civil Rights Act of 1966, H.R. 14765, which passed the House of Representatives August 9, 1966, contained a similar provision preserving state and local remedies against discrimination in housing.
35. 42 U.S.C. § 2000a-3(c) (1964).
36. 42 U.S.C. § 2000e-5(c) (1964).
37. 42 U.S.C. § 2000e-5(b) (1964).
38. 42 U.S.C. § 2000e-8(c) (1964).

record keeping by employers, employment agencies, and labor organizations, while section 709(d)[39] relieves from this burden all those subject to state or local fair employment practice laws;[40] and the detailed timing provisions of section 706,[41] which are designed (although imperfectly) to mesh federal and state enforcement, require corresponding provisions of state law for the plan to be effective.

The Civil Rights Act, then, had a significant impact. It confirmed the Conference in its decision that a model act was desirable; it provided a standard, at least for certain sections of the act, that led in the direction of uniform state legislation;[42] and it vitalized the "two act" concept. The second legislative proposal — which came to be known as the Basic Act — is designed for states that merely wish to accept responsibility under Titles II and VII of the Civil Rights Act for enforcement of laws prohibiting discrimination in public accommodations and employment.[43]

IV. THE COMPREHENSIVE ACT

Only the Comprehensive Act is reproduced here. Its overall scheme will be familiar to those conversant with existing omnibus state anti-discrimination laws. Introductory provisions,[44] including general definitions,[45] are followed by chapters prohibiting discrimination in employment,[46] public accommodations,[47] educational institutions,[48] and real property transactions.[49] The next chapter establishes a Commission on Human Rights and authorizes enforcement, including the imposition of sanctions, and judi-

39. 42 U.S.C. § 2000e-8(d) (1964).

40. This gap in the federal act should be filled. There seems no reason to exempt all those subject to a state fair employment practices law without regard to whether that law contains record-keeping provisions. According to Professor Sovern, "The difference is crucial, especially since almost no state fair employment practices law includes record-keeping or report-filing requirements. . . ." M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 88 (1966).

41. 42 U.S.C. § 2000e-5 (1964).

42. In the preparation of the Real Estate Investment Trust Act and the Supervision of Trustees for Charitable Purposes Act, the Conference has twice recently acknowledged the benefits of maintaining consistency with federal law. 1963 HANDBOOK 65, 68.

43. For further comment on the Basic Act, see p. 225 *infra*.

44. §§ 101-05.

45. § 201.

46. §§ 301-10.

47. §§ 401-03.

48. §§ 501-04.

49. §§ 601-08.

cial review;[50] the next contains some miscellaneous provisions;[51] and the last deals with local commissions.[52]

The act relies exclusively on administrative enforcement by the Commission, except that criminal penalties may be imposed for wilful interference with its processes.[53] Several parts of the enforcement machinery are designed to harmonize with federal law. For example, sections 703(b) and (c), 704(a), and 707 (c) are drafted to assure prompt consideration by the Commission in light of the limited grace period permitted by the Civil Rights Act.[54] And sections 708(b), (c), and (e) mesh with the federal requirements for record-keeping.[55] Other important enforcement provisions include section 706(b), which spells out the affirmative action that may be required of a respondent found to violate the act; sections 706(b)(8), (9), and (10), which strengthen enforcement, particularly of chapter 6; and sections 706(c) and (d), 805, and 806, which contain remedies for violations by state licensees and public contractors.

The Civil Rights Act also had an impact on some of the coverage provisions of chapters 3 and 4 of the Model Act. For example, the decision to prohibit discrimination because of sex in employment[56] but not discrimination because of age was traceable in part to the fact that Title VII follows this course.[57] Although both forms of discrimination are serious problems and both are forbidden in many state laws,[58] federal enforcement of sex discrimination can be deferred under section 706(c) of the Civil Rights Act[59] only if there is matching state legislation, while no such invitation to decentralize exists in the case of age discrimination. The Conference's decision to bar sex, but not age, discrimination was also a product of two other factors: (1) the undesirability of saddling the Equal Employment Opportunity Commission with the entire enforcement burden in cases of sex discrimination and (2) the belief that age discrimination in-

50. §§ 701-09.
51. §§ 801-07.
52. §§ 901-06.
53. § 804.
54. Civil Rights Act of 1964, §§ 204(c), 706(c), 42 U.S.C. §§ 2000a-3(c), 2000e-5(c) [hereinafter cited as CRA].
55. CRA §§ 709(c), (d), 42 U.S.C. §§ 2000e-8(c), (d).
56. §§ 302-07.
57. CRA §§ 703(a)-(d), 42 U.S.C. §§ 2000e2(a)-(d).
58. *E.g.*, HAWAII REV. LAWS §§ 90A-1(a)-(d) (Supp. 1963); MASS. GEN. LAWS ANN. ch. 151B, §§ 4(1)-(3) (Supp. 1966); NEB. REV. STAT. §§ 48-1004,-1104 to -1107, 1115 (Supp. 1965); N.Y. EXEC. LAW §§ 296(1)(a), (c) (McKinney Supp. 1966); WIS. STAT. ANN. § 111.32(5)(a) (Supp. 1967).
59. 42 U.S.C. § 2000e-5(c).

volves certain distinct factors that invited separate legislation.[60]

The Civil Rights Act also influenced particular sections. For instance, the definitions of discriminatory practices contained in sections 302-305 follow closely the corresponding portions of Title VII,[61] as do other sections in the employment chapter, such as 306(a),[62] 308,[63] and 309(1).[64] And in chapter 4, dealing with public accommodations, the basic statement of the discriminatory practice in section 402(1) and the exemption for private clubs in section 403 are both patterned after federal law.[65]

But the substantive chapters of the Model Act go well beyond the Civil Rights Act. Chapter 3 provides for broader coverage than Title VII.[66] It also bans additional discriminatory practices,[67] eliminates certain federal exemptions,[68] and adopts more limited versions of others.[69] Chapter 4 expands upon the corresponding provisions of Title II of the federal act: section 401 significantly broadens the definition of covered places of public accommodations,[70] and section 402(2) prohibits an additional important discriminatory practice.

Other chapters of the Model Act also contain material that goes beyond anything in the federal law and beyond existing state legislation. Only a few examples will be noted here. Perhaps of chief interest is chapter 9, which sets forth a novel plan for decentralizing efforts to eliminate discrimination. It authorizes local ordinances prohibiting discrimination[71] and the establishment of local commissions to enforce them,[72] and it provides for mutual referral of matters between these commissions and the state commission.[73] Chapter 6, on real property transactions, contains new provisions on restrictive covenants and conditions[74] and on "block-busting."[75] Finally, a series of similar provisions attempts to deal responsibly with the problems of "imbalance" in

60. *See* Note, *Age Discrimination in Employment: The Problem of the Older Worker,* 41 N.Y.U.L. REV. 383, 409 (1966).
61. *Compare* CRA §§ 703(a)-(d), 42 U.S.C. §§ 2000e-2(a)-(d).
62. *Compare* CRA § 704(b), 42 U.S.C. § 2000e-3(b).
63. *Compare* CRA § 702, 42 U.S.C. § 2000e-1.
64. *Compare* CRA § 703(e), 42 U.S.C. § 2000e-2(e).
65. *Compare* CRA §§ 201(a), (e), 42 U.S.C. §§ 2000a(a), (e).
66. *Compare, e.g.,* § 301(1) *with* CRA § 701(b), 42 U.S.C. § 2000e(b).
67. §§ 306(b), 307.
68. *Compare* CRA § 703, 42 U.S.C. § 2000e-2.
69. *Compare* § 309(2) *with* CRA § 703(e), 42 U.S.C. § 2000e-2(e).
70. *Compare* CRA § 201(b), 42 U.S.C. § 2000a(b).
71. § 902.
72. § 903.
73. §§ 905-06.
74. § 605.
75. §§ 606, 706(b)(9).

the areas of employment, education, and real property; sections 310, 504, and 608 encourage voluntary private plans to reduce or eliminate imbalance by authorizing the implementation of plans filed with the Commission, subject only to Commission disapproval.

All in all, as noted at the outset, the Model Anti-Discrimination Act will have to fend for itself. It was drafted with the hope that it would make a discernible contribution to a complex and important field of statutory law. It is presented here in the same spirit.

MODEL ANTI-DISCRIMINATION ACT†

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

I. PREFATORY NOTE

This act is the product of three years of research, comment, and discussion financed primarily by grants from charitable foundations. Tentative drafts were circulated to attorneys general and appropriate administrative agencies in every state, federal agencies, private civil rights groups, law professors, and two committees of the American Bar Association. Voluminous comments were received and taken into account, and in 1966 Kentucky enacted a civil rights act based on one of the tentative drafts.[1]

The act consists of two distinct legislative proposals, referred to below as the Comprehensive Act and the Basic Act, which are

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†The Model Act is comprised of two separate legislative proposals, the Comprehensive Act and the Basic Act, whose purposes are contrasted in the introduction and prefatory note herein. Only the Comprehensive Act appears here; all inquiries regarding the Basic Act should be addressed solely to the National Conference of Commissioners on Uniform State Laws, 1155 East 60th St., Chicago 37, Ill.

The text of the Comprehensive Act appearing here is that approved by the Conference at its annual meeting July 30-August 5, 1966. Some minor changes have been made in the format and style of the prefatory note and comments to the act. Footnote citations, based on references in the official version of the act, have been supplied by the editors.

1. KY. REV. STAT. §§ 344.010-.990 (Supp. 1966).
2. 42 U.S.C. §§ 2000a to h-6 (1964).

designed to implement two different types of state policy. Both proposals are compatible with the Federal Civil Rights Act of 1964[2] [hereinafter referred to as CRA] and carry out its policies.

Comprehensive Act. The Comprehensive Act attempts to provide a complete and strong law against discrimination based on the more than twenty years of experience with human rights commissions of more than thirty states. The Comprehensive Act contains chapters prohibiting discrimination in employment, public accommodations, educational institutions, and real property transactions and additional chapters on enforcement and local commissions. It embodies what were thought to be the best features of existing laws against discrimination as well as several new provisions that are designed to facilitate efficient and effective state action. The act also is drafted to mesh with the enforcement provisions of Title VII of the CRA.[3] Taken as a whole, the Comprehensive Act is designed for states wishing to enact, either initially or by amendment of existing laws, a complete and modern state law against discrimination.

Basic Act. The Basic Act has much more limited objectives. It is designed for states merely wishing to accept responsibility, pursuant to Titles II and VII of the CRA,[4] for enforcement of laws prohibiting discrimination in public accommodations and employment. Sections 204(c) and 706(c) of the CRA, dealing with these subjects, provide that if an act or practice allegedly in violation of the CRA occurs in a state or political subdivision of a state which has a law prohibiting the act or practice and that law is being enforced, no action may take place under the CRA for at least thirty days in the case of public accommodations and sixty days in the case of employment.[5] Consistently with the CRA, the Basic Act prohibits discrimination in employment and public accommodations, establishes a commission to enforce these prohibitions, and authorizes local commissions for the same purpose. The Basic Act does not contain chapters prohibiting discrimination in educational institutions and real property transactions, and it omits several other section of the Comprehensive Act that would be inappropriate for states merely wishing to comply with the deferral provisions of federal law.

Compilations. The pertinent state statutes on human rights commissions and discrimination in employment are kept current in The Bureau of National Affair's Labor Policy and Practices

3. Civil Rights Act of 1964, §§ 701-16, 42 U.S.C. §§ 2000e to e-15.

4. Civil Rights Act of 1964, §§ 201-07, 701-16, 42 U.S.C. §§ 2000a to a-6, e to e-15.

5. 42 U.S.C. §§ 2000a-3(c), e-5(c) (1964).

service.[6] State statutes on discrimination in public accommodations are gathered in *Hearings before the Senate Committee on Commerce.*[7] State statutes on discrimination in real property transactions can be found in *Fair Housing Laws.*[8] A complete summary of state laws against discrimination in housing is contained in *Hearings on S. 3296 and other bills before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary.*[9] There is apparently no published compilation of statutes on discrimination in educational institutions.

A current listing of all citations of state stautes against discrimination is contained in Emerson, Haber, and Dorsen's *Political and Civil Rights in the United States.*[10] The texts of many local ordinances establishing human relations commissions can be found in Brice and Charles Rhyne's *Civil Rights Ordinances,*[11] and a list of citations to local commissions is contained in an article by Joseph Witherspoon, "Civil Rights Policy in the Federal System."[12] The CRA should, of course, be consulted for the relevant provisions of federal law.

II. THE COMPREHENSIVE ACT

To prevent discrimination in employment, public accommodations, education, and real property transactions; to establish a Commission on Human Rights; to authorize the creation of local commissions; and to make uniform the law with reference thereto; and for other purposes.

[Be it enacted . . .]

CHAPTER 1—
DECLARATION OF PURPOSE; CONSTRUCTION; SEVERABILITY

SECTION 101. [*Purposes; Construction.*]

(a) The general purposes of this Act are

(1) to provide for execution within the State of the policies embodied in the Federal Civil Rights Act of 1964 and to make uniform the law of those states which enact this Act;

6. 6 BNA LAB. POL. & PRAC. §§ 451:51-:1304.
7. *Hearings before the Senate Comm. on Commerce,* 88th Cong., 1st Sess., ser. 27, pt. 2, at 1315-81 (1963).
8. HOUSING & HOME FINANCE AGENCY, FAIR HOUSING LAWS (1964).
9. 89th Cong., 2d Sess., pt. 2, at 1421-26 (1966).
10. 2 T. EMERSON, D. HABER, & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (3d. ed. 1967).
11. NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, REP. NO. 148 (1963).
12. 74 YALE L.J. 1171, 1239-44 (1965).

(2) to secure for all individuals within the State freedom from discrimination because of race, color, religion, or national origin in connection with employment, public accommodations, education and real property transactions, and discrimination because of sex in connection with employment, and thereby to protect their interest in personal dignity, to make available to the State their full productive capacities, to secure the State against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights and privileges of individuals within the State.

(b) This Act shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this Section and the special purposes of the particular provision involved.

COMMENT: Subsection (a)(1) is designed to assure that the act will be construed harmoniously with Titles II and VII of the CRA,[13] as explained in the prefatory note. Compare the Uniform Securities Act, which provides that it shall be so construed "to coordinate the interpretation and administration of this act with the related federal regulation."[14]

Subsection (a)(2) is a scaled-down version of state civil rights acts which contain elaborate legislative findings and purpose clauses. It dispenses with two common features of state laws. The first is a declaration that an individual's rights to be free of various forms of discrimination is a "civil right." These provisions are repetitive of the substantive protections of the act and, insofar as they proclaim such protection to be a "civil right," are confusing and subject to differing interpretations.

The second omission is a statement that the act is "deemed an exercise of the police power of the State." Such language apparently was designed to make it easier for the courts of any given state to uphold its civil rights act against claims of unconstitutionality. But there now seems little need for the dubious protection of the "police power" phrase, mainly because there is little ground to invalidate the act.[15]

Subsection (b) follows numerous state laws.[16]

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13. Civil Rights Act of 1964, §§ 201-07, 701-16, 42 U.S.C. §§ 2000a to a-6, e to e-15.

14. UNIFORM SECURITIES ACT § 415 (1958).

15. *See* Robison, *Housing—the Northern Civil Rights Frontier,* 13 W. RES. L. REV. 101, 123-24 (1961); Note, 74 HARV. L. REV. 526, 586-88 (1961); *Hearings before the Senate Comm. on Commerce,* 88th Cong., 1st Sess., ser. 27, pt. 2, at 1381-83 (1963).

16. *E.g.,* IOWA CODE ANN. § 105A.11 (Supp. 1966); KAN. GEN. STAT. ANN. § 44-1006 (Supp. 1965); KY. REV. STAT. § 344.020(2) (Supp. 1966); N.Y. EXEC. LAW § 300 (McKinney 1951).

SECTION 102. [*Severability.*]

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect 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.

SECTION 103. [*Effective Date.*]

This Act takes effect on [insert date].

SECTION 104. [*Title.*]

This Act may be cited as the Model Anti-Discrimination Act.

SECTION 105. [*Repeal.*]

The following acts and parts of acts are repealed:

(1)

(2)

(3)

COMMENT: The preparation of this section will require careful work in each state in view of the substantial number of existing statutes that prohibit discrimination, sometimes in widely separated parts of the state code.

CHAPTER 2 — GENERAL DEFINITIONS

INTRODUCTORY COMMENT: This chapter contains definitions that are used throughout the act. Definitions relating to specific substantive areas, such as employment and public accommodations, are in the chapters dealing with those subjects.

SECTION 201. [*Definitions.*]

In this Act, unless the context otherwise requires,

(1) "Commission" means the Commission on Human Rights created by this Act;

(2) "Commissioner" means a member of the Commission;

(3) "discriminatory practice" means a practice designated as discriminatory under the terms of this Act;

(4) "national origin" includes the national origin of an ancestor;

(5) "person" includes an individual, association, corporation, joint apprenticeship committee, joint-stock company, labor union, legal representative, mutual company, partnership, receiver, trust, trustee, trustee in bankruptcy, unincorporated organization; any other legal or commercial entity, the State, or any governmental entity or agency.

COMMENT: These definitions are self-explanatory. Subsection (5) follows several states in defining "person" inclusively;[17] it differs only slightly from CRA § 701(a).[18]

CHAPTER 3 — DISCRIMINATION IN EMPLOYMENT

INTRODUCTORY COMMENT: As of December 1, 1966, thirty-one states had enacted laws enforced by commissions and prohibiting discrimination in employment.[19] Similar laws in six other states are not enforced by commissions.[20]

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17. *E.g.*, MINN. STAT. ANN. § 363.01(7) (1966); N.J. STAT. ANN. § 18:25-5(g) (Supp. 1966).

18. 42 U.S.C. § 2000e(a) (1964).

19. ALASKA STAT. §§ 18.80.010-.300 (Supp. 1966); ARIZ. REV. STAT. ANN. §§ 41-1401, -1461 to -1466 (Supp. 1966); CAL. LABOR CODE §§ 1410, 1414, 1420 (West Supp. 1966); COLO. REV. STAT. ANN. §§ 80-21-1 to -8 (1963); CONN. GEN. STAT. REV. §§ 31-122 to -128 (1961), *as amended,* (Supp. 1965); DEL. CODE ANN. tit. 19, §§ 710-13 (Supp. 1964); HAWAII REV. LAWS §§ 90A-1 to -9 (Supp. 1963); ILL. REV. STAT. ch. 48, §§ 851-67 (1965); IND. ANN. STAT. §§ 40-2307 to -2328 (1965); IOWA CODE §§ 105A.1, .7 (Supp. 1966); KAN. GEN. STAT. ANN. §§ 44-1001 to -1013 (Supp. 1965); KY. REV. STAT. §§ 344.010-.990 (Supp. 1966); MD. ANN. CODE art. 49B, §§ 17-20 (Supp. 1966); MASS. GEN. LAWS ANN. ch. 151B, §§ 1-10 (1958), *as amended,* §§ 1-9 (Supp. 1966); MICH. STAT. ANN. §§ 3.548 (1)-(9) (Supp. 1965), §§ 17.458 (1)-(11) (1960), § 17.458(3a) (Supp. 1965); MINN. STAT. ANN. §§ 363.01-.12 REV. STAT. ANN. §§ 354-A:1 to :14 (1966); N.J. STAT. ANN. §§ 18: 25-1 to -28 (1966); MO. ANN. STAT. §§ 296.010-.070 (1965); NEB. REV. STAT. §§ 48-1001 to -1006, -1101 to -1125 (Supp. 1965); NEV. REV. STAT. §§ 233.010-.080 (1963); N.H. (Supp. 1964), *as amended,* (Supp. 1966); N.M. STAT. ANN. §§ 59-4-1 to -14 (1960); 1966); OHIO REV. CODE ANN. §§ 4112.01-.99 (Page 1965), *as amended* (Page Supp. 1966); ORE. REV. STAT. §§ 659.010-.115 (1965); PA. STAT. ANN. tit. 43, §§ 951-63 (1964); R.I. GEN. LAWS ANN. §§ 28-5-1 to -39, 28-6-1 to -21 (1956), *as amended,* (Supp. 1965); UTAH CODE ANN. §§ 34-17-1 to -8 (1966); WASH. REV. CODE ANN. §§ 49.60.010-.320 (1962); WIS. STAT. §§ 111.31-.37 (1963), *as amended,* WIS. STAT. ANN. §§ 111.31-.37 (Supp. 1967); WYO. STAT. ANN. §§ 27-257 to -264 (Supp. 1965).

20. IDAHO CODE ANN. §§ 18-7301 to -7303 (Supp. 1965); ME. REV. STAT. ANN. tit. 26, §§ 861-64 (Supp. 1966); MONT. REV. CODES ANN. §§ 64-301 to -303 (Supp. 1965); VT. STAT. ANN. tit. 21, § 495 (Supp. 1965).

Two states have commissions which lack enforcement power. OKLA. STAT. tit. 74, §§ 951-54 (Supp. 1965); W. VA. CODE ANN. §§ 5-11-2 to -6 (1966).

See 6 BNA LAB. POL. & PRAC. §§ 451:51-:1304. *See generally* Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study,* 18 VAND. L. REV. 965 (1965).

This chapter follows the CRA in prohibiting discrimination because of sex, and in leaving discrimination because of age to separate legislation.[21] Federal officials responsible for administering the CRA have stressed the importance of decentralized enforcement of provisions relating to sex discrimination. If state laws do not include such provisions, jurisdiction over such cases will be left solely in the federal government.[22]

SECTION 301. [*Definitions.*]

In this chapter

(1) "employer" means a person who has [ ] or more employees or a person who as contractor or subcontractor is furnishing material or performing work for the State or a governmental entity or agency of the State and includes an agent of such a person;

COMMENT: Patterned after CRA § 701(b).[23]

The number of employees to be covered is left blank for the option of each jurisdiction. Most states cover employers with at least 4, 6, or 8 employees; and several states, including Alaska, Hawaii, Minnesota, and Wisconsin, make employers subject to the act without regard to the number of persons they employ.[24] On the other hand, Illinois only covers employers with more than fifty employees.[25]

Conforming to the CRA,[26] there is no limitation as to the geographic location of employees.

All public contractors and subcontractors are covered in view of their special obligation to avoid discrimination. See §§ 706(d) and 806.

(2) "employment agency" means a person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person;

COMMENT: Taken from CRA § 701(c).[27]

(3) "labor organization" includes

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21. Civil Rights Act of 1964, §§ 703-04, 42 U.S.C. § 2000e-2 to -3.

22. *See* Civil Rights Act of 1964, §§ 204(c), 706(c), 42 U.S.C. §§ 2000a-3(c), e-5(c). *See generally* Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII,* 34 GEO. WASH. L. REV. 232, 253-54 (1965); Note, *Age Discrimination in Employment: The Problem of the Older Worker,* 41 N.Y.U.L. REV. 383 (1966).

23. 42 U.S.C. § 2000e(b) (1964).

24. ALASKA STAT. § 23.10.315(1) (1962); HAWAII REV. LAWS § 94-2 (Supp. 1963); MINN. STAT. ANN. § 363.03 subd. 1(2) (1966); WIS. STAT. § 111.32(3) (1963).

25. ILL. REV. STAT. ch. 48, § 852(d) (1965).

26. Civil Rights Act of 1964, § 701(b), 42 U.S.C. § 2000e(b).

27. 42 U.S.C. § 2000e(c) (1964).

(i) an organization of any kind, an agency or employee representation committee, group, association, or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment;

(ii) a conference, general committee, joint or system board, or joint council which is subordinate to a national or international labor organization; or

(iii) an agent of a labor organization.

COMMENT: Taken from CRA § 701(d).[28]

SECTION 302. [*Employers.*]

(a) It is a discriminatory practice for an employer

(1) to fail or refuse to hire, to discharge, or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify an employee in a way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, because of race, color, religion, sex, or national origin.

COMMENT: Based on CRA § 703(a).[29]

(b) This section does not apply to the employment of an individual by his parent, spouse or child or to employment in the domestic service of the employer.

COMMENT: Although this two-part exemption is not contained in the CRA, it is found in many state laws, including those of Massachusetts and New Jersey.[30] Some states may also wish to exclude employment by siblings or other close relatives.

SECTION 303. [*Employment Agencies.*]

It is a discriminatory practice for an employment agency to

28. 42 U.S.C. § 2000e(d) (1964).
29. 42 U.S.C. § 2000e-2(a) (1964).
30. MASS. GEN. LAWS ANN. ch. 151B, § 1(6) (1958); N.J. STAT. ANN. § 18:25(f) (Supp. 1964).

fail or refuse to refer for employment, or otherwise to discriminate against, an individual because of race, color, religion, sex, or national origin, or to classify or refer for employment an individual on the basis of race, color, religion, sex, or national origin.

SECTION 304. [*Labor Organizations.*]

It is a discriminatory practice for a labor organization

(1) to exclude or to expel from membership, or otherwise to discriminate against, a member or applicant for membership because of race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify membership, or to classify or to fail or refuse to refer for employment an individual in a way

(i) which would deprive or tend to deprive an individual of employment opportunities, or

(ii) which would limit employment opportunities or otherwise adversely affect the status of an employee or of an applicant for employment, because of race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to violate this chapter.

SECTION 305. [*Training Programs.*]

It is a discriminatory practice for an employer, labor organization, or joint labor-management committee controlling apprenticeship, on-the-job, or other training or retraining program, to discriminate against an individual because of race, color, religion, sex, or national origin, in admission to, or employment in, a program established to provide apprenticeship or other training.

COMMENT: Sections 302-305 are taken from CRA §§ 703(a) to (d),[31] State fair employment practices [hereinafter referred to as FEP] laws customarily include provisions dealing with each of the above four categories.[32]

SECTION 306. [*Other Discriminatory Practices.*]

(a) It is a discriminatory practice for an employer, labor

31. 42 U.S.C. §§ 2000e-2(a) to (d) (1964).

32. *E.g.*, MICH. STAT. ANN. § 17.458(3) (1960); PA. STAT. ANN. tit. 43, § 955 (1964).

organization, or employment agency to print or publish or cause to be printed or published a notice or advertisement relating to employment by the employer or membership in or a classification or referral for employment by the labor organization, or relating to a classification or referral for employment by the employment agency, indicating a preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin; but a notice or advertisement may indicate a preference, limitation, specification or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

COMMENT: Based on CRA § 704(b).[33] See § 309(1).

(b) Except as permitted by regulations of the Commission or by applicable federal law, it is a discriminatory practice for an employer or employment agency

(1) to make or use a written or oral inquiry or form of application that elicits or attempts to elicit information concerning the race, color, religion or national origin of a prospective employee,

(2) to make or keep a record of that information or to disclose the information, or

(3) to make or use a written or oral inquiry or form of application that expresses a preference, limitation or specification based on sex of a prospective employee.

COMMENT: This provision is based on several state laws, including those of Ohio and Pennsylvania, and commission regulations in California and Massachusetts.[34] It applies only to prospective employees. Compare § 502 relating to applicants to educational institutions. A labor union acting as an employment agency is covered. Because it would be difficult to enforce a flat prohibition on inquiry as to the sex of an applicant for employment, the usual language of state laws that forbids a "preference, limitation or specification" is used. Compare § 309(1). Commission regulations may provide for bona fide occupational qualifications. The provision is not intended to prohibit personal interviews. Compare § 502(2).

SECTION 307. [*Advertisements by Individuals Seeking Employment.*]

(a) Unless religion or national origin is a bona fide occupa-

33. 42 U.S.C. § 2000e-3(b) (1964).

34. Cal. FEPC, *Guide to Lawful and Unlawful Pre-Employment Surveys*, 6 BNA LAB. POL. & PRAC. § 451:155; Mass. FEPC Rulings Interpretive of FEP Law, 6 BNA LAB. POL. & PRAC. § 451:569.

tional qualification for particular employment, it is a discriminatory practice for an individual seeking employment to publish or cause to be published in a newspaper or magazine an advertisement that specifies or indicates his race, color, religion, or national origin, or expresses a preference or limitation as to the race, color, religion, or national origin of a prospective employer.

(b) This section does not apply to an advertisement for employment in the domestic service of the employer.

COMMENT: This section is not found in the CRA, but closely follows the Michigan, Ohio, and Pennsylvania provisions [35] It is designed to complement § 306 by prohibiting individuals seeking employment from trying to induce discrimination in their favor and from trying to obtain employment with an employer based on his race, color, religion, or national origin. Because of the undesirability of interfering with private correspondence, the section is limited to material published in newspapers and magazines. There is no reference to sex because of the difficulty of preventing revelation of that fact.

SECTION 308. [*Exemption.*]

This chapter does not apply to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by the corporation, association, or society of its religious activities.

COMMENT: Taken from CRA § 702[36] and several state laws.[37]

SECTION 309. [*Exceptions.*]

It is not a discriminatory practice

(1) for an employer to employ an employee, or an employment agency to classify or refer for employment an individual, for a labor organization to classify its membership or to classify or refer for employment an individual, or for an employer, labor organization, or joint labor-management committee controlling an apprenticeship or other training or retraining program to

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35. MICH. STAT. ANN. § 17.458(3) (1960); OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1966); PA. STAT. ANN. tit. 43, § 955 (1964).

36. 42 U.S.C. § 2000e-1 (1964).

37. *E.g.*, N.Y. EXEC. LAW § 296(9) (McKinney Supp. 1966); PA. STAT. ANN. tit. 43, § 955 (1964).

admit or employ an individual in the program, on the basis of his religion, sex, or national origin if religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise; or

COMMENT: Taken from CRA § 703(e)(1).[38] It also follows several states, such as Massachusetts, Michigan, and California, in providing a general exception for bona fide occupational qualifications.[39] On the other hand, some states, including New Jersey and New York, do not have such a general exception.[40]

(2) for a religious educational institution or an educational organization operated, supervised, or controlled by a religious institution or organization to limit employment or give preference to members of the same religion.

COMMENT: Based on the New York statute.[41]

SECTION 310. [*Imbalance Plans.*]

It is not a discriminatory practice for a person subject to this chapter to adopt and carry out a plan to fill vacancies or hire new employees so as to eliminate or reduce imbalance with respect to race, color, religion, sex, or national origin if the plan has been filed with the Commission under regulations of the Commission and the Commission has not disapproved the plan.

COMMENT: This section is designed to permit the adoption of voluntary plans to reduce or eliminate imbalance, subject to the power of the Commission to disapprove plans pursuant to its regulations. Several states have enacted similar provisions with respect to racial imbalance in schools.[42] Compare §§ 504 and 608. See also §§ 702(6) and (12). Any disapproval of a filed plan should have only prospective effect. Such questions as the effective date or duration of a plan are left to regulations. The Commission need not require that a plan cover all types of imbalance.

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38. 42 U.S.C. § 2000e-2(e)(1) (1964).

39. CAL. LABOR CODE § 1420 (West Supp. 1966); MASS. GEN. LAWS ANN. ch. 151B, § 4(2) (Supp. 1966); MICH. STAT. ANN. § 17.458(3) (1960).

40. N.J. STAT. ANN. § 18:25-12 (Supp. 1966); N.Y. EXEC. LAW § 296 (McKinney Supp. 1966).

41. N.Y. EXEC. LAW § 296(9) (McKinney Supp. 1966).

42. *E.g.*, CAL. EDUC. CODE § 363 (West Supp. 1966); IND. ANN. STAT. § 28-5157 (Supp. 1966).

CHAPTER 4 — DISCRIMINATION IN PUBLIC ACCOMMODATIONS

INTRODUCTORY COMMENT: As of December 1, 1966, twenty-three states had enacted laws enforced by commissions and prohibiting discrimination in public accommodations.[43] Similar laws in thirteen other states and the District of Columbia are not enforced by commissions.[44]

SECTION 401. [*Definition.*]

(a) "Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

(b) By way of example, but not of limitation, "place of public accommodation" includes facilities of the following types:

(1) a facility providing service relating to travel or transportation;

(2) a barber shop, beauty shop, bathhouse, swimming pool,

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43. ALASKA STAT. §§ 18.80.010-.300 (Supp. 1966); ARIZ. REV. STAT. ANN. §§ 41-1441 to -1442 (Supp. 1966); COLO. REV. STAT. ANN. §§ 25-1-1 to -5, 25-3-1 to -6 (1963); CONN. GEN. STAT. REV. § 53-35 (Supp. 1965); DEL. CODE ANN. tit. 6, §§ 4501-16 (Supp. 1964); IND. ANN. STAT. §§ 10-901 to -902 (Supp. 1966); IOWA CODE ANN. §§ 105A.1-.9 (Supp. 1966); KAN. GEN. STAT. ANN. §§ 44-1001 to -1013 (Supp. 1965); KY. REV. STAT. §§ 344.120-.140 (Supp. 1966); MD. ANN. CODE art. 49B, § 11 (1964); MASS. GEN. LAWS ANN. ch. 140, §§ 5-8 (1958), ch. 272, § 92A (1959), § 98 (Supp. 1966); MICH. COMP. LAWS §§ 750.146-.147 (1948); MINN. STAT. ANN. §§ 327.09, 363.03 subd. 3 (1966); MO. ANN. STAT. §§ 314.010-.080 (Supp. 1966); NEV. REV. STAT. §§ 651.050-.120 (1965); N.H. REV. STAT. ANN. §§ 354-A:8 (IV)-(V) (1966); N.J. STAT. ANN. §§ 10:1-1 to -7 (1960), 18:25-4 (Supp. 1964); N.Y. CIV. RIGHTS LAW §§ 40-44a (McKinney Supp. 1966); N.Y. EXEC. LAW §§ 290-301 (McKinney 1951), *as amended* (McKinney Supp. 1966). N.Y. PEN. LAW §§ 46.513-.515 (McKinney Supp. 1966); OHIO REV. CODE ANN. §§ 2901.35-.36 (Page 1954); ORE. REV. STAT. §§ 30..670-.680 (Supp. 1965); PA. STAT. ANN. tit. 18, § 4654 (1963); R.I. GEN. LAWS ANN. §§ 11-24-1 to -6 (1956); WASH. REV. CODE ANN. §§ 9.91.010, 49.60.010-.170 (1962).

44. CAL. CIV. CODE §§ 51-54 (West Supp. 1966); D.C. CODE ANN. §§ 47-2901 to -2911 (1961); IDAHO CODE ANN. §§ 18-7301 to -7303 (Supp. 1965); ILL. REV. STAT. ch. 38, §§ 13-1 to -4, ch. 43, § 133 (1965); ME. REV. STAT. ANN. tit. 17, § 1301 (Supp. 1966); MONT. REV. CODES ANN. §§ 64-301 to -303 (Supp. 1965); NEB. REV. STAT. §§ 20-101 to -102 (Supp. 1965); N.M. STAT. ANN. §§ 49-8-1 to -7 (1953); N.D. CENT. CODE § 12-22-30 (Supp. 1965); S.D. SESS. LAWS 81-82 (1963); UTAH CODE ANN. §§ 13-7-1 to -4 (Supp. 1965); VT. STAT. ANN. tit. 13, §§ 1451-52 (1958); WIS. STAT. § 942.04 (1963), *as amended*, WIS. STAT. ANN. (Supp. 1967); WYO. STAT. ANN. §§ 6-83.1-.2 (Supp. 1965). *See* Lockard, *The Politics of Antidiscrimination Legislation*, 3 HARV. J. LEG. 3 (1965). *See generally* Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 WASH. L. REV. 841 (1965); *Hearings Before the Senate Comm. on Commerce, supra* note 7, at 1315-81.

gymnasium, reducing salon, or other establishment conducted to serve the health, appearance, or physical condition of individuals;

(3) a campsite or trailer park; and

(4) a comfort station; a dispensary, clinic, hospital, convalescent home, or other institution for the infirm; a mortuary or undertaking parlor.

COMMENT: The definition is intended to be all-inclusive. It combines the two existing techniques of a general definition and a listing of specific types of public accommodations. The list in subsection (b) is taken from a report of the Ohio Civil Rights Commission.[45] The subsection is not as detailed as the Ohio list because it seems unnecessary to include places of public accommodation, such as inns and hotels, that are obviously covered by subsection (a).

SECTION 402. [*Discriminatory Practices.*]

It is a discriminatory practice for a person

(1) to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, religion, or national origin; or

COMMENT: Based on CRA § 201(a).[46]

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

COMMENT: Based on the laws of several states, including Colorado, New Jersey, and New York.[47]

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45. Referred to in Van Alstyne, *Civil Rights: A New Public Accommodations Law for Ohio,* 22 OHIO ST. L.J. 683, 686 (1961).

46. 42 U.S.C. § 2000a(a) (1964).

47. COLO. REV. STAT. ANN. § 25-2-1 (1963); N.J. STAT. ANN. § 10:1-3 (1960); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1948).

SECTION 403. [*Private Clubs.*]

This chapter does not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the establishment are made available to the customers or patrons of another establishment that is a place of public accommodation.

COMMENT: Based on CRA § 201(e),[48] which follows the laws of numerous states, including Oregon and Rhode Island.[49] The question of what is a "private club" is often difficult to determine, and it has been subject to much litigation.[50] The Commission could, by regulation, attempt a definition with the assistance of commentators who have proposed criteria to determine whether a "club" is in fact private.[51]

CHAPTER 5—DISCRIMINATION IN EDUCATIONAL INSTITUTIONS

INTRODUCTORY COMMENT: As of December 1, 1966, six states had enacted laws enforced by commissions and prohibiting discrimination in some or all educational institutions.[52] Similar laws in four other states are not enforced by commissions.[53]

SECTION 501. [*Definition.*]

In this chapter "educational institution" means a public or private institution and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system, or university and a business, nursing, professional, secretarial, technical, or vocational school; and includes an agent of an educational institution.

COMMENT: This definition, which is designed to be comprehensive, is

48. 42 U.S.C. § 2000a(e) (1964).

49. ORE. REV. STAT. § 659.010 (1965); R.I. GEN. LAWS ANN. § 11-24-3 (1956).

50. *See* T. EMERSON, D. HABER, & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 2152-60 (3d ed. 1967).

51. *See* Bonfield, *State Civil Rights Statutes: Some Proposals,* 49 IOWA L. REV. 1067, 1102-04 (1964); Van Alstyne, *supra* note 45, at 689-90.

52. IND. ANN. STAT. §§ 40-2307 to -2317 (1965); MASS. GEN. LAWS ANN, ch. 151C, §§ 1-5 (1958); N.J. STAT. ANN. §§ 18:25-1 to -28 (Supp. 1964), *as amended,* (Supp. 1966); N.Y. EDUC. LAW § 313 (McKinney 1953); N.Y. EXEC. LAW § 293 (McKinney Supp. 1966); PA. STAT. ANN. tit. 24, §§ 5000-10 (1962), *as amended,* § 5004 (Supp. 1966); WASH. REV. CODE ANN. § 9.91.010 (1965).

53. ILL. REV. STAT. ch. 122, § 22-19 (1965); KAN. GEN. STAT. ANN. § 21-2424 (1959); MINN. STAT. ANN. §§ 127.07-.08 (1960); KY. STATE BOARD OF BUS. SCHOOLS REGS. BS-1. *See generally* Note, *Fair Educational Practices Act: A Solution to Discrimination?,* 64 HARV. L. REV. 307 (1950).

based on the laws of Massachusetts, New Jersey, and Washington.[54]

SECTION 502. [*Discriminatory Practices.*]

It is a discriminatory practice for an educational institution

(1) to exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, and privileges of the institution, because of race, color, religion, or national origin;

COMMENT: This blanket prohibition against discrimination by educational institutions is based on the laws of Massachusetts, New York, and Pennsylvania.[55]

(2) to make or use a written or oral inquiry or form of application for admission that elicits or attempts to elicit information, or to make or keep a record, concerning the race, color, religion, or national origin of an applicant for admission, except as permitted by regulations of the Commission;

COMMENT: Based on the laws of Massachusetts and Pennsylvania.[56] Like them, it applies exclusively to practices with respect to applicants and not to students finally admitted, because the information involved can serve proper educational purposes as to enrolled students. Compare § 306(b)(1).

Even as to applicants, there may be occasions when legitimate purposes will be served by inquiries as to race, color, religion, and national origin, and therefore the Commission is given permission to make exceptions by regulations. Compare § 708(b), which *requires* certain records to be kept.

The provision is not intended to prohibit personal interviews. Compare § 306 (b)(3).

(3) to print or publish or cause to be printed or published a catalogue or other notice or advertisement indicating a preference, limitation, specification, or discrimination based on the race, color, religion, or national origin of an applicant for admission; or

COMMENT: Patterned after similar provisions in §§ 306(a), 402(2), and 602(6), all of which are derived from CRA § 704(b)[57] and several state laws.[58]

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54. MASS. GEN. LAWS ANN. ch. 151C, § 1(b) (1958); N.J. STAT. ANN. § 18:25-2 (Supp. 1964); WASH. REV. CODE ANN. § 28..02.010 (1964). *See also* PA. STAT. ANN. tit. 24, § 5003(1) (1962).

55. MASS. GEN. LAWS ANN. ch. 151C, § 2(a) (1958); N.Y. EDUC. LAW § 313 (McKinney 1953); PA. STAT. ANN. tit. 24, § 5004(a)(1) (1962).

56. MASS. GEN. LAWS ANN. ch. 151C, § 2(c) (1958); PA. STAT. ANN. tit. 24, § 5004(a)(2) (1962).

57. 42 U.S.C. § 2000e-3(b) (1964).

58. *E.g.*, N.J. STAT. ANN. § 18:25-12(c) (Supp. 1966).

(4) to announce or follow a policy of denial or limitation through a quota or otherwise of educational opportunities of a group or its members because of race, color, religion, or national origin.

COMMENT: This subsection is designed to prohibit discrimination against groups through, for example, the kind of quotas that have been widely used by certain educational institutions.

SECTION 503. [*Exceptions.*]

Notwithstanding any other provisions of this chapter, it is not a discriminatory practice for

[(1)] a religious educational institution or an educational institution operated, supervised, or controlled by a religious institution or organization to limit admission or give preference to applicants of the same religion [; or

(2) an educational institution to accept and administer an inter vivos or testamentary gift upon the terms and conditions prescribed by the donor].

COMMENT: Subsection (1) is based on several state laws.[59] Compare §§ 309(2) and 607. Subsection (2) is taken from the Pennsylvania statute.[60] It is bracketed because it is not common in state laws and could be used to defeat the policy of the chapter.

SECTION 504. [*Imbalance Plans.*]

It is not a discriminatory practice for an educational institution to adopt and carry out a plan to eliminate or reduce imbalance with respect to race, color, religion, or national origin if the plan has been filed with the Commission under regulations of the Commission and the Commission has not disapproved the plan.

COMMENT: Like §§ 310 and 608, this section authorizes voluntary plans to reduce or eliminate imbalance, subject to the power of the Commission to disapprove plans pursuant to its regulations. At least six states — California, Illinois, Indiana, Massachusetts, New Jersey, and New York — have statutes or administrative regulations permitting or requiring

59. KY. REV. STAT. §§ 344.090-.093 (Supp. 1966); MASS. GEN. LAWS ANN. ch. 151C, § 2 (1959); N.Y. EDUC. LAW § 313(3)(a) (McKinney 1953); PA. STAT. ANN. tit. 24, § 5004(c) (1962).

60. PA. STAT. ANN. tit. 24, § 5004(d) (1962).

elimination of imbalance in schools.[61] The section also precludes the possibility that quotas used to cure imbalance will be invalidated under § 502 (4). See also the comment to § 310.

CHAPTER 6 — DISCRIMINATION IN REAL PROPERTY TRANSACTIONS

INTRODUCTORY COMMENT: As of December 1, 1966, eighteen states had enacted laws enforced by commissions prohibiting discrimination in housing.[62] Similar laws enacted by three other states are not enforced by commissions.[63]

SECTION 601. [*Definitions.*]

For the purposes of this chapter

(1) "real property" includes buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein;

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61. CAL. EDUC. CODE § 363 (West Supp. 1966); ILL. REV. STAT. ch. 122, § 22-19 (1965); IND. ANN. STAT. § 28-5158 (Supp. 1966); MASS. GEN. LAWS ANN. ch. 15, §§ 1*I*-K (1966), ch. 71, §§ 37C-D (Supp. 1966).

In New Jersey, the elimination of racial imbalance in schools is required by interpretation of N.J. CONST. art. I, § 5. Fisher v. Board of Education, 8 RACE REL. L. REP. 30 (1963). It is required in New York by a statement of the N.Y. Bd. of Regents, adopted Jan. 28, 1961, as its official policy on racial desegregation, 8 RACE REL. L. REP. 738 (1963).

See T. EMERSON, D. HABER, & N. DORSEN, *supra* note 50, at 1781-91; *see generally* Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented,* 16 W. RES. L. REV. 502, 510-11 (1965).

62. ARIZ. REV. STAT. ANN. § 41-1401 (Supp. 1966); CAL. HEALTH & SAFETY CODE §§ 35700-44 (West Supp. 1965), CAL. CIV. CODE §§ 51-53 (West Supp. 1966); COLO. REV. STAT. ANN. §§ 69-7-1 to -7 (1963); CONN. GEN. STAT. REV. §53-34 (1961), §§ 53-35, -36 to -36(d) (Supp. 1965); IND. ANN. STAT. §§ 10-901 to -902 (Supp. 1964), §§ 40-2307 to -2328 (1965); MASS. GEN. LAWS ANN. ch. 121, § 26FF(e), ch. 151B, §§ 1-9 (Supp. 1966); MICH. STAT. ANN. §§ 5.3011-.3054 (Supp. 1965); MINN. STAT. ANN. §§ 363.01-.12 (1966); NEV. REV. STAT. §§ 233.010-.080 (1963); N.H. REV. STAT. ANN. §§ 354-A:1 to -14 (1966); N.J. STAT. ANN. §§ 18:25-1 to -28 (Supp. 1964), *as amended,* (Supp. 1966); N.Y. PUB. HOUSING LAW §§ 156, 223 (McKinney 1955), N.Y. CIV. RIGHTS LAW §§ 18(a)-(e) (McKinney Supp. 1966), N.Y. EXEC. LAW §§ 290-301 (McKinney 1951), *as amended,* (McKinney Supp. 1966); OHIO REV. CODE § 4112 (Page Supp. 1966); ORE. REV. STAT. §§ 659.010-.115, 696.300 (1965); PA. STAT. ANN. tit. 43, §§ 951-63 (1964); R.I. GEN. LAWS ANN. §§ 34-37-1 to -11 (Supp. 1965); WASH. REV. CODE ANN. §§ 49.60.010-.320 (1962); WIS. STAT. § 66.40 (1963).

63. ALASKA STAT. §§ 18.80.240, 18.80.250, 18.80.300(8) (Supp. 1966); IDAHO CODE ANN. §§ 18-7301 to -7303 (Supp. 1963); ME. REV. STAT. ANN. tit. 17, § 1301 (Supp. 1966).

Discrimination in connection with purchases, mortgages, leases, or rentals of private housing is prohibited by MICH. CONST. art. V, § 29. OP. MICH. ATT'Y. GEN. 4161 (1963). *See Hearings on S. 2396 and other bills before the Subcomm. on Constitutional Rights of the Senate Comm. of the Judiciary,* 89th Cong., 2d Sess. 963, pt. 2, at 1421-26 (1966); Lockard, *supra* note 44, at 8-9.

COMMENT: Taken from the Minnesota and New Jersey statutes,[64] with the addition of cooperatives and condominiums. Options are meant to be included.

(2) "real estate transaction" includes the sale, exchange, rental or lease of real property;

(3) "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 or residence of one or more individuals;

(4) "real estate broker or salesman" means a person, whether licensed or not, who, for or with the expectation of receiving a consideration, lists, sells, purchases, exchanges, rents, or leases real property, or who negotiates or attempts to negotiate any of these activities, or who holds himself out as engaged in these activities, or who negotiates or attempts to negotiate a loan secured or to be secured by mortgage or other encumbrance upon real property, or who is engaged in the business of listing real property in a publication; or a person employed by or acting on behalf of any of these.

COMMENT: Adapted from the Minnesota and New Jersey statutes.[65]

SECTION 602. [*Discriminatory Practices.*]

It is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesman, because of race, color, religion, or national origin

(1) to refuse to engage in a real estate transaction with a person;

(2) to discriminate against a person in the terms, conditions or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

(3) to refuse to receive or to fail to transmit a bona fide offer to engage in a real estate transaction from a person;

(4) to refuse to negotiate for a real estate transaction with a person;

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64. MINN. STAT. ANN. § 363.01 subd. 12 (1966); N.J. STAT. ANN. § 18:25-5(n) (Supp. 1966).

65. MINN. STAT. ANN. § 363.01 subd. 13 (1966); N.J. STAT. ANN. §§ 18:25-5(o)-(p) (Supp. 1966).

(5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to fail to bring a property listing to his attention, or to refuse to permit him to inspect real property;

(6) to print, circulate, post or mail or cause to be so published a statement, advertisement or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto; or

(7) to offer, solicit, accept, use or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith.

COMMENT: This section establishes a comprehensive prohibition against discrimination in every aspect of a transaction involving real property. It is patterned primarily after the Minnesota, New Jersey, and New York statutes[66] with the exception that it combines the prohibitions directed against owners, lessees, sublessees, assignees, and managing agents on the one hand and real estate brokers and real esate salesmen on the other. While it is true that certain subsections, such as (7), might be primarily directed toward only one of the two categories, it seems desirable to make the prohibitions as broad as possible in respect of both groups. The section is intended to cover discrimination against an individual because of the race, color, religion, or national origin of another individual, such as his wife.

SECTION 603. [*Exceptions.*]

The provisions of section 602 do not apply

(1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than [two] families living independently of each other, if the lessor or a member of his family resides in one of the housing accommodations; or

(2) to the rental of a room or rooms in a housing accommodation by an individual if he or a member of his family resides therein.

COMMENT: These exemptions for "tight living" are based on the laws

66. MINN. STAT. ANN. § 363.03 subd. 2 (1966); N.J. STAT. ANN. §§ 18:25-12 (g)-(h) (Supp. 1966); N.Y. EXEC. LAW § 296(3) (McKinney Supp. 1966).

of Connecticut and New York.[67] Some states, such as Alaska and Michigan,[68] permit no exemptions whatever, while some, such as California, exclude coverage of three- or four-family dwellings,[69] and Minnesota excludes the sale or rental of owner-occupied one-family dwellings.[70] The Commission should define "family" by regulation.

SECTION 604. [*Discriminatory Financial Practices.*]

It is a discriminatory practice for a person to whom application is made for financial assistance in connection with a real estate transaction or for the construction, rehabilitation, repair, maintenance, or improvement of real property, or a representative of such a person

(1) to discriminate against the applicant because of race, color, religion, or national origin; or

(2) to use a form of application for financial assistance or to make or keep a record or inquiry in connection with applications for financial assistance which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination as to race, color, religion, or national origin.

COMMENT: This section is based on many state laws which have reflected the general opinion that a fair housing law must contain provisions prohibiting discrimination by financial institutions in order to be effective.[71]

SECTION 605. [*Restrictive Covenants and Conditions.*]

(a) Every provision in an oral agreement or a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, occupancy or lease thereof to individuals of a specified race, color, religion, or national origin is void.

(b) Every condition, restriction or prohibition, including a right of entry or possibility of reverter, which directly or indirectly limits the use or occupancy of real property on the

67. CONN. GEN. STAT. REV. § 53-35 (Supp. 1965); N.Y. EXEC. LAW § 296(5)(a) (McKinney Supp. 1966).

68. ALASKA STAT. § 18.80.240 (Supp. 1966); MICH. CONST. art. V, § 29, OP. MICH. ATT'Y GEN. 4161 (1963).

69. CAL. CIV. CODE § 53 (West Supp. 1966).

70. MINN. STAT. ANN. § 363.02 subd. 2 (1966).

71. *E.g.*, MINN. STAT. ANN. § 363.03 subd. 2-(3) (1966); N.Y. EXEC. LAW § 296 (5)(d) (McKinney Supp. 1966). *See* Bonfield, *supra* note 51, at 1106-07. *Compare* 1963 COMM'N ON CIVIL RIGHTS REP. 101-02.

basis of race, color, religion, or national origin, is void, except a limitation of use on the basis of religion of real property held by a religious institution or organization or by a religious or charitable organization operated, supervised, or controlled by a religious institution or organization, and used for religious or charitable purposes.

(c) It is a discriminatory practice to insert in a written instrument relating to real property a provision that is void under this section or to honor or attempt to honor such a provision in the chain of title.

COMMENT: Based on several state laws, including those of Colorado, Minnesota, and Ohio.[72] The section voids restrictive covenants of the kind held unenforceable in *Shelley v. Kraemer*[73] and *Barrows v. Jackson*.[74] Subsection (a) invalidates provisions that restrict transfer because of race, color, religion, or national origin. Subsection (b) prohibits similar limitations on use and occupancy of real property, but contains an exception for the common form of limitation for the benefit of religious institutions. Subsection (c) is taken from the Ohio law[75] and makes it a discriminatory practice to honor or attempt to honor a provision declared void in this section. If this section cannot constitutionally be applied to a particular limitation, other applications are not affected. See § 102.

SECTION 606. [*Blockbusting.*]

It is a discriminatory practice for a person, for the purpose of inducing a real estate transaction from which he may benefit financially

(1) to represent that a change has occurred or will or may occur in the composition with respect to race, color, religion or national origin of the owners or occupants in the block, neighborhood, or area in which the real property is located, or

(2) to represent that this change will or may result in the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools in the block, neighborhood, or area in which the real property is located.

COMMENT: "Blockbusting" is carried on by operators who induce whites to sell their property to them at low prices by playing on the fear

72. COLO. REV. STAT. ANN. § 69-7-5 (1963); MINN. STAT. ANN. § 363.03(2) (1966); OHIO REV. CODE ANN. § 4112.02(H)(8) (Page Supp. 1966).
73. 334 U.S. 1 (1948).
74. 346 U.S. 249 (1953).
75. OHIO REV. CODE ANN. § 4112.02(H)(8) (Page Supp. 1966).

that the neighborhood is about to be opened to nonwhites. The property is then resold at high profit to nonwhites who are prepared to pay exorbitant prices for decent housing.[76] Numerous cities have enacted "anti-blockbusting" ordinances,[77] and Ohio has passed a statute on the subject.[78]

This section is a modified version of the typical ordinance. Although it imposes some restriction on speech, constitutional problems are significantly lessened by the fact that the restraint imposed is on commercial expression, where there is a narrower reach to the first amendment.[79]

For a remedy against a respondent who profits financially by "block-buster" tactics, see § 706(b)(9).

SECTION 607. [*Religious Institutions.*]

It is not a discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction.

COMMENT: Although several states, such as Connecticut and Minnesota,[80] have no religious exemption, this subsection follows Ohio's provision for a limited exemption.[81] See also the laws of Massachusetts and New Jersey.[82]

SECTION 608. [*Imbalance Plans.*]

It is not a discriminatory practice for any person subject to this chapter to adopt and carry out a plan to eliminate or reduce imbalance with respect to race, color, religion, or national origin if the plan has been filed with the Commission under regulations of the Commission and the Commission has not disapproved the plan.

COMMENT: Like §§ 310 and 504, this section authorizes voluntary plans to reduce imbalance, subject to the power of the Commission to dis-

76. *See, e.g.,* Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process,* 74 YALE L.J. 1171, 1207-08 (1965).

77. *E.g.,* SAN FRANCISCO ADMINISTRATIVE CODE § 12A.8(a) (1964), 9 RACE REL. L. REP. 1491-2 (1964).

78. OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1966).

79. *See* Valentine v. Christensen, 316 U.S. 52 (1942); Note, *Freedom of Expression in a Commercial Context,* 78 HARV. L. REV. 1191, 1199-1203 (1965).

80. CONN. GEN. STAT. REV. § 53-35 (Supp. 1965); MINN. STAT. ANN. 363.01 (1966).

81. OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1966).

82. MASS. GEN. LAWS ANN. ch. 151B, § 4(7) (Supp. 1966); N.J. STAT. ANN. § 18:25-12(g) (Supp. 1966).

approve plans pursuant to its regulations. "Benign" housing quotas have received considerable attention.[83] See the comment to § 310.

CHAPTER 7 — COMMISSION ON HUMAN RIGHTS; ENFORCEMENT; JUDICIAL REVIEW

INTRODUCTORY COMMENT: This chapter establishes a Commission, specifies its powers and duties, sets out enforcement machinery, and provides for judicial review.[84]

SECTION 701. [*Commission on Human Rights.*]

(a) There is hereby created the Commission on Human Rights to consist of [5] [7] members, who shall be appointed by the Governor [by and with the consent of the Senate]. One of the Commissioners shall be designated by the Governor as Chairman [and another as Vice Chairman]. No more than [3] [4] members of the Commission shall be from the same political party.

COMMENT: This subsection creates the Commission, following the prevailing pattern of an independent administrative body. Alternative figures are presented for the size of the Commission, an issue that could be resolved

83. *See, e.g.*, Hellerstein, *The Benign Quota, Equal Protection and "The Rule in Shelley's Case,"* 17 RUTGERS L. REV. 531, 533-34 (1963); Comment, 59 MICH. L. REV. 1054, 1071-74 (1961).

84. Statutes creating state anti-discrimination commissions include: ALASKA STAT. §§ 18.80.010-.070 (Supp. 1966); ARIZ. REV. STAT. ANN. §§ 41-1401 to -1403 (Supp. 1966); CAL. LABOR CODE §§ 1410-32 (West Supp. 1966); COLO. REV. STAT. ANN. §§ 80-21-3 to -8 (1963); CONN. GEN. STAT. REV. §§ 31-123 to -128 (1961), *as amended,* (Supp. 1965); DEL. CODE ANN. tit. 19, §§ 710-13 (Supp. 1964); HAWAII REV. LAWS §§ 90A-1 to -9 (Supp. 1963); ILL. REV. STAT. ch. 127, §§ 214.1-.5 (1965); IND. ANN. STAT. §§ 40-2310 to -2312, 2317 (1965); IOWA CODE ANN. §§ 105 A.3-.10 (Supp. 1966); KAN. GEN. STAT. ANN. §§ 44-1003 to -1013 (Supp. 1965); KY. REV. STAT. §§ 344.150-.270 (Supp. 1966); MD. ANN. CODE art 49B, §§ 1-16 (1964), *as amended,* §§ 14-20 (Supp. 1966); MICH. STAT. ANN. §§ 3.548(1)-(5) (Supp. 1965); MINN. STAT. ANN. §§ 363.04-.09 (1966); MO. ANN. STAT. §§ 296.010-.070 (1965); NEB. REV. STAT. §§ 48-1101 to -1125 (Supp. 1965); NEV. REV. STAT. §§ 233.010-.080 (1963); N.H. REV. STAT. ANN. §§ 354-A:1 to :14 (1966); N.J. STAT. ANN. §§ 18:25-1 to -28 (Supp. 1964), *as amended* (Supp. 1966); N.Y. EXEC. LAW §§ 290-301 (McKinney 1951),*as amended,* (McKinney Supp. 1966); OHIO REV. CODE ANN. §§ 4112.01-.99 (Page 1965), *as amended* (Page Supp. 1966); PA. STAT. ANN. *tit.* 43, §§ 951-63 (1964); R.I. GEN. LAWS ANN. §§ 34-17-1 to -8 (1966); WASH. REV. CODE ANN. §§ 49.60.010-320 (1962); §§ 28-5-1 to -39 (1956), *as amended* (Supp. 1965); UTAH CODE ANN. §§ 34-17-1 to -8 (1966); WASH. REV. CODE ANN. §§ 49.60.010-320 (1962); WIS. STAT. §§ 111.3-.37 (1963), *as amended,* WIS. STAT. ANN. §§ 111.31-.37 (Supp. 1967); WYO. STAT. ANN. §§ 27-257 to -264 (Supp. 1965).

See 6 BNA LAB. POL. & PRAC. §§ 451:51-:1304. *See generally* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation,* 74 HARV. L. REV. 526 (1961); Rosen, *The Law and Racial Discrimination in Employment,* 53 CALIF. L. REV. 729 (1965).

on the basis of the volume of business expected. A minimum of five is needed if three Commissioners are to be available for the hearing provided in § 704 and if the Commissioners who file the complaint and conduct the conciliation in a given case are not also to participate in a judicial role involving the same matter. See §§ 702(6), 703(c) and (d), 704(a), (b) and (g). Seven commissioners have been provided for by most states.[85]

The mode of appointment may depend on constitutional or other legal requirements within a given state. Most states, including Illinois, Michigan, Minnesota, and New Jersey,[86] provide for the "consent of the Senate," but the provision is bracketed as optional because some jurisdictions may want to lodge the appointing power solely in the governor.

In most existing statutes the governor designates the chairman.[87] This assures that the chairman's powers emanate from the highest possible source and discourages politicking within the Commission. Because some states may want to permit commissions to select the vice chairman, the governor's power to choose this official is bracketed as optional.

As a means of obtaining a broad spectrum of opinion on a non-partisan body, the subsection follows CRA § 705[88] and several states, including Arizona and Pennsylvania,[89] in providing that only a bare majority of the Commissioners may be of the same political party.

(b) The term of office of each member of the Commission is [6] years. Of those members first appointed, two shall be appointed for a term of two years, two for a term of four years, and the balance for a term of six years. A member chosen to fill a vacancy otherwise than by expiration of a term shall be appointed for the unexpired term of the member whom he is to succeed. A member of the Commission is eligible for reappointment.

COMMENT: Although the members of most state commissions serve four or five years, six has been used as an illustrative figure because it shows

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85. *E.g.*, ARIZ. REV. STAT. ANN. § 41-1401(A) (Supp. 1966); CAL. LABOR CODE § 1414 (West Supp. 1966); COLO. REV. STAT. ANN. § 80-21-4 (1963); IOWA CODE ANN. § 105A.3 (Supp. 1966); NEB. REV. STAT. § 48-1116 (Supp. 1965); N.J. STAT. ANN. 18:25-7 (Supp. 1964); WIS. STAT. § 11.34 (1963).

86. ILL. REV. STAT. ch. 48, § 855 (1965); MICH. STAT. ANN. § 3.548(1) (Supp. 1965); MINN. STAT. ANN. § 363.04(1) (1966); N.J. STAT. ANN. § 18:25-7 (Supp. 1964).

87. *E.g.*, COLO. REV. STAT. ANN. § 80-21-3 (1963); KAN. GEN. STAT. ANN. § 44-1003 (Supp. 1965); KY. REV. STAT. § 344.150 (Supp. 1966); NEV. REV. STAT. § 233.050 (1963); N.Y. EXEC. LAW § 293 (McKinney 1951); PA. STAT. ANN. tit. 43, § 956 (1964); WASH. REV. CODE ANN. § 49.60.050 (1962).

88. 42 U.S.C. § 2000e-4 (1964).

89. ARIZ. REV. STAT. ANN. § 41-1401(A) Supp. 1966); PA. STAT. ANN. tit. 43, § 956 (1964). *See also* COLO. REV. STAT. ANN. § 80-21-4 (1963); IND. ANN. STAT. § 40-2310 (1965); IOWA CODE ANN. § 105A.3 (Supp. 1966); MICH. STAT. ANN. § 3.548(1) (Supp. 1965).

well how terms can be staggered with a commission of either five or seven members. In order to preserve continuity, all major state statutes[90] and CRA § 705[91] stagger terms and fill vacancies only for unexpired terms.

(c) [2] [3] members of the Commission constitute a quorum. A vacancy in the Commission does not impair the authority of the remaining members to exercise the powers of the Commission. The Commission may by rule establish panels of not less than a quorum to exercise its powers.

COMMENT: The provision that a quorum may be one less than a majority is found in several states.[92] This device and the use of panels will permit action when members are dispersed.

(d) Each member is entitled to reimbursement of expenses incurred by him in the performance of his duties and to a [salary of $..... a year] [per diem of $..... a day for each day of service as a Commissioner].

COMMENT: The bracketed alternatives are based on the laws of Massachusetts and Ohio (salary) and Alaska, Indiana, and Kansas (per diem).[93]

(e) A Commissioner may be removed by the Governor for inefficiency, neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon.

COMMENT: Based on several state laws, including California and Washington.[94]

SECTION 702. [*Powers of Commission.*]

Within the limitations provided by law, the Commission has the following powers:

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90. *E.g.*, ARIZ. REV. STAT. ANN. § 41-1401(A) (Supp. 1966); COLO. REV. STAT. ANN. § 80-21-4 (1963); IOWA CODE ANN. § 105A.3 (Supp. 1966); KAN. GEN. STAT. ANN. § 44-1003 (Supp. 1965); KY. REV. STAT. § 344.150 (Supp. 1966); MICH. STAT. ANN. § 3.548(1) (Supp. 1965); N.J. STAT. ANN. § 18:25-7 (Supp. 1964); PA. STAT. ANN. tit. 43, § 956 (1964); WASH. REV. CODE ANN. § 49.60.060 (1962).

91. 42 U.S.C. § 2000e-4(a) (1964).

92. *E.g.*, CAL. LABOR CODE § 1415 (West Supp. 1966).

93. ALASKA STAT. § 18.80.070 (Supp. 1966); IND. ANN. STAT. § 40-2310 (1965); KAN. GEN. STAT. ANN. § 44-1003 (Supp. 1965); MASS. GEN. LAWS ANN. ch. 6, § 56 (Supp. 1966); OHIO REV. CODE ANN. § 4112.03 (Page 1965).

94. CAL. LABOR CODE § 1417 (West Supp. 1966); WASH. REV. CODE ANN. § 49.60.060 (1962).

(1) to maintain an office in the City of [ ] and such other offices within the State as it may deem necessary;

(2) to meet and exercise its powers at any place within the State;

(3) to appoint an Executive Director and any necessary attorneys, hearing examiners, clerks and other employees and agents [and fix their compensation. Attorneys appointed under this section may appear for and represent the Commission in any court];

COMMENT: Based on numerous state laws.[95] The bracketed portion of subsection (3) is to allow for states whose constitutions or laws will not enable an independent commission to fix compensation or to appear in court through attorneys other than those in the office of the attorney general. See CRA § 705(h),[96] which authorizes the Equal Employment Opportunity Commission [hereinafter referred to as EEOC] attorneys to appear in court.

(4) to promote the creation of local commissions on human rights, and to cooperate or contract with individuals and state, local and other agencies, both public and private, including agencies of the federal government and of other states;

COMMENT: Based in part on CRA § 705(g)(1)[97] and several state laws,[98] this subsection is somewhat broader and more explicit than the common provision in state acts enabling commissions to utilize the services of governmental departments and agencies. It specifically authorizes cooperation with local commissions created under chapter 9 of the act, with federal agencies, including the EEOC as provided in CRA § 709(b),[99] and with private agencies.

(5) to accept public grants [or private gifts, bequests,] or other payments;

COMMENT: This provision authorizes public and private contributions to assist the financing of the law against discrimination and enables the Commission to receive payments for services rendered, such as those provided for in CRA § 709(b).[100] Kansas has such a provision.[101] The

95. *E.g.*, N.Y. EXEC. LAW §§ 295(1)-(3) (McKinney 1951); MINN. STAT. ANN. §§ 363.05(1)-(3) (1966).
96. 42 U.S.C. § 2000e-4(h) (1964).
97. 42 U.S.C. § 2000e-4(g)(1) (1964).
98. *E.g.*, MASS. GEN. LAWS ANN. ch. 151B, § 3(8) (1958); MICH. STAT. ANN. § 3.548(8) (Supp. 1965).
99. 42 U.S.C. § 2000e-8(b) (1964).
100. *Id.*

bracketed language can be omitted in states that restrict private donations to public bodies.

(6) to receive, initiate, investigate, seek to conciliate, hold hearings on, and pass upon complaints alleging violations of this Act, and to approve or disapprove plans to eliminate or reduce imbalance with respect to race, color, religion, sex or national origin;

COMMENT: This subsection follows the CRA[102] and such states as Massachusetts, Minnesota, and Washington[103] in granting the Commission power to initiate complaints. It has been asserted frequently that some state commissions, lacking such power, have not been able to function successfully because private individuals cannot be relied on to initiate action in view of the time and expense involved, the fear of reprisal, and the unavoidable delay in obtaining effective relief.[104] New York, which set the pattern for administrative enforcement, provided for the initiation of proceedings by the Commission in 1965.[105] The last clause grants the Commission power to take the action provided for in §§ 310, 504, and 608.

(7) to require answers to interrogatories, compel the attendance of witnesses, examine witnesses under oath or affirmation, and require the production of documents. The Commission may make rules authorizing any member or individual designated to exercise these powers in the performance of official duties;

COMMENT: Based on CRA § 710(a)[106] and many state laws.[107] The provision grants the Commission power to obtain necessary evidence, before and after a complaint is filed.

(8) to furnish technical assistance requested by persons subject to this Act to further compliance with the Act or an order issued thereunder;

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101. KAN. GEN. STAT. ANN. § 40-1004(11) (Supp. 1965).
102. Civil Rights Act of 1964, § 705(a), 42 U.S.C. § 2000e-4.
103. MASS. GEN. LAWS ANN. ch. 151B, § 5 (1958); MINN. STAT. ANN. § 363.06 (2) (1966); WASH. REV. CODE ANN. § 49.60.120 (1962).
104. *See* Girard & Jaffe, *Some General Observations on Administration of State Fair Emloyment Laws,* 14 BUFFALO L. REV. 114 (1964); Witherspoon, *supra* note 76, at 1191-94.
105. N.Y. EXEC. LAW § 295(6)(b) (McKinney Supp. 1966).
106. 42 U.S.C. § 2000e-9(a) (1964).
107. *E.g.,* MICH. STAT. ANN. § 3.548(5) (Supp. 1965); N.Y. EXEC. LAW § 295 (7) (McKinney Supp. 1966).

COMMENT: Based on CRA § 705(g)(3)[108] and numerous state laws.[109]

(9) to make studies appropriate to effectuate the purposes and policies of this Act and to make the results thereof available to the public;

COMMENT: Based on CRA § 705(g)(5)[110] and numerous state laws.[111]

(10) to render at least annually a comprehensive written report to the Governor and to the Legislature. The report may contain recommendations of the Commission for legislative or other action to effectuate the purposes and policies of this Act;

COMMENT: Based on CRA § 705(d)[112] and numerous state laws.[113]

(11) to create local or state-wide advisory committees to aid in effectuating the purposes of this Act and to empower those agencies

(i) to study and report on problems of discrimination because of race, color, religion, sex, or national origin,

(ii) to foster through community effort or otherwise goodwill among the groups and elements of the population of the State, and

(iii) to make recommendations to the Commission for the development of policies and practices that will aid in carrying out the purposes of this Act. Members of such committees shall be reimbursed for expenses incurred in such service. The Commission may make provision for technical and clerical assistance to the committees; and

COMMENT: Based on a common provision of state law which enables the Commission to involve as many private persons as possible in its work and to acquire facts and opinions developed by these private groups.[114] Private persons who are not appointed under subsection (3) would serve without pay.

108. 42 U.S.C. § 2000e-4(g)(3) (1964).
109. *E.g.*, MINN. STAT. ANN. § 363.05-1(12) (1966).
110. 42 U.S.C. § 2000e-4(g)(5) (1964).
111. *E.g.*, MINN. STAT. ANN. § 363.05-1(14) (1966).
112. 42 U.S.C. § 2000e-4(d) (1964).
113. *E.g.*, ALASKA STAT. § 18.80.150 (Supp. 1966); KAN. GEN. STAT. ANN. § 44-1004(13) (Supp. 1965); KY. REV. STAT. § 344.190(2) (Supp. 1966); OHIO REV. CODE ANN. § 4112.04(8) (Page Supp. 1966); NEB. REV. STAT. § 48-1117(6) (Supp. 1965).
114. *E.g.*, MASS. GEN. LAWS ANN. ch. 151B, § 4(8) (Supp. 1966); N.Y. EXEC. LAW § 295(8) (McKinney 1951).

(12) [in accordance with the Administrative Procedure Act,] to adopt, promulgate, amend and rescind rules and regulations to effectuate the purposes and policies of this Act, including regulations requiring the posting or inclusion in advertising material of notices prepared or approved by the Commission, and regulations as to the filing, approval or disapproval of plans to eliminate or reduce imbalance with respect to race, color, religion, sex or national origin.

COMMENT: This is a standard rule-making provision. The bracketed portion is for states that have adopted the Model State Administrative Procedure Act. Instead of making posting mandatory for all persons subject to the act, as is the case with CRA § 711(a)[115] and several state laws,[116] the subsection authorizes the Commission to determine whether and to what extent to require posting.[117] The specific grant of power to issue regulations relating to plans to eliminate or reduce imbalance (see subsection (6)) is not intended to limit the general power of the Commission to issue regulations.

SECTION 703. [*Complaint and Subsequent Proceedings.*]

(a) A person claiming to be aggrieved by a discriminatory practice, his agent, a member of the Commission, [or] the Attorney General [, or a non-profit organization chartered to combat discrimination] may file with the Commission a written complaint stating that a discriminatory practice has been committed, setting forth the facts upon which the complaint is based, and setting forth facts sufficient to enable the Commission to identify the person charged (hereinafter the respondent). The Commission or a member of the Commission or the staff shall promptly investigate the allegations of discriminatory practice set forth in the complaint and shall immediately furnish the respondent with a copy of the complaint. The complaint must be filed within one year after the alleged discriminatory practice occurs.

COMMENT: On the question of who is entitled to lodge a complaint, the subsection is consistent with § 702(6), which authorizes the Commission as a body to file. Following CRA § 706(a),[118] it also permits indi-

115. 42 U.S.C. § 2000e-10(a) (1964).

116. *E.g.*, KAN. GEN. STAT. ANN. § 44.1012 (Supp. 1965); KY. REV. STAT. § 344.190(14) (Supp. 1966); OHIO REV. CODE ANN. § 4112.07 (Page Supp. 1966).

117. *Compare* Cal. FEPC R. 19013(a), 6 BNA LAB. POL. & PRAC. § 451.143; Pa. Human Relations Comm'n R. 200.01, *id.* § 451.1033.

118. 42 U.S.C. §§ 2000e-4(g)(6), -5(a) (1964).

vidual members to file, in part because as a practical matter the Commission could be expected to support an individual member at this preliminary stage of the proceeding. The attorney general is also empowered to file, following the law of several states, including California, Colorado, and New York.[119] Although this authority is used sparingly in practice, it seems desirable to allow the state's highest legal authority to act if he so wishes.

The bracketed clause is an optional provision based on several state and local acts that permit private civil rights organizations to lodge complaints.[120]

By permitting the Commission to provide by rule that the investigation be carried out by a member of the staff or another designated person, the subsection assists in freeing Commissioners for policy decisions and avoids the merging of the investigative and judicial functions of the Commission.[121]

The one year statute of limitations follows the California and New York Acts.[122]

In line with existing state laws[123] and the CRA,[124] which recognize that the matter must be handled flexibly, there is no attempt to spell out the techniques of the investigative process.

(b) If within 60 days after the complaint is filed it is determined by the Commission or a member of the Commission or the staff that there is no reasonable cause to believe that the respondent has engaged in a discriminatory practice, the Commission shall issue an order dismissing the complaint and shall furnish a copy of the order to the complainant, the respondent, the Attorney General, and such other public officers and persons as the Commission deems proper.

COMMENT: In employing the standard of "reasonable cause," the subsection follows CRA § 706(a)[125] rather than the more common state formulation of "probable cause."[126] As used here, "no reasonable cause" means that the complaint lacks sufficient merit to warrant the case's going forward to the conciliation and hearing stage.

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119. CAL. LABOR CODE § 1422 (West Supp. 1966); COLO. REV. STAT. ANN. § 80-21-7 (1963); N.Y. EXEC. LAW § 297(1) (McKinney 1951).

120. *E.g.*, OHIO REV. CODE ANN. §§ 4112.01, .05 (Page 1965); R.I. GEN. LAWS ANN. § 28-5-17 (1956).

121. *See* Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652, 653-55 (1965).

122. CAL. LABOR CODE § 1422 (West Supp. 1966); N.Y. EXEC. LAW § 297(3) (McKinney 1951).

123. *E.g.*, CAL. LABOR CODE § 1421 (West Supp. 1966); N.Y. EXEC. LAW § 297 (McKinney Supp. 1966).

124. Civil Rights Act of 1964, §§ 101-1106, 42 U.S.C. §§ 2000a to h-6.

125. 42 U.S.C. § 2000e-5(a) (1964).

126. *E.g.*, COLO. REV. STAT. ANN. § 80-21-7(3) (1963); KAN. GEN. STAT. ANN. § 44-1005 (Supp. 1965); MASS. GEN. LAWS ANN. ch. 151B, § 5 (Supp. 1966); MINN. STAT. ANN. § 363.06 subd. 4 (1966); N.Y. EXEC. LAW § 297(2) (McKinney 1951).

(c) The complainant, within 30 days after receiving a copy of an order dismissing the complaint, may file with the Commission an application for reconsideration of the order. Upon such application, the Commission or a designated member of the Commission other than the member making the determination under subsection (b) shall make a new determination whether there is reasonable cause to believe that the respondent has engaged in a discriminatory practice. If it is determined within 30 days after the application is filed that there is no reasonable cause to believe that the respondent has engaged in a discriminatory practice, the Commission shall issue an order dismissing the complaint and furnish a copy of the order to the complainant, the Attorney General, and such other public officers and persons as the Commission deems proper.

COMMENT: This subsection, which is patterned after a New York provision,[127] affords complainants dissatisfied with a negative decision under subsection (b) an avenue of review within the Commission. Since the "reasonable cause" determination ordinarily will be made in the first instance by a single individual designated pursuant to rule, internal review de novo within the Commission is a desirable check if the complainant desires to press the charge. The judicial review provided for in § 707 is an inadequate substitute for Commission review because the court cannot disturb findings of fact unless they are "clearly erroneous."

The procedure under subsections (b) and (c) could last 120 days if the initial finding of no reasonable cause came on the sixtieth day after the filing of the complaint, if the complainant waited thirty days before filing an application for reconsideration, and if the Commission on review delayed thirty days further before deciding that there was no reasonable cause. If there is further delay, the Commission must require the respondent to answer. See § 704(a).

CRA § 706(b) provides that no charge shall be filed under the federal act in a state having an anti-discrimination law "before the expiration of 60 days after proceedings have been commenced" under the state law (120 days during the first year that a state law is effective).[128] Accordingly, the complainant in a state proceeding that is delayed beyond the sixtieth day from the time of the filing of the complaint will have the option of turning to the EEOC while the state proceeding is pending. There seems no escape from this potential overlap of jurisdiction without unduly reducing the time periods. In most cases the complainant could be expected not to move to the EEOC immediately after the sixty-day period has expired

127. N.Y. EXEC. LAW § 297(2) (McKinney 1951).
128. 42 U.S.C. § 2000e-5(b) (1964).

because he has up to 210 days after the alleged unlawful practice occurred to file with the EEOC under CRA § 706(d).[129]

(d) Unless the Commission has issued an order dismissing the complaint pursuant to this section, a member of the Commission designated by the Chairman or the staff may endeavor to eliminate the alleged discriminatory practice by conference, conciliation, and persuasion. The terms of a conciliation agreement reached with the respondent may require him to refrain in the future from committing discriminatory practices of the type stated in the agreement and to take such affirmative action as in the judgment of the Commission will carry out the purposes of this Act and may include consent by the respondent to the entry in court of a consent decree embodying terms of the conciliation agreement. If a conciliation agreement is entered into, the Commission shall issue an order stating its terms and furnish a copy of the order to the complainant, the respondent, the Attorney General, and such other public officers and persons as the Commission deems proper. Except for the terms of the conciliation agreement, neither the Commission nor any officer or employee thereof shall make public, without the written consent of the complainant and the respondent, information concerning efforts in a particular case to eliminate a discriminatory practice by conference, conciliation, or persuasion, whether or not there is a determination of reasonable cause or a conciliation agreement.

COMMENT: This subsection provides that a Commissioner or the staff be responsible for conciliation unless the Commission has dismissed the complaint for lack of reasonable cause. Following New York law,[130] conciliation is not mandatory if it is likely to be fruitless.[131] The Commission or the staff may use local commissions established under chapter 9 or other appropriate persons to assist in conciliation.

The question of who actually enters into the conciliation agreement with the respondent is left to rules of the Commission and, in the absence of rules, to the Executive Director. Apart from containing a cease and desist order, the conciliation agreement may require affirmative action on the part of the respondent. Compare §§ 706(a) and (b).

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129. 42 U.S.C. § 2000e-5(d) (1964). For a full discussion of the timing problem, *see* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 93-95 (1966).

130. N.Y. EXEC. LAW § 297(2)(b) (McKinney Supp. 1966).

131. *See* Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1171, 1195 (1965).

The subsection follows CRA § 706(a)[132] and many state laws[133] in forbidding public dissemination of the details of the conciliation process without written consent of the parties, but it does not adopt criminal penalties as a sanction in the manner of the federal act. Compare § 708(f).

The subsection follows many states in providing that the conciliation agreement shall be entered as an order of the Commission.[134] Earlier statutes which did not so provide were subjected to criticism.[135] The subsection also provides, as do Washington and some other states,[136] for entry of part or all of the agreement as a consent decree.

The net effect is that in the event of violation of a conciliation agreement the Commission can consider at least four remedies: (1) filing a fresh complaint, (2) proceeding under § 803 for violation of the agreement as a discriminatory practice, (3) enforcing its order under § 707(f), and (4) taking appropriate steps for violation of the consent decree, if one is entered. In addition, in some circumstances, civil contract remedies may be available to the complainant.

(e) At any time in its discretion but not later than one year from the date of a conciliation agreement, the Commission shall investigate whether the terms of the agreement are being complied with by the respondent. Upon a finding that the terms of the agreement are not being complied with by the respondent, the Commission shall take appropriate action to assure compliance.

COMMENT: To assure that conciliation agreements are adhered to, this subsection provides for one mandatory inspection by the Commission and other inspections from time to time. It has frequently been asserted that a provision of this kind is necessary to assure compliance.[137] The Commission must exercise discretion so that the respondent is not harassed.

(f) (1) At any time after a complaint is filed, the Commission may file a petition in the [ ] court in a county in which the subject of the complaint occurs, or in a county in which a respondent resides or transacts business, seeking appropriate temporary

132. 42 U.S.C. § 2000e-5(a) (1964).

133. *E.g.*, IOWA CODE ANN. § 105A.9(4) (Supp. 1966); KY. REV. STAT. § 344.220 (Supp. 1966); NEB. REV. STAT. § 48-1118 (1965).

134. *E.g.*, CAL. LABOR CODE §§ 1421, 1421.1 (West Supp. 1966); KAN. GEN. STAT. ANN. § 44-1005 (Supp. 1965); KY. REV. STAT. § 344.200(4) (Supp. 1966); N.Y. EXEC. LAW § 297(2)(a) (McKinney Supp. 1966).

135. *E.g.*, Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 BUFFALO L. REV. 100, 109-10 (1964).

136. WASH. REV. CODE ANN. § 49.60.240 (1962). *See also, e.g.*, KY. REV. STAT. § 344.200 (Supp. 1966); MASS. GEN. LAWS ANN. ch. 151B, § 5 (Supp. 1966).

137. *See* Bonfield, *State Civil Rights Statutes: Some Proposals*, 49 IOWA L. REV. 1067, 1115 (1964); Rabkin, *supra* note 135 at 108-10.

relief against the respondent, pending final determination of proceedings under this Chapter, including an order or decree restraining him from doing or procuring any act tending to render ineffectual any order the Commission may enter with respect to the complaint. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, but no such relief or order extending beyond [5] days shall be granted except by consent of the respondent or after hearing upon notice to the respondent and a finding by the court that there is reasonable cause to believe that the respondent has engaged in a discriminatory practice;

COMMENT: Based on several state laws, including Connecticut and Massachusetts.[138] By providing for temporary relief pending determination of the complaint, it assures that complainants do not win meaningless victories, particularly in housing cases.[139] Although a court may enter an *ex parte* order, the rights of the respondent are protected by the provision that no temporary order may extend beyond a few days (here five) without either his consent or a hearing and a finding of reasonable cause.

(2) If a complaint is dismissed by final order of the Commission or a court after a court has granted temporary relief or a restraining order under subsection (f) (1), the respondent shall be entitled to recover from the state damages and costs sustained by reason of the temporary relief or restraining order in an action in the court which granted the temporary relief or restraining order.

COMMENT: Based on a proposed amendment to the New York law,[140] the subsection is designed to assure that respondents will not suffer financial damage because of temporary relief granted on a complaint with reasonable cause which is subsequently dismissed.

(g) At any time after a determination by the Commission or a member of the Commission that there is reasonable cause to believe that a respondent has engaged in a discriminatory practice under section 602 of this Act, the Commission may cause a notice to be posted on all entrances to the real property which is the subject of the complaint, for a period not to exceed ten days,

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138. CONN. GEN. STAT. REV. § 31-127 (Supp. 1965); MASS. GEN. LAWS ANN. ch. 151B, § 6 (1963).

139. *See* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 550-51 (1961).

140. N.Y. EXEC. LAW § 297(4) (McKinney Supp. 1966).

stating that prospective transferees will take the real property subject to the rights of the complainant and to the power of the Commission to nullify a transfer of the real property. If a notice is so posted, the Commission shall file a copy in the office of [ ] of [ ] where the real property is situated, in the same manner and with like effect as a [notice of lis pendens].

COMMENT: Based on a provision of the New York City Human Relations Law[141] that has been effective in preventing sale or rental of real property while a complaint is outstanding. See § 706(b)(7). The final sentence assures legal notice to prospective transferees.

SECTION 704. [*Hearing.*]

(a) Within 60 days after a complaint is filed, or within 30 days after an application for review is filed under section 703(c), unless the Commission has issued an order dismissing the complaint or stating the terms of a conciliation agreement, the Commission shall serve on the respondent by registered or certified mail a written notice, together with a copy of the complaint as it may have been amended, requiring the respondent to answer in writing the allegations of the complaint at a hearing before one or more members of the Commission or a hearing examiner at a time and place specified in the notice. A copy of the notice shall be furnished to the complainant, the Attorney General, and such other public officers and persons as the Commission deems proper. [The notice shall conform to and the hearing shall be conducted in accordance with the Administrative Procedure Act.]

COMMENT: This provision requires the Commission to take the first step to a hearing by ordering the respondent to answer the complaint. The hearing can be held before one or more Commissioners or before a hearing examiner designated pursuant to Commission rule. When a hearing is held by less than the full Commission or by an examiner, the rules of the Commission may provide for proposed findings and a hearing thereon by the full Commission.

The sixty-day period is designated to take account of the two types of cases where the Commission fails to act seasonably on a complaint. If sixty days elapse without a dismissal of the complaint under § 703(b) or the issuance of an order embodying a conciliation agreement under § 703(d), the Commission is required under this subsection to begin the hearing im-

141. N.Y. CITY ADMIN. CODE ch. 1, § B1-8.2 (1966), 11 RACE REL. L. REP. 467, 474 (1966), 6 BNA LAB. POL. & PRAC. § 451:2761.

mediately by ordering the respondent to answer the allegations of the complaint. The thirty-day period is designed to assure prompt action on an application for internal review under § 703(c).

If the state has enacted an administrative procedure act, the provisions of this subsection should be reviewed to assure consistency and prevent duplication.[142]

(b) A member of the Commission or staff who filed or investigated the complaint or endeavored to eliminate the alleged unlawful practice by conference, conciliation, or persuasion shall not preside at the hearing or participate in the subsequent deliberation of the Commission.

COMMENT: This provision attempts to assure the fairness of the hearing by providing that a Commissioner who filed or investigated the complaint or attempted conciliation may not participate in the hearing. By analogy to a magistrate's power in a criminal case to rule on probable cause for purposes of issuing a search warrant without disqualifying himself from presiding at the trial,[143] the subsection contains no bar to the participation in the hearing by a Commissioner who, without conducting an investigation, may have determined that there was reasonable cause under §§ 703(b) or (c).[144] If this procedure is followed, usually no more than two commissioners will be disqualified, leaving a minimum of three for the hearing. Compare § 701(a).

(c) The respondent may file an answer with the Commission in person or by registered or certified mail in accordance with the rules of the Commission. The Commission shall furnish a copy of the answer to the complainant and any other party to the proceeding. The Commission or the complainant may amend a complaint and the respondent may amend an answer at any time prior to the issuance of an order based on the complaint, but no order shall be issued unless the respondent has had the opportunity of a hearing on the complaint or amendment on which the order is based.

COMMENT: Based on numerous state laws.[145]

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142. *See* MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 10 (1961).

143. *E.g.*, OHIO REV. CODE ANN. § 2945.01 (Page 1954).

144. *Compare* Girard & Jaffe, *supra* note 104, at 118-19. *See generally* Elman, *A Note on Administrative Adjuication*, 74 YALE L.J. 652 (1965).

145. *E.g.*, CAL. LABOR CODE § 1423 (West Supp. 1966); IOWA CODE ANN. § 105A.9 (Supp. 1966); NEB. REV. STAT. § 48-1119 (1965); N.Y. EXEC. LAW § 297(2)(b) (McKinney 1951); WASH. REV. CODE ANN. § 49.60.250 (1962).

(d) The case in support of the complaint shall be presented at the hearing by the Commission staff. Efforts in a particular case to eliminate a discriminatory practice by conference, conciliation, and persuasion shall not be received in evidence.

COMMENT: Based on numerous state laws.[146] See also CRA § 706 (a).[147]

(e) A respondent who has filed an answer or whose default in answering has been set aside for good cause shown may appear at the hearing with or without representation, may examine and cross-examine witnesses and the complainant, and may offer evidence. The complainant, the Attorney General, and, in the discretion of the Commission, any person may intervene, examine and cross-examine witnesses, and may present evidence.

COMMENT: The respondent's right to appear is found in all state laws.[148] Although some statutes leave intervention by the complainant to the discretion of the Commission,[149] this subsection follows California, Nebraska, and Ohio[150] in permitting intervention as of right because he has a direct interest in the proceeding and because it is unclear what criteria would be employed to inform discretion. The attorney general is frequently given the right to intervene,[151] though it is rarely exercised. Compare § 703(a), which deals with the attorney general's role at the complaint stage.

(f) If the respondent fails to answer the complaint, the Commission or the hearing examiner may enter his default and the hearing shall proceed on the evidence in support of the complaint. The default may be set aside for good cause shown upon equitable terms and conditions.

COMMENT: Based on the Iowa statute.[152] It provides for the respondent's default for failure to answer, but obligates the Commission to satisfy

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146. *E.g.*, CAL. LABOR CODE § 1421.1 (West Supp. 1966); IOWA CODE ANN. § 105A.9 (Supp. 1966); N.Y. EXEC. LAW § 297(2)(b) (McKinney 1951); WASH. REV. CODE ANN. § 49.60.250 (1962).

147. 42 U.S.C. § 2000e-5(a) (1964).

148. *E.g.*, NEB. REV. STAT. § 48-1119 (1965); WASH. REV. CODE ANN. § 49.60.250 (1962).

149. *E.g.*, IOWA CODE ANN. § 105A.9 (Supp. 1966).

150. CAL. LABOR CODE § 1422 (West Supp. 1966); NEB. REV. STAT. § 48-1116 (1965); OHIO REV. CODE ANN. § 4112.05(B) (1964).

151. *E.g.*, NEB. REV. STAT. § 48-1116 (Supp. 1965); OHIO REV. CODE ANN. § 4112.05(D) (Page Supp. 1966).

152. IOWA CODE ANN. § 105A.9 (Supp. 1966).

itself by evidence in support of the complaint that there is a prima facie case before entering an order against the respondent.

(g) Testimony taken at the hearing shall be under oath and transcribed. If the testimony is not taken before the Commission, the record shall be transmitted to the Commission. After the hearing, the Commission upon notice to all parties with an opportunity to be heard may take further evidence or hear argument.

COMMENT: Based on numerous state laws requiring testimony to be under oath and transcribed.[153] The third sentence enables the Commission to take additional evidence; this may be particularly desirable when it is considering the proposed findings of fact and conclusions of law of a hearing examiner.[154] Compare § 704(a) and the comment thereto.

SECTION 705. [*Dismissal after Hearing.*]

If the Commission determines that the respondent has not engaged in a discriminatory practice, the Commission shall state its findings of fact and conclusions of law and shall issue an order dismissing the complaint and furnish a copy of the order to the complainant, the respondent, the Attorney General, and such other public officers and persons as the Commission deems proper.

COMMENT: This is a standard provision for dismissal of the complaint. Distribution to the attorney general and other public officials as well as to the respondent will assure that the latter's interests are protected.

SECTION 706. [*Determination of Discriminatory Practice; Relief.*]

(a) If the Commission determines that the respondent has engaged in a discriminatory practice, the Commission shall state its findings of fact and conclusions of law and shall issue an order requiring the respondent to cease and desist from the discriminatory practice and to take such affirmative action as in the judgment of the Commission will carry out the purposes of this Act. A copy of the order shall be delivered to the respondent, the complainant, the Attorney General, and to such other public officers and persons as the Commission deems proper.

153. *E.g.*, CAL. LABOR CODE § 1424 (West Supp. 1966); CAL. GOV'T CODE § 11513 (West 1966); OHIO REV. CODE ANN. § 4112.05 (1964); N.Y. EXEC. LAW § 297(2)(b) (McKinney 1951).

154. For the rules of evidence *see* MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 10,11 (1961).

COMMENT: This is a standard provision authorizing a cease and desist order in the event of a finding of a discriminatory practice.

(b) Affirmative action ordered under this section may include but is not limited to

(1) hiring, reinstatement or upgrading of employees with or without pay;

(2) admission or restoration of individuals to union membership, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program or other occupational training or retraining program, with the utilization of objective criteria in the admission of individuals to such programs;

(3) admission of individuals to a public accommodation or an education institution;

(4) sale, exchange, lease, rental, assignment or sublease of real property to an individual;

(5) extension to all individuals of the full and equal enjoyment of the advantages, facilities, privileges, and services of the respondent;

(6) reporting as to the manner of compliance;

COMMENT: Although not ordinarily spelled out in statutes, these are standard affirmative remedies that may be ordered by the Commission.[155]

(7) posting notices in conspicuous places in the respondent's place of business in form prescribed by the Commission and inclusion of such notices in advertising material;

COMMENT: This provision authorizes another standard remedy. Compare § 702(12).

(8) cancellation, rescission or revocation of a contract, deed, lease or other instrument transferring real property, which is the subject of a complaint of a discriminatory practice,

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155. *See generally* Bonfield, *supra* note 137; Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations,* 14 BUFFALO L. REV. 22 (1964); Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination,* 14 BUFFALO L. REV. 79 (1964).

to a person who had actual knowledge or record notice, prior to the transfer or the execution of the legally binding obligation to make the transfer, that a determination of reasonable cause had been made with respect to the discriminatory practice;

COMMENT: This provision permits the Commission to cancel transfers made with actual knowledge or record notice of a pending complaint that has been determined to have reasonable cause. "Record notice" refers to a recorded notice of a proceeding under § 703(f) or to a notice filed under § 703(g). Transfers to bona fide purchasers or lessees and all others without notice are fully protected.

(9) payment to an injured party of profits obtained by the respondent through a violation of section 606, subject to the principles of equity;

COMMENT: This provision is designed to permit reimbursement of an injured party where the respondent profited at his expense in a case of "blockbusting" under § 606.[156]

(10) payment to the complainant of damages for an injury caused by the discriminatory practice and costs, including a reasonable attorney's fee. Unless greater damages are proven, damages may be assessed at $500 for each violation.

COMMENT: Provision for payment of damages is found in several laws, including New York and Oregon.[157] See also CRA §§ 706(e) and (g).[158] Reimbursement of costs, including attorney's fees, is provided for in many state laws[159] and CRA § 706(k).[160]

The second sentence of this section permits the Commission to award liquidated damages up to $500 when complainants suffer a discernible loss that is speculative in amount, as in the case of discrimination in housing or by a place of public accommodation.[161]

(c) In the case of a respondent operating by virtue of a license issued by the State or a political subdivision or agency thereof, if the Commission, upon notice to the respondent with an opportunity to be heard, determines that the respondent has engaged in

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156. *Compare* Lanham Act § 35, 15 U.S.C. § 1117 (1964).

157. N.Y. CIV. RIGHTS LAW § 41 (McKinney Supp. 1966); ORE. REV. STAT. § 659.105 (1966).

158. 42 U.S.C. §§ 2000e-5(e),(g) (1964).

159. *E.g.*, NEB. REV. STAT. § 48-1120 (1965).

160. 42 U.S.C. § 2000e-5(k) (1964).

161. *See* Note, *supra* note 139, at 557.

a discriminatory practice and that the discriminatory practice was authorized, requested, commanded, performed or knowingly or recklessly tolerated by the board of directors of the respondent or by an officer or executive agent acting within the scope of his employment, the Commission shall so certify to the licensing agency. Unless the Commission finding of a discriminatory practice is reversed in the course of judicial review under section 707, the finding of discrimination is binding on the licensing agency.

COMMENT: This subsection follows the New York statute[162] in directing the Commission to advise appropriate state officials so that action can be considered under § 805 if the respondent is operating under a public license. License termination, though a severe remedy, may be necessary to cope with flagrant violations of the act, particularly in the absence of general criminal penalties.[163] In order to assure that the remedy is limited to flagrant cases and is not applied when a low-level employee discriminates, the subsection adopts a standard similar to that used by the Model Penal Code[164] to find a corporation guilty of a crime — the practice must be authorized or at least recklessly tolerated by the board of directors or an officer or executive agent acting within the scope of his employment.

The sentence making the Commission determination of a discriminatory practice binding on the licensing agency is based on a provision of the New York City Administrative Code.[165] See the comment to subsection (d). As to the procedure in license revocation, see the Model State Administrative Procedure Act.[166]

(d) In the case of a respondent who is found by the Commission to have engaged in a discriminatory practice in the course of performing under a contract or subcontract with the State or political subdivision or agency thereof, if the discriminatory practice was authorized, requested, commanded, performed, or knowingly or recklessly tolerated by the board of directors of the

162. N.Y. EXEC. LAW § 297(2)(c) (McKinney 1951).

163. *See* Routh, *Supplementary Activities for State Governments Seeking to Eliminate Discrimination*, 14 BUFFALO L. REV. 148, 149 (1964).

164. MODEL PENAL CODE § 6.04 (Proposed Official Draft 1962).

165. *Cf.* N.Y. CITY ADMIN. CODE ch. 1, § B1-11.0 (1966), 11 RACE REL. L. REP. 467, 477 (1966), 6 BNA LAB. POL. & PRAC. § 451:2761. The decision of the New York City Human Rights Commission is not binding on the licensing agency, though it does exclude any other civil or criminal action against the defendant. However, as a matter of administrative practice, the agency generally accepts the determinations of fact of the Commission, acting independently only in taking appropriate action based on the Commission's determinations.

An analagous situation prevails at the state level under N.Y. EXEC. LAW § 297(2)(c) (McKinney Supp. 1966), as implemented by the Governor's 1960 Code of Fair Practices, 9 N.Y. CODES R. & REGS. § 1.5 (1961).

166. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 14 (1961).

respondent or by an officer or executive agent acting within the scope of his employment, the Commission shall so certify to the contracting agency. Unless the Commission's finding of a discriminatory practice is reversed in the course of judicial review under section 707, the finding of discrimination is binding on the contracting agency.

COMMENT: At least a dozen states[167] have separate statutes relating to discrimination by public contractors which antedated the general state laws forbidding discrimination in employment. These typically require contractors to agree to antidiscrimination provisions in the contract and set out certain remedies in the event of a breach of these provisions, including contract revocation and financial penalties.[168]

Rather than duplicate these statutes, this subsection assumes the general run of sanctions against employers contained in §§ 706(a) and (b) and, by providing for referral to the contracting agency, lays the basis for appropriate action against the respondent under § 806. As in the case of subsection (c), because of the possibility that discrimination might take place by an unauthorized, low-level employee, the standard of the Model Penal Code[169] is adopted.

The sentence making the Commission determination of a discriminatory practice binding on the contracting agency is based on a provision of the New York City Administrative Code embodying the standard contract form against discrimination by public contractors.[170]

In order to assure full coverage, the definition in § 301(1) includes public contractors and subcontractors.

(e) Thirty days after an order is issued under this section, unless a petition by the respondent for judicial review is pending, the Commission may publish or cause to be published the name of a person who has been determined to be engaged in a discriminatory practice.

COMMENT: Based on the laws of Indiana and Wisconsin.[171] There is evidence that publicity is a highly effective remedy.[172] Thirty days is

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167. *E.g.*, IND. ANN. STAT. § 40-2316 (1965); PA. STAT. ANN. tit. 43, § 153 (1964).

168. *See generally* Birnbaum, *Equal Employment Opportunity and Executive Order 10925*, 11 KAN. L. REV. 17 (1962); Powers, *Federal Procurement and Equal Employment Opportunity*, 29 LAW & CONTEMP. PROB. 468 (1964).

169. MODEL PENAL CODE § 6.04 (Proposed Official Draft 1962).

170. N.Y. Standard Contract Form § F, *reproduced in* Conway, *Local Contracts and Subcontracts: the Roles of City Governments and Private Citizen Groups*, 14 BUFFALO L. REV. 130, 138 (1964).

171. IND. ANN. STAT. § 40-2326 (1965); WIS. STAT. ANN. § 111.37 (Supp. 1967).

172. *See* Note, *supra* note 139, at 556-57.

the period within which respondent must seek review of an adverse order. See § 707(f).

SECTION 707. [*Judicial Review; Enforcement.*]

(a) A complainant, respondent, or intervenor aggrieved by an order of the Commission, including an order dismissing a complaint, or stating the terms of a conciliation agreement, may obtain judicial review, and the Commission may obtain an order of the court for enforcement of its order, in a proceeding brought in the [court in a county] [(insert appropriate intermediate appellate court)] in which the alleged discriminatory practice which is the subject of the order occurred or in which a respondent resides or transacts business.

COMMENT: This provision authorizes judicial review. Although most statutes presently provide for review at the instance merely of complainants and respondents,[173] there seems little reason for the limitation, and this subsection accords all proper parties to the hearing the right to seek review. This is the pattern in the case of federal administrative action.[174] The alternative bracketed language provides a choice of court for judicial review.

The subsection includes authority for review of a dismissal of a complaint for lack of reasonable cause, following a rule that has been judicially applied in many states but not codified.[175]

(b) The proceeding for review or enforcement is initiated by filing a petition in the court. Copies of the petition shall be served upon all parties of record. Within 30 days after the service of the petition upon the Commission of its filing by the Commission, or within such further time as the court may allow, the Commission shall transmit to the court the original or a certified copy of the entire record upon which the order is based, including any transcript of testimony, which need not be printed. By stipulation of all parties to the review proceeding, the record may be shortened. The court may reverse or modify the order if substantial rights of the petitioner have been prejudiced because the findings of fact of the Commission are clearly erroneous in view of the reliable, probative and substantial evidence on the whole

173. *E.g.*, COLO. REV. STAT. ANN. § 80-24-8 (1963); MASS. GEN. LAWS ANN. ch. 151C, § 4 (1958); N.Y. EXEC. LAW § 298 (McKinney 1951).

174. *E.g.*, Communications Act of 1934, § 402(b), 47 U.S.C. § 402(b) (1934).

175. *E.g.*, Jean-Pierre v. Arbury, 4 N.Y.2d 238, 149 N.E.2d 882 (1958). *See* Note, *supra* note 139, at 540-72.

record. The court shall have power to grant such temporary relief or restraining order as it deems just, and to enter an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the Commission, or remanding the case to the Commission for further proceedings. [All such proceedings shall be heard and determined by the court and any appellate court as expeditiously as possible and with precedence over all other matters before it, except matters of like nature.]

COMMENT: Based on the Model State Administrative Procedure Act.[176] See also the Massachusetts statute.[177] The subsection follows the majority position in permitting courts to modify an order of the Commission.[178] The "precedence" provision in the final sentence is based on several acts, but is bracketed as optional in view of different state policies toward favoring any class of cases in this way.

(c) If the Commission has failed to schedule a hearing in accordance with section 704(a) or has failed to issue an order within 180 days after the complaint is filed, the complainant, respondent, Attorney General, or an intervenor may petition the [ ] court in a county in which the alleged discriminatory practice set forth in the complaint occurs or in which the petitioner resides or transacts business for an order directing the Commission to take such action. The court shall follow the procedure set forth in subsection (b) so far as applicable.

COMMENT: This subsection provides for immediate judicial action in cases where the Commission fails to hold a hearing under § 704(a) or to render a decision after holding a hearing.

(d) An objection not urged at a hearing shall not be considered by the court unless the failure to urge the objection is excused for good cause shown. A party may move the court to remit the case to the Commission in the interest of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he shows good cause for the failure to adduce such evidence before the Commission.

COMMENT: This subsection contains two common provisions.

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176. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 12 (1961).
177. MASS. GEN. LAWS ANN. ch. 151B, § 6 (1958).
178. *E.g.*, KY. REV. STAT. § 344.240 (Supp. 1966); NEB. REV. STAT. § 48-1120 (Supp. 1965).

(e) The jurisdiction of the [ ] court shall be exclusive and its final judgment or decree shall be subject to review by the [ ] court in the same manner and form and with the same effect as in appeals from a final judgment or decree in a [special proceeding]. The Commission's copy of the testimony shall be available at reasonable times to all parties for examination without cost.

COMMENT: The bracketed words "special proceeding" are taken from New York law[179] and are designed to draw attention to the fact that each state will have its own court system and nomenclature; for example, the Massachusetts statute refers to "proceedings in equity."[180]

(f) A proceeding under this section must be initiated within 30 days after a copy of the order of the Commission is received, unless the Commission is the petitioner or the petition is filed under subsection (c). If no proceeding is so initiated, the Commission may obtain a decree of the court for enforcement of its order upon showing that a copy of the petition for enforcement was served on the respondent and that the respondent is subject to the jurisdiction of the court.

COMMENT: Based on several state laws, including those of Iowa and New Mexico.[181] This subsection simplifies the enforcement process by removing from the Commission the onus of supporting its findings in court with "substantial evidence" if its order is not challenged by a party to the hearing.

SECTION 708. [*Inspection; Records.*]

(a) In connection with an investigation of a complaint filed under this Act, the Commission or its designated representative shall have access at any reasonable time to premises, records and documents relevant to the complaint and the right to examine, photograph and copy evidence.

COMMENT: Based on CRA § 709(a).[182] It gives the Commission

179. N.Y. EXEC. LAW § 298 (McKinney 1951); *see* N.Y. CIV. PRAC. §§ 401-11 (McKinney 1963); as amended (McKinney Supp. 1966).

180. MASS. GEN. LAWS ANN. ch. 151B, § 6 (1958).

181. IOWA CODE ANN. § 105A.10 (Supp. 1966); N.M. STAT. ANN. § 59-4-11 (1953).

182. 42 U.S.C. § 2000e-8(a) (1964).

the power to examine and copy pertinent documentary evidence. Compare the discovery power granted in § 702(7).

(b) Notwithstanding any other section of this Act, every person subject to this Act shall (1) make and keep such records relevant to the determination of whether discriminatory practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order as reasonable, necessary, or appropriate for the enforcement of this Act or the regulations or orders thereunder.

COMMENT: Based on CRA § 709(c).[183] Regulations of the Commission should define persons "subject to this Act." See subsection (e).

(c) The Commission, by regulation, shall require each person subject to this Act which controls an apprenticeship or other training program to keep all records reasonably necessary to carry out the purpose of this Act, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which such applications were received, and shall furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training programs.

COMMENT: Based on CRA § 709(c).[184]

[(d) A person who believes that the application to him of a regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of the regulation or order. If the application is denied, he may bring a civil action in the [ ] court for the county [of] [where the records are made or kept]. If the Commission or the court finds that the application of the regulation or order to the person in question would impose an undue hardship, the Commission or the court may grant appropriate relief.]

COMMENT: Based on CRA § 709(c).[185] Since the provision is not common in state laws, it is bracketed as optional.

183. 42 U.S.C. § 2000e-8(c) (1964).
184. *Id.*
185. *Id.*

(e) Records and reports required by the Commission under this section shall conform as near as convenient to similar records and reports required by federal law [and the laws of other states and to customary record-keeping practices].

COMMENT: The purpose of this subsection is to reduce the burden on persons subject to the act by encouraging one system of record-keeping.[186] The bracketed clause is optional; it would require commissions to heed record-keeping practices other than those required under the CRA or other federal law.

(f) It is unlawful for an officer or employee of the Commission to make public with respect to a particular person without his consent information obtained by the Commission pursuant to its authority under this section except as necessary to the conduct of a proceeding under this Act.

COMMENT: Based on CRA § 709(e),[187] the subsection is designed to maintain the confidentiality of information obtained under the Commission's inspection and record-keeping authority. The criminal provision of the federal law is omitted;[188] sanctions are left to administrative action and other state law. Compare § 703(d).

(g) If a person fails to permit access, examination, photographing or copying or fails to make, keep, or preserve records or make reports in accordance with this section, the Commission may issue an order requiring compliance. Upon a failure to comply with the order of the Commission, the Commission may apply to the [ ] court for the county in which the person is found, resides, or transacts business, for an order directing compliance.

COMMENT: Based on CRA § 710(b).[189]

SECTION 709. [*Subpoenas; Witnesses.*]

(a) Upon written application to the Commission a party to a proceeding is entitled as of right to the issue of subpoenas for deposition or hearing in the name of the Commission by an indi-

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186. The regulations issued by the EEOC are collected in 6 BNA LAB. POL. & PRAC. §§ 401:301-:306, :325-:332; 441:1, :51, :101-:103.

187. 42 U.S.C. § 2000e-8(e) (1964).

188. *Id.*

189. 42 U.S.C. § 2000e-9(b) (1964).

vidual designated pursuant to its rules requiring attendance and the giving of testimony by witnesses and the production of documents. A subpoena so issued shall show on its face the name and address of the party at whose request the subpoena was issued. On petition of the individual to whom the subpoena is directed and notice to the requesting party, the Commission or an individual designated pursuant to its rules may vacate or modify the subpoena.

COMMENT: Based on regulations issued by the California, Connecticut, and Massachusetts Commissions.[190] The subsection gives parties before the Commission a reciprocal right to require the presence of witnesses and the production of documents. Compare § 702(7).

(b) Witnesses whose depositions are taken or who are summoned before the Commission or its agents shall be entitled to the same witness and mileage fees as are paid to witnesses subpoenaed in the [ ] court of the State.

COMMENT: Based on CRA § 705(g)(2)[191] and several state laws.[192] Provisions should be made for payment by the Commission of witnesses and of costs.

(c) If a person fails to comply with a subpoena issued by the Commission, the [ ] court for the county in which the person is found, resides, or transacts business, upon application of the Commission or the party requesting the subpoena, may issue an order requiring compliance. In any proceeding brought under this section, the court may modify or set aside the subpoena.

COMMENT: Based on CRA § 710(b)[193] and Massachusetts regulations.[194] Since most states regulate contempt proceedings in some detail, the subsection does not attempt to specify the procedure for enforcement of subpoenas.

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190. Cal. FEPC R. 19008(b), 6 BNA LAB. POL. & PRAC. § 451:142; Mass. Comm'n Against Discrimination R. 6(a)(2), 6 BNA LAB. POL. & PRAC. § 451:567.

191. 42 U.S.C. § 2000e-4(g)(2) (1964).

192. *E.g.*, Comm'n for Human Rights R. 11(b), 9 N.Y. CODES R. & REGS. § 465.11(b), N.Y. EXEC. LAW, app. (McKinney Supp. 1966); WASH. REV. CODE ANN. § 49.60.170 (1962).

193. 42 U.S.C. § 2000e-9(b) (1964).

194. Mass. Comm'n Against Discrimination R. 6(d), 6 BNA LAB. POL. & PRAC. § 451:567.

CHAPTER 8 — OTHER DISCRIMINATORY PRACTICES; MISCELLANEOUS

SECTION 801. [*Other Discriminatory Practices.*]

It is a discriminatory practice for a person, or for two or more persons to conspire,

(1) to retaliate or discriminate against a person because he has opposed a discriminatory practice, or because he has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act;

COMMENT: Based on CRA § 704(a)[195] and several state laws, including those of California, Minnesota, and New Jersey.[196]

(2) to aid, abet, incite, or coerce a person to engage in a discriminatory practice;

COMMENT: Based on the Minnesota and New York statutes.[197]

(3) wilfully to interfere with the performance of a duty or the exercise of a power by the Commission or one of its members or representatives; or

COMMENT: Based on several state laws[198] prohibiting wilful interference with the Commission and its agents. Compare § 804, which provides criminal penalties for this conduct.

(4) wilfully to obstruct or prevent a person from complying with the provisions of this Act or an order issued thereunder.

COMMENT: Complements subsection (3).

SECTION 802. [*Attempts.*]

An attempt to commit, directly or indirectly, a discriminatory practice is a discriminatory practice.

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195. 42 U.S.C. § 2000e-3(a) (1964).

196. CAL. LABOR CODE § 1420 (West Supp. 1966); MINN. STAT. ANN. § 363.03 (1966); N.J. STAT. ANN. § 18:25-12(d) (Supp. 1964). *See* Bonfield, *State Civil Rights Statutes: Some Proposals,* 49 IOWA L. REV. 1067, 1110 (1964).

197. MINN. STAT. ANN. § 363.03 (1966); N.Y. EXEC. LAW § 296(6) (McKinney 1951).

198. *E.g.,* CAL. LABOR CODE § 1430 (West Supp. 1966); MASS. GEN. LAWS ANN. ch. 151B, § 8 (1958); MINN. STAT. ANN. § 363.03 (1966); N.Y. EXEC. LAW § 299 (McKinney 1951).

COMMENT: Based on the Minnesota statute.[199]

SECTION 803. [*Conciliation Agreements.*]

It is a discriminatory practice for a party to a conciliation agreement made under this Act to violate the terms of the agreement.

COMMENT: Based on the New York statute.[200] See the comment to § 703(d).

SECTION 804. [*Wilful Interference.*]

A person who wilfully resists, prevents, impedes, or interferes with the performance of a duty or the exercise of a power by the Commission or one of its members or representatives, is guilty of a misdeameanor and shall be fined not more than [$], or imprisoned for not more than [ ], or both.

COMMENT: Based on CRA § 714[201] and several state laws.[202] New York and some other states provide that wilful violation of an order of the Commission also may be punished as a misdemeanor.[203]

SECTION 805. [*Licensees.*]

If a certification is made pursuant to section 706(c), the licensing agency may take appropriate action to revoke or suspend the license of the respondent.

COMMENT: This section authorizes the licensing agency to revoke or suspend a license in the event of a flagrant violation of the act, as defined in § 706(c).

SECTION 806. [*Public Contractors.*]

Upon receiving a certification made under section 706(d), a contracting agency may take appropriate action to

(1) terminate a contract or portion thereof previously entered into with the respondent, either absolutely or on condition

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199. MINN. STAT. ANN. §§ 363.03 subd. 1(6), subd. 2(4)(d) (1966).
200. N.Y. EXEC. LAW § 296(8) (McKinney 1951).
201. 42 U.S.C. § 2000e-13 (1964).
202. *E.g.*, CAL. LABOR CODE § 1430 (West Supp. 1966); MINN. STAT. ANN. § 363.09 (1966); MASS. GEN. LAWS ANN. ch. 151B, § 8 (1958).
203. N.Y. EXEC. LAW § 299 (McKinney 1951).

that the respondent carry out a program of compliance with the provisions of this Act, and

(2) assist the State and all political subdivisions and agencies thereof to refrain from entering into further contracts, or extensions or other modifications of existing contracts, with the respondent until the Commission is satisfied that the respondent will carry out policies in compliance with the provisions of this Act.

COMMENT: This section authorizes the contracting agency to take appropriate action, including notification to other contracting agencies, in the event of a flagrant violation of the act, as defined in § 706(d).

SECTION 807. [*Prima Facie Evidence.*]

In a proceeding under this Act, a written, printed, or visual communication, advertisement, or other form of publication, or written inquiry, or record, or other document purporting to have been made by a person is prima facie evidence that it was authorized by him.

COMMENT: Based on public accommodations laws of several states, including Colorado and Pennsylvania,[204] which place the burden on a proprietor to prove that an advertisement or other document indicating a discriminatory policy by his establishment was unauthorized. In using this principle to facilitate proof of all forms of discrimination, the section follows New Jersey law.[205] The section is intended to apply to proceedings before courts as well as the Commission.

CHAPTER 9 — LOCAL COMMISSIONS

INTRODUCTORY COMMENT: This chapter authorizes political subdivisions of the state to establish commissions on human rights which would exercise some but not all the powers of the State Commission. It is premised on the desirability of decentralizing efforts to eliminate discrimination. Scores of cities and small municipalities have established human relations commissions.[206]

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204. COLO. REV. STAT. ANN. § 25-2-2 (1963); PA. STAT. ANN. § 4654(b) (1963).

205. N.J. STAT. ANN. § 10:1-4 (1960).

206. *E.g.*, Gary, Ind., City Ordinance 4050 (1965), 10 RACE REL. L. REP. 906-10 (1965); Louisville, Ky., City Ordinance 33 (1962), 8 RACE REL. L. REP. 702-03 (1965), City Ordinance 66 (1963), 8 RACE REL. L. REP. 719-23 (1963); ST. PAUL, MINN. LEGISLATIVE CODE §§ 74.01-.13 (1964), 9 RACE REL. L. REP. 1481-88 (1964); SAN FRANCISCO, CAL. ADMINISTRATIVE CODE §§ 12A.1-.16 (1964), 9 RACE REL. L. REP. 1489-93 (1964).

Because the local commission is not given authority similar to that given the State Commission to hold hearings, pass on complaints, or grant relief, local commissions set up under this chapter probably will not be given the deference provided for under CRA §§ 204(c) and 706(c).[207] If such powers are given the local commission, as is the case under the Kentucky statute,[208] federal deference would follow.

SECTION 901. [*Definitions.*]

In this chapter

(1) "political subdivision" means a [city, county, or . . .] within this State;

(2) "local commission" means a commission on human relations created by one or more political subdivisions.

SECTION 902. [*Local Ordinances.*]

A political subdivision may adopt and enforce an ordinance prohibiting discrimination because of race, color, religion, sex, or national origin not in conflict with a provision of this Act.

COMMENT: This section authorizes local ordinances prohibiting discrimination to the extent not inconsistent with the act. Compare CRA § 1104.[209]

SECTION 903. [*Local Commissions.*]

A political subdivision, or two or more political subdivisions acting jointly, may create a local commission to promote the purposes of this Act and to secure for all individuals within the jurisdiction of the political subdivisions freedom from discrimination because of race, color, religion, sex, or national origin [, and may appropriate funds for the expenses of the local commission].

COMMENT: This section authorizes the establishment of local human rights commissions with purposes similar to those of the State Commission.

See Bonfield, *supra* note 196, at 1123-29; B. & C. RHYNE, CIVIL RIGHTS ORDINANCES (NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS REP. No. 148, 1963). For a model statute establishing a local human relations commission *see* Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1171, 1226-38 (1965).

207. 42 U.S.C. §§ 2000a-3(c), e-5(c) (1964).

208. KY. REV. STAT. § 82.220 (1963).

209. 42 U.S.C. § 2000h-4 (1964).

See § 101(a). The provision permitting joint commissions for political subdivisions is adapted from a recent article in this field.[210] The appropriation clause is bracketed for states which require such express authorization.

SECTION 904. [*Powers of Local Commissions.*]

A local commission may have the following powers in addition to powers authorized by other laws:

(1) to employ an executive director and other employees and agents [and fix their compensation];

(2) to cooperate or contract with individuals and state, local and other agencies, both public and private, including agencies of the federal government and of other states and municipalities;

(3) to accept public grants [or private gifts, bequests,] or other payments;

(4) to receive, initiate, investigate, and seek to conciliate complaints alleging violations of this Act or of a municipal ordinance prohibiting discrimination because of race, color, religion, sex, or national origin;

(5) to make studies appropriate to effectuate its purposes and policies and to make the results thereof available to the public; and

(6) to render at least annually a report, a copy of which shall be furnished to the State Commission.

COMMENT: Patterned after § 702, this section establishes the basic powers of the local commission. Regarding subsection (3), see the comment to § 702(5). Subsection (6) is designed to keep the State Commission informed of the activities of all local commissions within the State.

Subsection (4) does not grant the power to hear and determine complaints, a power sometimes possessed by local commissions. If the power is to be granted, the Kentucky state law[211] can be used as a model.

SECTION 905. [*Referral to Local Commission.*]

(a) The State Commission

(1) whether or not a complaint has been filed under this Act, may refer a matter involving discrimination because of

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210. DES MOINES, IOWA CITY CODE art. XVIII, § 2-423(e) (1954); Louisville, Ky. Ordinance 66, § 4(a) (1963), 8 RACE REL. L. REP. 719, 721 (1963).

211. KY. REV. STAT. § 344.320 (Supp. 1966).

race, color, religion, sex, or national origin to a local commission for investigation, study and report, and

(2) may refer a complaint alleging a violation of this Act to a local commission for (i) investigation, (ii) determination whether there is a reasonable cause to believe that the respondent has engaged in a discriminatory practice, or (iii) assistance in eliminating a discriminatory practice by conference, conciliation or persuasion.

(b) Upon referral by the State Commission, the local commission shall make a report and may make recommendations to the State Commission and take other appropriate action within the scope of its powers.

COMMENT: This provision authorizes the State Commission to decentralize its activities by referring a matter to the local commission, whether or not a complaint has been filed. See § 702(4) and the comment to § 703(d).

SECTION 906. [*Transfer to State Commission.*]

(a) A local commission may refer a matter under its jurisdiction to the State Commission.

(b) At any time after a complaint under this Act is filed, the State Commission may require a local commission to transfer any related proceeding to the State Commission. After the local commission is requested to transfer a proceeding, the local commission has no further jurisdiction over the proceeding except to take appropriate action to implement the transfer to the State Commission or to carry out a request or order of the State Commission.

COMMENT: By providing for transfer of matters from the local commission to the State Commission, this section encourages uniform interpretation and enforcement, but it is not intended to enlarge the jurisdiction of the State Commission. When a complaint has been filed with the State Commission, a transfer of any cognate proceeding is compulsory to avoid duplication of effort. If local commissions are given power under § 904 to conduct trial-type hearings, concurrent jurisdiction can be provided for, following the Kentucky law.[212]

212. *Id.*

HARVARD STUDENT LEGISLATIVE RESEARCH BUREAU
1966-1967

A STATE STATUTE TO PREVENT THE OPERATION OF MOTOR VEHICLES BY PERSONS UNDER THE INFLUENCE OF ALCOHOL

I. THE PROBLEM

The problem of the drinking driver is not new.[1] He has long been recognized as presenting a serious threat to the public interest in safety on the highways.[2] Every state makes operating a motor vehicle while intoxicated or under the influence of alcohol a criminal offense.[3] Recently a number of states have enacted

1. Today one continues to hear about the threat of the *drunken* driver; however, in reality society should be more concerned with the threat of the *drinking* driver. One who is dead drunk or grossly intoxicated will most likely be so anesthetized that he will be unable to stagger to the steering wheel. However, somewhere between sobriety and deep intoxication a driver can be "under the influence of alcohol," and in this critical area of perception loss, the use of liquor can significantly diminish his coordination and cloud his judgment. Thus, a motorist's driving ability can be impaired long before he reaches the state referred to in common parlance as "intoxication" or "drunkenness."

Slough & Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing*, 44 MINN. L. REV. 673, 673-74 (1960).

2. "Reports received from cities and states from which [National Safety] Council records are compiled, show that the drinking driver . . . [constitutes] one of the major problems confronting law enforcement agencies and the courts." R. DONIGAN, CHEMICAL TESTS AND THE LAW 1 (1957).

3. ALA. COVE tit. 36, § 2 (1959); ALASKA STAT. § 28.35.030 (1962); ARIZ. REV. STAT. ANN. § 28-692 (1956); ARK. STAT. ANN. § 75-1027 (1957); CAL. VEHICLE CODE § VCCEB (West 1960); COLO. REV. STAT. ANN. § 13-5-30 (1963); CONN. GEN. STAT. REV. § 14-227a (1966); DEL. CODE ANN. tit. 21, § 4176 (Supp. 1964); D.C. CODE ANN. § 40-609 (1961); FLA. STAT. ANN. § 317.201 (Supp. 1966); GA. CODE ANN. § 68-1625 (1957); HAWAII REV. LAWS § 311-28 (1955); IDAHO CODE ANN. § 49-1102 (1958); ILL. REV. STAT. ch. 95 1/2, § 144 (1965); IND. ANN. STAT. § 47-2001 (1965); IOWA CODE § 321.281 (1962); KAN. GEN. STAT. ANN. § 8-530 (1949); KY. REV. STAT. § 189.520 (1962); LA. REV. STAT. § 14:98 (Supp. 1966); ME. REV. STAT. ANN. tit. 29, § 1312 (1964); MD. ANN. CODE art. 66 1/2, § 206 (1957); MASS. GEN. LAWS ANN. ch. 90, § 24 (1958); MICH. STAT. ANN. § 9.2325 (1960); MINN. STAT. ANN. § 169.121 (1960); MISS. CODE ANN. § 8174 (1956); MO. REV. STAT. § 564.440 (1959); MONT. REV. CODES ANN. § 32-2142 (1947); NEB. REV. STAT. § 39-727 (Supp. 1965); NEV. STAT. ANN. § 484.040 (1965); N.H. REV. STAT. ANN. § 262-A:62 (1955); N.J. REV. STAT. § 39:4-50 (Supp. 1966); N.M. STAT. ANN. § 64-22-2 (Supp. 1965); N.Y. VEH. & TRAF. LAW § 1192 (McKinney Supp. 1966); N.C. GEN. STAT. § 20-138 (Supp. 1965); N.D. CENT. CODE § 39-08-01 (Supp. 1965); OHIO REV. CODE ANN. § 4511.19 (Page 1965); OKLA. STAT. tit. 47, § 11-902 (1961); ORE. REV. STAT. § 483.992 (1965); PA. STAT. ANN. tit. 75, § 1037 (1960); R.I. GEN. LAWS ANN. § 31-27-2 (Supp. 1965); S.C. CODE ANN. § 46-343 (1962); S.D. CODE § 13.2025 (Supp. 1960); TENN. CODE ANN. § 59-1031 (Supp. 1966); TEX. PEN. CODE ANN. art. 802 (1961); UTAH CODE ANN. § 41-6-44 (1953); VT. STAT. ANN. tit. 23, § 1183 (1959); VA. CODE ANN. § 18.1-54

implied consent statutes[4] which permit police officers to order chemical tests for blood alcohol content of persons suspected of operating motor vehicles while under the influence of alcohol. Also, many states specifically provide by statute for the evidentiary significance to be given in adjudicatory proceedings to the results of chemical tests for blood alcohol content.[5] These various enactments indicate the widespread concern with reducing as far as possible the death and destruction which results from the irresponsibility induced by alcohol.

In attempts to control the drinking driver, three problem areas have come into focus. First, effective sanctions must be provided to deter driving by intoxicated persons. Second, a firm legal basis must be devised for allowing the state to order chemical tests for blood alcohol content. And third, a measure of protection must be ensured for the individual when the state is seeking to have him submit to the taking of a chemical test.

A. Deterrence Of Drunk Driving

Two basic approaches exist to the problem of deterring persons from operating motor vehicles while under the influence of alcohol. One approach is to impose criminal sanctions upon those engaging in such conduct. Alternatively, this conduct can be considered noncriminal and can be dealt with less severely. An

(1960); WASH. REV. CODE ANN. § 46.61.505 (Supp. 1966); W. VA. CODE ANN. § 17C-5-2 (1966); WIS. STAT. § 346.63 (1963); WYO. STAT. ANN. § 31-129 (1957), *as amended,* (Supp. 1965).

4. CONN. GEN. STAT. REV. § 14-227(b) (1966); KAN. STAT. ANN. ch. 8-1001 (1964); MO. ANN. STAT. § 564.441 (Supp. 1966); NEB. REV. STAT. § 39.727.03 (Supp. 1965); N.H. REV. STAT. ANN. ch. 262-A:69-a (1966); N.J. STAT. ANN. § 39:4-50.2 (Supp. 1966); N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1966); N.D. CENT. CODE § 39-20-01 (Supp. 1965); ORE. REV. STAT. § 483.634 (1965); S. D. CODE § 44.0302-2 (Supp. 1960); UTAH CODE ANN. § 41-6-44.10 (Supp. 1965); VT. STAT. ANN. tit. 23, § 1188 (Supp. 1965); VA. CODE ANN. § 18.1-55.1 (Supp. 1966).

5. COLO. REV. STAT. ANN. § 13-5-30 (1963); CONN. GEN. STAT. REV. § 14-227(a) (1966); D.C. CODE ANN. § 40-609a (1961); GA. CODE ANN. § 68-1625 (Supp. 1966); HAWAII REV. LAWS § 29 (1955); IDAHO CODE ANN. § 49-1102 (1958); ILL. REV. STAT. ch. 95 1/2, § 144 (1965); KY. REV. STAT. § 189.520 (1962); ME. REV. STAT. ANN. tit. 29, § 1312(1964); MICH. STAT. ANN. § 9.2325(1) (Supp. 1965); MINN. STAT. ANN. § 169.121 (Supp. 1965); MO. ANN. STAT. § 564.442 (Supp. 1966); MONT. REV. CODES ANN. § 32-2142 (1947); NEB. REV. STAT. § 39.727.01 (Supp. 1965); NEV. REV. STAT. § 484.055 (1963); N.H. REV. STAT. ANN. § 262-A:63 (1955); N.J. STAT. ANN. §§ 39:4-50.1, 39:4-50.6 (Supp. 1966); N.Y. VEH. & TRAF. LAW § 1192 (McKinney Supp. 1966); N.D. CENT. CODE § 39-20-07 (Supp. 1965); ORE. REV. STAT. § 483.642 (1965); S.C. CODE ANN. § 46-344 (1962); S.D. CODE § 44.0302-1 Supp. 1960); TENN. CODE ANN. § 59-1033 (1955); UTAH CODE ANN. § 41-6-44 (1953); VT. STAT. ANN. tit. 23, § 1189 (Supp. 1965); VA. CODE ANN. § 18.1-57 (Supp. 1966); WASH. REV. CODE ANN. § 46.61.505(2) (Supp. 1966); W. VA. CODE ANN. § 17C-5-2a (1966); WIS. STAT. § 325.235 (1963); WYO. STAT. ANN. § 31-129 (1957).

example of the latter approach might be to provide that whenever a police officer discovers a person who he reasonably believes is under the influence of alcohol, and the person is operating or intends to operate a motor vehicle in that condition, the officer shall take the person's car keys and place him on a public transportation vehicle. All states have adopted the view that, given the magnitude of the problem, deterrence through the use of the criminal law is needed.[6]

Although there is almost unanimous agreement on the use of criminal sanctions, there is wide disparity with respect to the substance of the sanctions to be imposed.[7] Perhaps this disparity may be explained in terms of the significance of the problem of the drinking driver in different states. However, assuming that driving while under the influence of alcohol does pose a serious danger to public safety, some states seem to lack effective criminal sanctions to deal with it.[8]

B. The Legal Basis For Ordering Chemical Tests

In their efforts to convict drinking drivers, and thus to foster safety on the highways, many states have resorted to the use of chemical tests for blood alcohol content as evidence that a person was under the influence.[9] There is little dissent from the proposition that chemical tests for blood alcohol content are a valuable and reliable source of evidence on the issue of whether

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6. See note 3 *supra.*

7. *See, e.g.,* Ohio Rev. Code Ann. § 4511-99 (Page 1965) (each offense punishable by three days to six months imprisonment and a fine not exceeding $500); Wash. Rev. Code Ann. § 46.61.515 (Supp. 1966) (first conviction punishable by imprisonment for not less than five days nor more than one year and by a fine not less than $50 nor more than $500; second or subsequent conviction within five years of a previous conviction punishable by imprisonment for not less than thirty days nor more than one year and by a fine not less than $100 nor more than $1000; if a person at the time of a second or subsequent conviction is without a license or permit because of a previous suspension or revocation, a minimum mandatory imprisonment term of ninety days and a fine of $200 is imposed).

8. *E.g.,* Ohio Rev. Code Ann. § 4511-99 (Page 1965). A related problem may arise. A state may provide for such serious consequences to attach upon a conviction for operating a motor vehicle while under the influence of alcohol that juries will be reluctant to convict. Note, 1960 Wash. U.L.Q. 84, 93.

9. For a comprehensive discussion of this subject, *see* R. Donigan, *supra* note 2. For judicial decisions upholding the performance of chemical tests at the insistence of police officers and the admission of the results of the tests into evidence, *see id.,* ch. 2 and cases cited therein; *see also* Breithaupt v. Abram, 352 U.S. 432 (1957), and Schmerber v. California, 384 U.S. 757 (1966). For statutes authorizing police officers to order chemical tests, see note 4 *supra.*

a person was under the influence.[10] However, there has been considerable controversy as to the constitutionality of statutes which seek to provide a legal basis for permitting police officers to order the taking of a sample of a bodily substance for the purpose of chemical analysis, the results of which can be introduced into evidence in a criminal prosecution.

The legal basis on which the present statutes rely is implied consent.[11] The statutes theorize that a person who uses the public highways impliedly indicates his willingness to submit to a chemical test for blood alcohol content, regardless of whether or not he consents in fact. The premise underlying this theory is that driving is a privilege granted by the state and subject to reasonable conditions.[12]

It is clear that this implied consent theory is based on a fiction, but it is not clear that the theory is therefore invalid. Underlying the fiction is the public interest in safety on the highways. The question would seem to be whether this interest is sufficient to permit the state to order a sample of a bodily substance to be taken and to submit the results of a chemical analysis of that sample into evidence in a criminal prosecution of the person tested when the person did not give his express consent to the extraction of the sample.[13]

Constitutional objections to implied consent statutes have been grounded in the due process clause of the fourteenth amendment, the right to be free from unreasonable searches and seizures protected by the fourth amendment, and the privilege against self-incrimination found in the fifth amendment.[14] The

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10. R. DONIGAN, *supra* note 2, at 8-12; Muehlberger, *Medicolegal Aspects of Alcohol Intoxication*, MICH. ST. B.J., Feb., 1956, p. 36; Slough & Wilson, *supra* note 1, at 678. For a dissenting view as to the efficacy of chemical tests, *see* Murphy, *Chemical Tests For Intoxication—A Criticism*, 1964 N.Z.L.J. 491.

11. New York, in 1953, was the first state to enact an implied-consent statute. The implied-consent statutes presently in effect are collected in note 4 *supra*.

12. Many cases support this premise, *e.g.*, Escobede v. Cal. Dep't of Motor Vehicles 35 Cal. 2d 870, 222 P.2d 1 (1950); Dempsey v. Tyman, 143 Conn. 202, 120 A.2d 700 (1956); Lee v. State Highway Comm'n, 187 Kan. 566, 358 P.2d 765, (1961); Anderson v. McDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (1955); Ragland v. Wallace, 80 Ohio App. 210, 70 N.E.2d 118 (1946); State v. Seraphine, 266 Wis. 118, 62 N.W.2d 403 (1954).

13. The question as stated suggests a due process analysis in the determination of the constitutionality of implied consent statutes. Such an analysis has been made by commentators. *See generally* Note, *Virginia's Implied Consent Statute: A Survey And Appraisal*, 49 VA. L. REV. 386, 388-89 (1963). The majority opinions in Breithaupt v. Abram, 352 U.S. 432 (1957), and Schmerber v. California, 384 U.S. 757 (1966), suggest that the due process analysis is appropriate.

14. For a summary of the constitutional arguments, see Slough & Wilson, *supra* note 1, at 684-701.

Supreme Court has not passed directly on the constitutionality of any implied consent statute.[15] However, on the basis of its decisions in *Breithaupt v. Abram*[16] and *Schmerber v. California*,[17] it would seem that implied-consent statutes can be drawn and implemented constitutionally.

Both *Breithaupt* and *Schmerber* involved the taking of a blood sample with a hypodermic needle by a physician in a hospital at the order of a police officer. In each case the officer had reasonable grounds to believe that the person tested had been operating a motor vehicle while under the influence of alcohol. In each case, too, the analysis of the blood sample was admitted into evidence in a criminal prosecution for driving under the influence and the defendant was convicted. However, in *Schmerber* the person tested was conscious and expressly refused to consent on the advice of counsel, while in *Breithaupt* the person tested was unconscious at the time. The Supreme Court upheld both convictions.

The major portion of the *Breithaupt* opinion dealt with the contention that the taking of the blood test violated due process. A majority of the Court, speaking through Justice Clark, held that under the circumstances of the case this contention was unsound. The majority thought that the taking of a blood test by a skilled technician is not conduct that shocks the conscience or a method of obtaining evidence that offends a sense of justice.[18] Furthermore, they declared that the slight invasion of the person involved in the taking of the blood test is outweighed by the test's deterrent value.[19]

Two dissents were registered. Chief Justice Warren, joined by Justices Black and Douglas, argued that the deterrent value of the test was irrelevant and that the sole question was whether petitioner's constitutional right to due process had been violated. They found no consent — because there was no actual expression of petitioner's will — and concluded that there is no basis for distinguishing between puncturing a person's skin with a hypodermic needle and pumping his stomach, conduct which, in *Rochin v. California*,[20] had been held to violate the fourteenth amend-

15. In Breithaupt v. Abram, 352 U.S. 432, at 435, 436 (1957), Justice Clark, speaking for the majority, referred to Kansas' implied-consent statute with apparent approval.

16. 352 U.S. 432 (1957).

17. 384 U.S. 757 (1966).

18. 352 U.S. at 435-38.

19. *Id.* at 439.

20. 342 U.S. 165 (1952).

ment. They would go further and hold that law enforcement officers may not bruise or break the skin or extract body fluids in their search for evidence.[21] Justice Douglas, joined by Justice Black, disagreed with the majority as to the point at which the balance is struck between society's interest in law enforcement and the interest in not having individuals compelled by the police — through force, trickery, or taking advantage of an inability to resist — to give evidence which subsequently will be used in criminal prosecutions against them. He also disagreed with the majority's conclusion that puncturing an unconscious person's skin for the purpose of obtaining evidence is consistent with the decencies of a civilized state.[22]

In *Schmerber,* a 5-4 majority upheld *Breithaupt* with respect to its holding on the due process question.[23] The majority further held that the taking of the blood sample and the use of it in evidence did not constitute a violation of the privilege against self-incrimination embodied in the fifth amendment or the right not to be subjected to unreasonable searches and seizures guaranteed by the fourth amendment. Justice Brennan's opinion for the majority argued that the self-incrimination privilege applies only to the compulsion of evidence which is communicative or testimonial as to the person asserting the privilege, that as to petitioner the blood sample was not communicative or testimonial but rather real or physical evidence, and that therefore there was no violation of the petitioner's rights.[24] With respect to the unreasonable search and seizure claim Justice Brennan reasoned that although the taking of the sample was a search within the meaning of the fourth amendment, it was not an unreasonable one, because (1) the evidence would have been "destroyed" — *i.e.,* burned out of the bloodstream — had not the sample been taken when it was, (2) the blood test was performed by a competent person in suitable surroundings, and (3) blood tests are widely used devices in everyday life which involve little risk, trauma, or pain.[25]

Four dissents were registered. Chief Justice Warren argued for reversal of the conviction on the basis of his dissent in *Breithaupt.*[26] Justice Black, joined by Justice Douglas, argued that the

21. 352 U.S. at 440-42.
22. *Id.* at 444.
23. 384 U.S. at 759-60.
24. *Id.* at 760-65.
25. *Id.* at 766-72.
26. *Id.* at 772.

privilege against self-incrimination applied.[27] Justice Douglas used as a separate ground of dissent the notion expressed in *Griswold v. Connecticut*[28] that there is a right of privacy which is within the penumbra of some specific guarantees of the Bill of Rights; he declared that "no clearer invasion of the right of privacy [surrounding the fifth amendment] can be imagined than a forcible blood-letting of the kind involved here."[29] Finally, Justice Fortas argued that the privilege against self-incrimination applied, and that "under the Due Process Clause [of the Fourteenth Amendment], the State, in its role as prosecutor, has no right to extract blood from an accused . . . over his protest."[30]

Several aspects of the *Breithaupt* and *Schmerber* decisions should be noted. First, the fact that both are 5-4 decisions breeds some aprehension that a Court with a changed complexion might rule implied consent statutes unconstitutional. Second, in spite of the general approval of the statutes, some restrictions are placed on the ability of a state to order the taking of a sample of bodily substance for the purpose of a chemical analysis. Thus, if a person *physically* objects to the taking of a sample, due process may be violated if he is *physically* forced to submit.[31] The fifth amendment right to be free from unreasonable searches and seizures is another restriction. For example, the order of a police officer for a blood sample by an untrained person might well be found unreasonable.[32]

Third, both decisions dealt with the taking of blood samples. If the basis of the objection to requiring persons to submit to the taking of a *blood* sample without their express consent lies in the intrusive and physically offensive character of such a taking, *breath* tests may be subject to less criticism.[33]

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27. *Id.* at 773-78.
28. 381 U.S. 479 (1965).
29. 384 U.S. at 779.
30. *Id.* at 779.
31. This conclusion seemed to be implicit in the majority opinion in *Breithaupt.* It has been modified in *Schmerber.* In a footnote Justice Clark suggests that due process will not be violated if a chemical test is performed over the physical protests of an operator unless the officer ordering the test uses "inappropriate force" in subduing the resistance of the operator. 384 U.S. at 760 n. 4.
32. This conclusion seems to be a fair inference from the majority opinion in *Schmerber.* Another instance where the taking of a sample might be an unreasonable search is where the sample is ordered and taken prior to the arrest of the operator.
33. In terms of offensiveness to the individual tested, requiring him to urinate or expectorate in order to obtain a sample of urine or saliva for chemical analysis would seem to fall closer to the taking of a blood sample than to the taking of a breath sample.

Finally, it should be noted that the states do not necessarily lack the ability to obtain widespread express consent from motor vehicle operators to submit to the taking of a sample for blood alcohol content analysis. Thus a state might condition the grant of a driver permit or license upon the signing of a statement giving express consent to submit to the taking of such a sample.[34] However, to date no state has sought to avoid the asserted constitutional difficulties of implied consent provisions by resorting to such an approach.

C. Protecting Persons Required to Submit to the Taking of Samples

The state has a clear interest in obtaining samples of bodily substances for blood alcohol analysis of persons suspected of driving while under the influence of alcohol. By taking and analyzing such samples and putting the results of the analyses into evidence, the state can more effectively deter drunk driving. On the other hand, the state should recognize and take into account the individual interests which may be invaded by the taking of a sample and the use of a chemical analysis of it as evidence. The individual interests involved may be grouped into two broad classes. First, there are interests which may be invaded at the time the sample is taken. Second, there are interests which may be invaded at the time the results of the chemical analysis are admitted into evidence.

The first group includes the interest in not being physically forced to submit to the taking of a sample. As noted above, this interest may well rise to constitutional proportions.[35] Another related interest is that of the individual in not being harassed by the police. Permitting samples to be ordered upon mere suspicion of driving while under the influence would probably be insufficient to meet the fourth amendment's requirement that searches be reasonable.[36] Furthermore, even if probable cause exists, perhaps samples should not — perhaps, constitutionally they cannot — be taken unless the person to be tested has been arrested.[37] A third interest which may sometimes be in-

34. See section 301 of the proposed Act and Comment thereto.

35. *Supra* note 31.

36. Schmerber v. California, 384 U.S. 757, at 769-70 (1966).

37. In Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954), New York's implied-consent statute was held unconstitutional, one of the grounds being that it had no provision limiting its application to cases where there had been a lawful arrest. The statute was subsequently amended to correct this deficiency. N.Y. Vehicle & Traffic Law § 1194 (McKinney Supp. 1966).

vaded when a sample is taken is that of religious freedom. The drawing of blood from a Christian Scientist might be offensive to him on religious grounds. Regardless of whether he and similarly situated persons have a constitutional right to refuse to submit to methods of taking samples which would be offensive for religious reasons, perhaps the state should protect this interest. Finally, the individual has an interest in insuring that his health and safety are not endangered by state action. This interest would be invaded, for example, if a police officer delayed taking an injured person to a hospital because time was needed to take a sample.

Individual interests may also be invaded when chemical analyses of samples are used as evidence. One interest is being able to challenge the accuracy of the final alcohol content figure. This interest is not fully protected when the individual has no opportunity to obtain the data which go into the determination of the final percentage figure. Furthermore, assuming that the final blood alcohol content figure has a significant impact on juries, the individual, and the state, would seem to have a strong interest in not having introduced into evidence the results of chemical tests which are of doubtful reliability and accuracy.[38] Finally, the individual has an interest in not having any particular level of alcohol content by itself constitute conclusive evidence that he was operating a motor vehicle under the influence. A person with a high alcohol tolerance may be able to consume, without significant effect on his driving ability, a considerably larger amount of alcohol than would be necessary to affect the driving ability of the average person. The opportunity to prove such a situation should not be foreclosed.

A sense of fairness, even apart from the constitutional duty of fairness imposed on the states by the due process clause, would seem to suggest that the numerous individual interests which may be affected by a state's decision to permit police officers to order chemical tests should be taken into account in

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38. Strong comment has been made that the states should make very certain that the persons responsible for performing chemical tests for blood alcohol content are properly trained. *E.g.*, R. DONIGAN, *supra* note 2, at 72:

> [A]ll law enforcement officials contemplating installation of chemical test programs in their communities should be advised that every person in any way connected with the program should be properly schooled and trained in the duties and responsibilities he will have to perform. . . . [These persons] should not be . . . robot[s] trained to do one operation mechanically.

For a similar comment dealing specifically with breath tests, *see* Dubowski, *Necessary Scientific Safeguards in Breath Alcohol Analysis*, 5 Trial LAWYER'S Guide 28 (1961).

the determination of the means of implementing the policy of ordering such tests. The accompanying Bureau Draft offers a significant degree of protection to individual interests without impairing a state's ability to enforce its policy against the drinking driver. Some protective measures used are the grant of a right upon adequate justification to refuse to submit to the taking of samples, the grant of a right to choose the type of test to be performed, the requirement that a person to be tested be under arrest before a test can be ordered, and the provision for certification of chemical tests and of persons who may perform them.

II. THE STATUTE
PART I. SHORT TITLE AND DEFINITIONS

SECTION 101. *Short Title.*

This Act shall be known and may be cited as the Drunk Driving Act.

SECTION 102. *Definitions.*

As used in this Act:

(a) "Motor vehicle" includes every description of carriage used or capable of being used as a means of transportation on land which is propelled by other than muscular power and which does not operate upon stationary tracks or rails.

(b) "Operate" means to drive a motor vehicle or to be in physical control of a motor vehicle which is in motion.

(c) "Operator" means a person who operates a motor vehicle.

(d) "Sample" means a sample of a bodily substance, including blood, breath, urine, and saliva.

(e) "Chemical analysis" means an analysis of a sample to determine the percentage of alcohol by weight in a person's blood.

(f) "Chemical test" means a taking of a sample and a chemical analysis of it.

(g) "Chemical test unit" means a single device for taking a sample and making a chemical analysis of it and includes breathalyzers, intoxometers, and similar devices.

(h) "Special driving privilege" means a grant by this state, whether express or implied, permitting a person to operate a

motor vehicle within this state and not evidenced by a driver permit or license.

COMMENT: The definitions of "motor vehicle" and "operate" are intended to give the statute the widest possible scope. The definition of "motor vehicle" is intended to include all motor powered transportation except trains and trolleys. The exception is one generally recognized in the statutes presently in effect. The phrase "in physical control of" in the definition of "operate" covers the situation of a passenger in an automobile who is under the influence of alcohol and who grabs the steering wheel.

The term "chemical test" refers to the entire procedure from the taking of a "sample" to the final analysis of the sample resulting in a blood alcohol content figure. A "sample" is the actual specimen of a body substance (the substances listed are not all-inclusive) which is put through a "chemical analysis." The phrase "alcohol by weight" means the weight of alcohol in milligrams found in 100 milligrams of blood. "Special driving privilege" is a general term of art which facilitates reference to any driving privileges granted by the state not evidenced by a permit or license — *e.g.*, a nonresident student registration.

PART II. CRIMINAL OFFENSE

SECTION 201. *Operating A Motor Vehicle While Under the Influence of Alcohol.*

(a) No person shall operate a motor vehicle in this state while under the influence of alcohol.

(b) A police officer may arrest any person who he has probable cause to believe is violating subsection (a) of this section.

COMMENT: This section makes driving while under the influence of alcohol a crime. The phrase "under the influence of alcohol" is intended to cover the drinking driver as well as the drunken driver. Whether a particular operator was "under the influence" is a jury determination to be made in the light of the particular fact situation. The sections of this statute concerning chemical tests are significant only to the extent that they provide accurate and reliable evidence to aid this jury determination.

In most states the conduct made criminal in section 201 would be a misdemeanor and not a felony. This is because in most states a crime is not a felony unless a prison term of over a year may be imposed for its commission, and section 202(a) sets the maximum prison sentence which may be imposed for a violation of section 201 at one year. Since at common law, however, an arrest without a warrant can only be made pursuant to a felony or a breach of the peace in the presence of an officer, section 201(b) includes a statutory power to arrest without a warrant when there is probable cause to believe that a violation of section 201(a) has occurred.

SECTION 202. *Penalties.*

Any person convicted of violating section 201(a) shall be punishable as follows:

(a) Fine and Imprisonment.

(1) A conviction not within five years of a prior conviction is punishable by imprisonment for no more than six months, or by a fine not less than $50 or more than $500, or both.

(2) A conviction within five years of a prior conviction is punishable by imprisonment for not less than thirty days or more than one year and by a fine not less than $200 or more than $1000.

(b) Revocation of Driving Privileges.

(1) Upon a first conviction the [Registrar of Motor Vehicles] shall revoke for six months any driver permit, license, or special driving privilege granted by this state.

(2) Upon a second conviction not within five years of the first conviction the [Registrar of Motor Vehicles] shall revoke for one year any driver permit, license, or special driving privilege granted by this state.

(3) Upon a second conviction within five years of the first conviction the [Registrar of Motor Vehicles] shall revoke for two years any driver permit, license, or special driving privilege granted by this state.

(4) Upon a third conviction the [Registrar of Motor Vehicles] shall permanently revoke any driver permit, license, or special driving privilege granted by this state.

(5) Any period of revocation which may be imposed under paragraphs (1)-(4) of this subsection shall begin with the date of conviction but shall not include any period when the convicted operator is in prison for any offense.

(6) The [Registrar of Motor Vehicles] shall refuse to grant, during the period specified for revocation in paragraphs (1), (2), (3), or (4) of this subsection, whichever is applicable, a driver permit, license, or special driving privilege to any person convicted of a violation of section 201(a).

(7) Any person who operates a motor vehicle during the period of revocation imposed pursuant to paragraphs (1)-(4) of this subsection shall be punishable as provided in [ ].

[ALTERNATIVE: (7) Any person who operates a motor vehicle during the period of revocation imposed pursuant to paragraphs (1)-(4) of this subsection shall be punishable by imprisonment for not less than five days or more than one year, or by a fine not less than $50 or more than $2000, or both.]

COMMENT: Sections 202(a) and 202(b) are not mutually exclusive. The graduated system of penalties in both these sections is meant to penalize heavily the habitual or frequent drinking driver. The "shall refuse to grant" wording in section 202(b)(6) takes into consideration the driver who *subsequent* to his conviction under section 201(a) applies for driver permit, license, or special driving privilege in the state.

It may be desirable to make certain specific exceptions to the operation of section 202(b). For example, it might not be in the best interest of a state to revoke a license (or special driving privilege) to operate farm equipment on a farm because of the possibility of damage to the state's economy. Any such exceptions should be expressly written into section 202(b) before enactment.

SECTION 203. *Administrative Procedures After Conviction.*

(a) Upon a conviction of a violation of section 201(a):

(1) The clerk of the court where the conviction occurred shall send to the [Registrar of Motor Vehicles] a certified notice of the conviction which includes the name of the convicted person, the date of the conviction, the state of residence of the person, and the person's driver permit or license number if he has a permit or license and the state of issuance.

(2) Upon receipt of notice of a conviction the [Registrar of Motor Vehicles] shall:

(A) revoke the convicted person's driver permit, license, or special driving privilege as provided in section 202(b), and

(B) if the person is a nonresident or holds a permit or license issued by another state send notice of the conviction to the appropriate official of the person's state of residence and of any state from which he holds a driver permit or license.

(b) If a person convicted of violating section 201(a) applies for a driver permit, license, or special driving privilege after the running of the applicable period of revocation under section

202(b), the [Registrar of Motor Vehicles] shall not take the conviction into account in granting or denying the application.

COMMENT: Subsection 203(a)(2)(B) is solely a notice provision and is included to facilitate cooperation among states toward the end of deterring the operation of motor vehicles by persons under the influence of alcohol. Section 203(b) guarantees that the license revocation sanction will not be a bar to reapplication for a license once the prescribed period has run.

PART III. CONSENT TO CHEMICAL TESTS

SECTION 301. *Express Consent.*

(a) An applicant for a driver permit or license, or a renewal thereof, shall sign a statement giving express consent to a chemical test ordered by a police officer pursuant to section 501. The [Department of Motor Vehicles] shall not issue a driver permit or license to an applicant who does not submit a signed statement of consent.

(b) A driver permit or license, or a first renewal thereof, issued after this section becomes effective may be declared void by the [Registrar of Motor Vehicles] if the application was not accompanied by the statement of consent required by subsection (a) of this section.

COMMENT: Section 301 is an innovation. It is intended (1) to make persons aware — prior to their operating motor vehicles — of the state's right to demand a chemical test (provided the conditions of section 501 are met), (2) to provide a "back up" provision should the implied consent provisions of section 302 ever be declared unconstitutional, and (3) to assure written evidence of the operator's consent. The major limitation of this section is that it is only effective against drivers who seek to obtain permits or licenses, or renewals thereof, issued by the state enacting the section. This limitation may be significant, for example, in New York City where daily there is a large influx of nonresident drivers.

As noted above, section 301 is an attempt to avoid some of the difficulties which inhere in implied consent provisions. However, it may itself be subject to equally as many problems. It may be asked whether an expression of consent elicited under a threat by the state to refuse to grant a driver license is any more meaningful than an implied consent. Should it be held that a motor vehicle operator has a constitutional right to refuse to take a chemical test for blood alcohol content, there is a question whether consent based on section 301 would satisfy the constitutional requirement for waiver. It might be argued that since historically the receiving of a license has historically been considered a privilege granted by the state, the

state may make the grant of the privilege conditional. While this may be true as a general proposition, the real question is whether the state may condition the grant of the privilege on the relinquishment of a constitutional right.

When an operator has not signed a statement of consent required under section 301(a), section 301(b) states that his license may be declared void.

Section 301(b) guarantees that all resident drivers will eventually sign a statement of consent even though they have a valid license at the time of this statute's passage.

SECTION 302. *Implied Consent.*

Any person who operates a motor vehicle in this state shall be deemed to have consented to a chemical test ordered by a police officer pursuant to section 501.

COMMENT: The implied consent provision of section 302 establishes a broad basis of consent, covering any motor vehicle operator "in this state" whether licensed by the state or not. This section is a key one in implementing the system of chemical testing. The qualifying phrase "pursuant to a valid exercise of authority under section 501" points out that protection against automatic submission to a chemical test is assured to the individual by section 501.

SECTION 303. *Request to Sign Consent Statement At Time of Suspected Offense.*

A police officer who intends to order a chemical test pursuant to section 501 shall first request the person to be tested to sign a statement of his consent to the test.

COMMENT: Section 303 is an attempt to settle any question concerning the existence of consent at the time a test is ordered. It is hoped that a statement of consent signed when a test is ordered will minimize time-consuming controversy in judicial and other proceedings on the issue of whether the person tested in fact refused to submit (as he may do under section 401). As subsection (b) of section 401 points out, refusal to sign a consent statement when a chemical test is ordered is not to be taken by the officer ordering the test as a refusal to submit to the test. Furthermore, the lack of this signed statement will not impair the admissibility of the results of a chemical test ordered pursuant to section 501.

PART IV. REFUSAL TO SUBMIT

SECTION 401. *Operator's Right to Refuse to Submit to the Taking of a Sample.*

(a) Notwithstanding the existence of prior consent, an operator may refuse to submit to the taking of a sample ordered to be taken pursuant to section 501. If an operator so refuses the sample shall not be taken, but action shall be commenced as required by section 402.

(b) An operator who does not expressly indicate refusal by word or action shall be deemed not to have refused. No refusal shall be found solely on the basis of a refusal by the operator to sign a statement of consent.

(c) An operator who is unable to communicate because of unconsciousness, shock, or otherwise and therefore is unable to express refusal to submit to the taking of the sample shall be deemed not to have refused.

COMMENT: In spite of the express and implied consents of sections 301 and 302 the operator may nevertheless refuse to have a sample taken. This right of refusal is an instance of the balancing of the public interest in obtaining chemical test results against the individual's interests in privacy and freedom from harassment and interference with his actions.

Section 401(b) requires express refusal "by word or action." In the case of an uncooperative operator who refuses to do or say anything that indicates refusal, the police officer in his discretion is authorized to proceed with the test until he obtains the express refusal. The subsection also provides that an officer may not assume that a person who has refused to sign a statement of consent requested under section 303 also has refused to submit to a test. It is felt that given the state's interest in obtaining chemical tests, a provision which was added merely as a means of providing evidence should not act in any way to impair the state's ability to obtain these tests.

The situation of an operator who is unable to communicate a refusal, usually due to unconsciousness following an accident, is resolved in section 401(c). The consent to submit to a chemical test is deemed *not* to have been withdrawn. There is some objection to "taking advantage" of the operator's condition, but the public interest in deterring driving while under the influence of alcohol should control. A stronger argument against the statute's position is that the operator's physical condition might be worsened, or at least not attended to quickly enough, if the chemical test is administered. The evaluation of such a condition must necessarily rest with the judgment of the arresting officer. Section 501(h) makes a reasonable exercise of this judgment a condition precedent to a valid ordering of a chemical test.

SECTION 402. *Administrative Action Upon Operator's Refusal.*

(a) Within three days of a refusal of an operator to submit

to the taking of a sample ordered pursuant to section 501, the police officer who ordered the sample to be taken shall send to the [Registrar of Motor Vehicles] a sworn declaration containing the name and address of the operator, a statement of his refusal to submit, and a statement as to whether the conditions specified in section 501 were satisfied.

(b) Upon receipt of a declaration sent pursuant to subsection (a) of this section and stating that all the conditions of section 501 were satisfied the [Registrar of Motor Vehicles] shall institute a hearing pursuant to [the state administrative procedure act] to determine whether the operator refused to submit and, if he did, whether the refusal was justifiable.

(1) No refusal shall be found if the operator can show that subsequent to a refusal he agreed to submit under circumstances which afforded reasonable opportunity for a sample to be taken.

(2) Refusal is justifiable if the operator shows that:

(A) at least one of the conditions specified in section 501 was not satisfied,

(B) he was not aware of his refusal because of shock, intoxication, or other similar reasons,

(C) he refused on religious grounds, or

(D) he refused on substantial medical or psychological grounds.

(3) If an operator fails to appear at a hearing instituted pursuant to subsection (b) of this section, the [Registrar of Motor Vehicles] shall determine that he unjustifiably refused to submit. Upon the operator's timely showing of cause for failure to appear, the [Registrar of Motor Vehicles] shall set aside a determination made under the preceding sentence and shall hear the merits as under subsection (b).

COMMENT: As unjustifiable refusal to submit to the taking of a sample will result in the imposition of sanctions under section 403, fairness requires that an opportunity for a hearing be given. Section 402(b) provides such an opportunity. If the state has a general administrative-hearing statute which is appropriate, reference should be made to it. If no such statute exists, specific procedures for a hearing should be written into section 402(b).

Section 402 introduces an important safeguard of the operator's rights, the justifiable refusal. Section 402(b) states the grounds upon which the operator can justifiably refuse to submit to a sample being taken. Any

violation of the conditions of section 501 justifies refusal under section 402(b)(2)(A). In particular, a refusal is justified if the arresting officer did not have probable cause for arrest. The situation where there is an actual refusal but it was not intended (because of shock or intoxication) is covered by 402(b)(2)(B). Religious objections to a chemical test, such as having blood drawn, are protected by section 402(b)(2)(C). Section 402(b)(2)(D) provides for justifiable refusal when the operator knows of some unusual medical or psychological condition such as hemophilia.

Section 402 also provides — in subsection (b)(1) — that even if an operator has unjustifiably refused, if he subsequently consents so that a sample may be taken he is relieved of the adverse consequences which would have flowed from the refusal. It seems clear that the policy of obtaining chemical tests would not be effectuated by holding an operator to his first and often hasty reaction.

SECTION 403. *Sanctions For Refusal to Submit.*

(a) If after complying with the procedures established in section 402 the [Registrar of Motor Vehicles] determines that an operator unjustifiably refused to submit to the taking of a sample, he shall revoke any driver permit, license, or special driving privilege in the same manner and with the same effect as if the operator had been convicted of violating section 201(a); and any unjustified refusal shall accordingly be treated as any conviction for the purpose of paragraphs (1)-(7) of section 202(b).

(b) Any sanction period imposed under subsection (a) of this section runs from the date of the order imposing the sanction, but if an appeal from the order is taken pursuant to section 404 the sanction period is suspended during the pendency of the appeal.

COMMENT: The sanctions of section 403 are the "enforcers" of the consent provisions; they compel the operator to submit to a chemical test or else, unless refusal is justifiable, have his license revoked. In either case the ultimate objective of keeping drinking drivers off the roads is achieved.

It should be noted that these sanctions for refusal must be independent of the outcome of the section 201 proceedings. In this regard, the draftsmen disapprove the result reached in *Colling v. Hjelle*.[1]

SECTION 404. *Appeal From Imposition of Sanction.*

An order under section 403 is appealable in accordance with the procedure [prescribed in this state for appeal of sanctions imposed through administrative order].

1. 125 N.W.2d 453 (N.D. 1964).

SECTION 405. *Comment Upon Or Admission Into Evidence Of Refusal to Submit.*

The refusal of an operator to submit to a chemical test ordered under section 501 is not admissible in evidence, nor may it be commented upon, in any civil, criminal, or administrative proceeding in this state, except an administrative proceeding instituted under section 402.

PART V. PERFORMANCE OF CHEMICAL TESTS

SECTION 501. *Authority to Order Performance.*

A police officer may order a chemical test to be performed on an operator if the following conditions are met:

(a) The officer must have probable cause to believe that the operator violated section 201 (a).

(b) The operator must have been lawfully arrested.

(c) The chemical test ordered must be certified by the [State Medical Examiners] as provided in section 601.

(d) The person to perform the test must be certified by the [State Medical Examiners] when certification is required under section 602.

(e) The samples for the chemical test ordered must be taken within the time limits prescribed by the [State Medical Examiners] as provided in section 603.

(f) The operator must be informed of his right under section 401 to refuse to submit to the taking of a sample and of the sanctions which may be imposed under section 403, and the operator must not have exercised his right to refuse. The officer may disregard this condition if he reasonably believes that because of unconsciousness, shock, or other disability the operator is unable to make the choice involved.

(g) The officer must give the operator an opportunity to select the chemical test to be performed when required to do so under section 502.

(h) The officer, in deciding whether to order a chemical test, must exercise reasonable judgment to insure against its interfering with necessary medical attention.

COMMENT: Section 501 is a central section of the statute. It provides the specific conditions which must be met before a chemical test can be ordered regardless of questions of consent; it is the major bulwark for protecting the individual's constitutional rights and guaranteeing the accuracy and reliability of the tests. These conditions do not merely skirt the bare minimum of constitutional rights, but rather they set the tone for a fair system of testing. To insure that these conditions are met, they are made conditions to the admission into evidence of the results of the chemical test.

Many of the specific provisions refer to testing procedure provided for in subsequent sections. Comment need only be made about section 501(b), the requirement of lawful arrest. This condition is intended to protect the individual against police "fishing expeditions" for evidence. Probable cause sufficient to compel the taking of a test should also be sufficient for arrest.

SECTION 502. *Operator's Choice of Chemical Test.*

(a) A police officer who is considering ordering a chemical test under section 501 shall determine which chemical tests among those certified by the [State Medical Examiners] under section 601 are reasonably available. If the officer determines that more than one is reasonably available he shall give the operator an opportunity to select the test to be performed.

(b) An officer is relieved of the duty imposed by subsection (a) of this section if he reasonably believes that because of unconsciousness, shock, or other disability the operator is unable to make the choice involved.

(c) When an operator is unable to select a chemical test or refuses to do so the officer may order any certified test that is available.

COMMENT: Since the state medical examiners may certify a number of tests under section 601, this section leaves the choice among those certified tests to the operator. The choice is limited by the availability of the tests and the operator's ability and willingness to make a choice. In a typical situation the driver who objects to having a blood test taken, perhaps because of the use of a hypodermic needle, may choose some other test such as one of saliva or breath. This opportunity for choice should encourage the attitude that the testing procedure is an impartial system for obtaining competent evidence rather than an exclusive tool of the police.

SECTION 503. *Test At Operator's Request.*

(a) Whenever an operator is arrested and is suspected of having violated section 201(a) and no chemical test is ordered

pursuant to section 501 the operator may request a chemical test. If this request is denied without cause the denial is admissible in any civil, criminal, or administrative proceeding on the issue of whether the operator operated a motor vehicle while under the influence of alcohol.

(b) Whenever a chemical test is performed pursuant to section 501 the operator tested shall have a reasonable opportunity to have an additional test performed by a person of his own choosing. If an operator's request for an additional test is denied without cause the results of the test ordered pursuant to section 501 are inadmissible in evidence in any civil, criminal, or administrative proceeding.

COMMENT: Section 503(a) says that the operator is *entitled* to a chemical test by the state whenever he is arrested for suspicion of having violated section 201(a) even if none is ordered under section 501. Again, this is a safeguard for the operator, ensuring that the mechanics of this statute will work to prove sobriety as well as intoxication It should be noted that the right granted by section 503(a) does not depend upon whether the operator is arrested upon probable cause. The incongruity of denying a test because an arrest is *unlawful* is evident. It should be further noted that the right to obtain a test may attach whenever an operator is under arrest *and* is suspected of having violated section 201(a); the right is not limited to the case where the operator is arrested *for* suspicion of such a violation. If the arresting officer, although requested, refuses to permit the test, the refusal is admissible into evidence.

The right to an additional test by a person of the operator's own choosing is granted by section 503(b). This provision is a check on the state's chemical test and another way of protecting the individual's rights. The right is qualified by the phrases "reasonable opportunity" and "without cause." It is not intended that the police should drive the arrested operator across a city to see his personal physician, but the police should allow a call to a physician and allow him to perform a test when he arrives.

SECTION 504. *Reports.*

Any person who performs a chemical test ordered pursuant to section 501 shall, at the time the test is performed, make a report containing the data from which the alcohol content is computed.

SECTION 505. *Providing Operator With Results.*

Upon his request, an operator who submitted to a chemical test pursuant to section 501 shall be furnished a copy of the results

and of the report required by section 504 from the department employing the police officer who ordered the test.

[SECTION 506. *Liability for Causes of Action Arising Out of Performance.*

(a) Any cause of action arising out of performance of a chemical test ordered by an officer claiming authority under section 501 may be brought against this state or against the subdivision of this state which employed the officer at the time he ordered the test.

(b) No police officer or person certified under section 602 is liable, except as provided in subsection (c) of this section, for any cause of action arising out of an order or performance of a chemical test ordered by an officer claiming authority under section 501.

(c) If this state or any subdivision of this state is found liable in an action brought against it under subsection (a) of this section the state or subdivision may seek indemnity from the person whose action resulted in the liability.]

COMMENT: The common law is developing rapidly in the area of sovereign immunity, but it is felt that the immunity should be expressly discarded.

PART VI. CERTIFICATION AND SPECIAL REQUIREMENTS

SECTION 601. *Certification of Tests and Checking of Testing Units.*

(a) The [State Medical Examiners] shall certify the chemical tests which may be ordered under section 501. In the determination of whether to certify a particular test, due consideration shall be given to the actual conditions under which the test shall be performed and to the fact that the purpose of certifying chemical tests is to permit their results to be admitted into evidence in adjudicative proceedings.

(b) The [State Medical Examiners] shall pass upon the certification of existing chemical tests within thirty days after the passage of this Act.

(c) The [State Medical Examiners] shall prescribe periodic intervals for the checking of chemical test units used to make

chemical tests pursuant to section 501. The person or persons responsible for operating such chemical test units shall make a complete check of the unit, including a check of all chemicals and other materials used in conjunction with it, at least as often as the [State Medical Examiners] shall prescribe.

COMMENT: Section 601(a) provides for a process of choosing specific, official, certified tests. This certification is important to control the particular chemical tests which may be ordered under section 501 and thereby increase the accuracy and reliability of the test results. The phrase "due consideration shall be given to the actual conditions" means that factors not present in a laboratory should not be overlooked. For example, temperature extremes encountered when administering a breath test on a highway should be allowed for when analyzing the breath sample.

The provision in section 601(c) for checking of testing units is a further safeguard against the results of chemical tests ordered by the state being inaccurate and unreliable.

SECTION 602. *Certification of Persons Who May Perform.*

(a) The following procedure is established and shall be maintained for the purpose of certifying persons who may perform the chemical tests certified under section 601 when these tests are ordered under section 501:

(1) The [State Medical Examiners] shall prescribe minimum standards of competency of performance with respect to the taking of a sample and the chemical analysis for each chemical test certified under section 501.

(2) The [State Medical Examiners] shall appoint certification examiners so that within each county of the state certification examinations may be given for each certified chemical test.

(3) [On the same day of the last week in every month] each certification examiner shall conduct examinations. The examination will consist of a comparison by the examiner of an actual performance of a particular chemical test by the person seeking certification with the minimum standards of competency prescribed by the [State Medical Examiners] with respect to the performance of the test.

(4) The certification examiner shall make a finding after each examination as to whether the minimum standards were satisfied. Every person who satisfies the standards shall be

certified. Within one week after making a finding the examiner shall notify the person examined whether or not he has been certified. If a particular test does not require the same person both to take the sample and to make a chemical analysis of it, a person may be certified to perform only one of these functions.

(b) Notwithstanding subsection (a) of this section only licensed physicians, registered nurses, and qualified hospital technicians are permitted to take a blood sample for the purpose of making a chemical analysis pursuant to an order for a chemical test under section 501.

(c) The [State Medical Examiners] may designate chemical tests certified under section 601 which may be performed by licensed physicians, registered nurses, and qualified hospital technicians without certification under subsection (a) of this section.

(d) Persons certified under subsection (a) of this section must take an examination every [six months] in order to keep their certified status.

(e) The first certification examination under this section is to take place in the month after the passage of this Act.

(f) The [State Medical Examiners] shall keep on file the names and addresses of all certification examiners appointed under paragraph (2) of subsection (a) of this section and shall make this information available on request.

COMMENT: The purpose of the system of examination and certification is to train laymen in the proper procedure for administering the various tests. This training will introduce the police officers to the subtleties of equipment like the breathalyzer and the intoxometer. Note that section 602(b) allows only "licensed physicians, registered nurses, and qualified hospital technicians" to take *blood* samples; under section 602(c) they may take other samples and perform other chemical tests without certification under section 602(a) at the discretion of the state medical examiners (or equivalent officials). Note also that the "state certification examiner" is a new official and that compensation must be provided for him.

SECTION 603. *Special Requirements For Taking And Analyzing Samples.*

(a) The [State Medical Examiners] shall prescribe time limits during which the samples to be used for the chemical tests

which may be ordered under section 501 may be taken. Time limits shall be prescribed for each chemical test and shall be designed to insure the accuracy and reliability of the chemical analysis of the sample.

(b) Whenever a chemical test is ordered pursuant to section 501 two independent chemical analyses shall be made of the sample or samples taken.

COMMENT: The time limits provided for in section 603 are important to insure accurate test results. Different time limits for each test certified under section 601 are important since different body substances absorb and lose alcohol at varying rates. For example, the saliva test will show too high a percentage of alcohol if it is taken within fifteen minutes after the alcohol was consumed.

The provision in section 603(b) for two independently analyzed samples serves as a check against an error in analysis and as a convenient substitute for the additional and different test by a person of the operator's own choosing, as provided for in section 503(a).

PART VII. USE OF CHEMICAL TEST IN EVIDENCE

SECTION 701. *Admissibility In Evidence.*

(a) The results of chemical tests are admissible in civil, criminal, and administrative proceedings on the issue of whether a person involved in the proceeding operated a motor vehicle while under the influence of alcohol.

(b) Notwithstanding subsection (a) of this section:

(1) The results of a chemical test performed at the request of a police officer acting in his official capacity are admissible by the state only if the conditions stated in section 501 were met before the test was ordered and a report required by section 504 is offered into evidence.

(2) The results of a chemical test not performed at the request of a police officer acting in his official capacity are admissible only if an adequate foundation is laid by expert testimony as to the accuracy and reliability of the chemical test used or if the chemical test used is one certified by the [State Medical Examiners] under section 601.

(c) This section shall not be construed as limiting the admissibility of any competent evidence other than the results of chemical tests bearing on the question of whether or not a person was operating a motor vehicle while under the influence of alcohol.

COMMENT: The results of a chemical test are admissible provided that all the conditions of sections 501 and 504 are met. This exclusion of evidence is the basic sanction against the state for violating the statutory standards of fairness. Expert testimony is not required as a foundation for those tests which have been certified under section 601 when the tests were performed at the request of someone other than a police officer acting in his official capacity.

Relevant evidence other than the chemical test results which bears on whether the operator was under the influence of alcohol, such as the testimony of officers and witnesses, is in no way excluded by section 701. Regardless of what the results of a chemical test are, the jury may still consider all the relevant evidence.

SECTION 702. *Evidentiary Significance.*

A showing that the alcohol content of a person's blood was .13 percent by weight or more is prima facie evidence that the person was under the influence of alcohol.

COMMENT: Many states provide by statute for the evidentiary significance which the results of chemical tests for blood alcohol content will have when admitted into evidence in criminal and other proceedings. This approach is adopted in section 702. The chief source of controversy in this area lies not in giving blood alcohol percentages prima facie effect, but in determining which percentages to use. The statutes presently in effect generally adopt .15 percent by weight as the figure which prima facie establishes that the person who had this blood alcohol content was under the influence of alcohol. This figure has been chosen in an attempt to reflect scientific experimentation in the area of intoxication.

Section 702 suggests .13 percent as the critical percent. Most persons with a blood alcohol content of .13 percent by weight will be under the influence of alcohol at least to the extent that they will have suffered impairment of driving ability.[2] Furthermore, when chemical tests are introduced into evidence in prosecutions for driving while under the influence of alcohol, juries tend to consider the statutory figure as not merely a maximum above which the defendant is prima facie guilty, but also a minimum below which the defendant should be found innocent. To the extent that this tendency exists, the state's attempt to insure safety on the highways is frustrated. By lowering the critical figure to .13 percent by weight, the state's task will be made easier without any rejection of the results of scientific experimentation.

Section 702 makes only one distinction with respect to the evidentiary significance of blood alcohol percentage: a blood alcohol content of less than .13 percent by weight has no prima facie effect; a blood alcohol content of .13 percent by weight or more establishes a prima facie case that

2. Slough & Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing,* 44 MINN. L. REV. 673, 677 (1960).

the person tested was under the influence of alcohol. In this respect section 702 differs from the statutes presently in effect, most of which have three divisions. The most widely used differentiation provides that a blood alcohol content of .05 percent by weight or less indicates, prima facie, not being under the influence, a blood alcohol content of between .05 percent and .15 percent by weight is relevant evidence on the issue of whether a person under the influence but has no prima facie effect, and a blood alcohol content of .15 percent by weight or more establishes, prima facie, that the person tested was under the influence.

This three-fold differentiation is not very helpful, for unless a person may not be adjudged under the influence if he had a blood alcohol content of .05 percent or less by weight there seems to be no difference between the first and second categories. And if this result is intended, it is objectionable on two grounds. First, the use of the term "prima facie" does not express the intended result. Second, and more important, it would seem possible for a person with a low alcohol tolerance to be under the influence of alcohol although having a blood alcohol content of .05 percent or less.

PART VIII. MISCELLANEOUS

SECTION 801. *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 this Act which can be given effect without the invalid provisions or applications, and to this end the provisions of this Act are severable.

SECTION 802. *Savings Clause.*

This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 803. *Repealer.*

The following Acts, chapters and titles and all other Acts, etc. and parts of Acts, etc. inconsistent with any part of this Act are hereby repealed:

(a)
(b)
(c)

SECTION 804. *Effective Date.*

This Act shall become effective 120 days after it is passed by the legislature, except that sections 601 and 602 become effective immediately upon their approval.

A STATE STATUTE TO PROVIDE A PSYCHOTHERAPIST-PATIENT PRIVILEGE

I. THE PROBLEM OF DEFINITION

The proposed Act establishes a psychotherapist-patient privilege. The effect of this Act is to empower a patient to prevent his psychotherapist from disclosing certain confidential communications; it further protects the psychotherapist from any liability for failing to make disclosures privileged by this Act.

At the outset a distinction should be made between confidentiality and privilege. Confidentiality is an ethical obligation of one person not to disclose communications made to him by another.[1] A privilege is a legal power to prevent another from disclosing certain communications by him to another. Thus, confidentiality is an obligation in the person to whom communications have been made not to disclose those communications and a privilege is a power in the person who has made confidential communications to prevent those communications from being disclosed. A privilege serves as a buttress to confidentiality in that it permits the person under the ethical obligation to fulfill that obligation even when questioned under oath.

The principal problem in establishing a privilege for persons undergoing diagnosis or treatment of a mental or emotional disturbance, for whom communications are part of psychotherapy, is one of definition. All who argue for the establishment of a privilege in this area grant that some limitations are necessary; no one is attempting to privilege the offhand outburst of mental frustration made to a casual acquaintance. But a strong argument has been made that the test of privileged communications in the area of psychotherapy should be whether these communications were made to a psychotherapist in the course of a psychotherapeutic relationship, and not whether they were communicated to a licensed physician.[2] This approach, sometimes called the functional approach, has several spokesmen. Professor Louisell argues that "the demonstrable need is for confidentiality

1. Some persons under an ethical obligation of confidentiality may, in some jurisdictions, be under a legal obligation also. *See* Challener, *Doctor-Patient Relationship and the Right to Privacy*, 11 U. PITT. L. REV. 624 (1950).

2. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609 (1964). *See also* Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731 (1957); Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 NW. U.L. REV. 384 (1952).

for communications between a patient and his licensed or otherwise authorized psychodiagnostician and psychotherapist, whether the professional practitioner be a medical psychiatrist or a nonmedical psychologist."[3] What is a "psychodiagnostician" or "psychotherapist" and how may he be "otherwise authorized"? Louisell himself recognized the difficulty of such questions:[4]

> It is apparent that no attempt has been made in this article to define psychodiagnosis or psychotherapy for the purpose of prescribing the conditions of their legitimate practice by the nonmedically trained psychologist. That must await another time.

One writer suggests the enactment of a statute "providing a mandatory privilege for the psychiatrist and clinical psychologist and a discretionary privilege for the general medical practitioner when acting in the capacity of a psychotherapist."[5] The provision of a mandatory privilege for a clinical psychologist is relatively easy to administer in a state such as Illinois, which has a statute establishing standards for the certification of psychologists.[6] A troublesome problem persists, however, in making discretionary the privilege to be granted the medical practitioner. This same writer concedes that, from the standpoint of judicial administration, it would be difficult to determine just when a physician is acting as a psychotherapist and when he is not.[7] Nevertheless, he would provide that confidential communications to a general practitioner in the course of a counseling relationship can attach only at the discretion of the trial judge.[8] Under such circumstances the privilege is scarcely viable because it depends on an ex post facto determination of a trial judge. Thus, the discretionary privilege fails entirely as a means of encouraging and supporting confidentiality in the psychotherapeutic relationship, unless the court maintains a consistent posture over an extended period of time.

The most recent and far-reaching statement of the functional approach is by Professor Fisher.[9] His model statute[10] makes privileged "confidential communications between patient and psychotherapist" and defines "psychotherapist" as "a person skilled in the diagnosis and treatment of problems as the result

3. Louisell, *supra* note 2, at 744.
4. *Id.* at 747.
5. Note, *supra* note 2, at 289.
6. ILL. ANN. STAT. ch. 91 1/2, § 1-12 (Smith-Hurd 1966).
7. Note, *supra* note 2, at 388.
8. *Id.*
9. Fisher, *supra* note 2.
10. *Id.* at 643.

of professional training in the behavioral sciences." This formulation is not wholly satisfactory, however, for it fails to make clear how to determine whether a person is "skilled." Is licensing or certification required? How much "professional training" must a person have? The answers to these questions are presumably left to the courts. Such a result appears to be inherent in the functional approach. Where the statute fails to define clearly the communication to be privileged a burden is thrust upon the parties involved, who may someday wish to invoke the privilege. The outcome will be determined by a court whose only statutory guidance is that "confidential communication between patient and psychotherapist" is to be privileged. As another writer said in a similar context, "An exclusively functional grounding of the privilege would prevent even the minimal controls attainable by licensing and force the client himself to make the fine distinctions necessary to separate privileged from nonprivileged consultations, or to keep silent."[11] But if the patient or client "keep[s] silent," the very purpose of the privilege — the encouragement of disclosure to the psychotherapist — is frustrated. It would seem that in order to be effective a statute must be sufficiently definite to permit relatively certain interpretation by the patient before the privilege is invoked. And in order to have such definiteness, the privilege will have to be limited to certain communications made between a patient and a readily recognizable and definable professional class.

Professor Louisell argues that a "privilege should be defined as precisely as possible in terms of the function performed or service rendered, and not arbitrarily be accorded or withheld solely on the basis of whether the professional person involved happens to be a licensed, registered or certified psychologist."[12] Yet this approach, depending on a case-by-case analysis by individual judges, fails to provide the certainty necessary to achieve the desired objective. The strictly functional approach is theoretically attractive, but it does not lend itself to a statutory solution.

Hence, some clear line must be drawn. But at what point? All the states which presently have psychologist-client statutes require some form of certification or licensing of such psychologists.[13] Admittedly, licensing or certification is not a guarantee

11. Note, *Functional Overlap between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1258-59 (1962).

12. Louisell, *supra* note 2, at 742.

13. See Part III of this memorandum.

that a privilege will attach to *all* communications made to persons who are so licensed or certified, but it is at least a tangible sign that *confidential* communications to such persons will be privileged.

With respect to the question of who should be licensed or certified, it is arguable that licensed psychologists giving therapeutic treatment should be able to assure their clients a privilege. It may be contended on the other hand that the practice of psychotherapy should be limited to licensed medical practitioners. The answer to this dilemma depends on cost, availability of personnel, and other local conditions, as well as the technical decision concerning professional competence. As Professor Louisell stated:[14]

> It is a problem in the first instance to be threshed out by the medical profession, particularly its psychiatric branch, and the psychological profession, and still to be authoritatively threshed out in some localities. This problem, the resolution of which is vital to the public welfare and which increasingly engages public interest, may represent one of those conflicts of expert opinion which ultimately has to be settled by non-professional or lay judgment.

Regardless of how this problem is resolved, a privilege for psychotherapist-patient communications is a minimum requirement to guarantee the efficacy of psychotherapeutic treatment.

The proposed Act is the product of a lay judgment which does not recognize any significant distinction between psychotherapy as practiced by the physician and as practiced by the licensed psychologist. Therefore, the privilege created by the Act extends to both the physician and the licensed psychologist, except in those states which do not license, or otherwise certify, psychologists. The limitation of the privilege in the latter states is for the purpose of protecting the patient so that he may readily determine when he is taking part in communications which are privileged under the Act.

II. THE NEED FOR A PSYCHOTHERAPIST-PATIENT PRIVILEGE

Almost every argument[15] either for or against a privilege begins with a statement of the four conditions for the creation

14. Louisell, *supra* note 2, at 747-748.

15. *See, e.g.*, Fisher, *supra* note 2; Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175 (1964).

of a privilege set down by Wigmore in his treatise on evidence. These conditions are:[16]

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
> (4) The injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Openness between patient and psychotherapist would seem to be essential in psychotherapy:[17]

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. It is extremely hard for them to bring themselves to the point where they are willing to expose the dark recesses of their minds to the psychiatrist; often patients have undergone therapy for a year or more before they begin to reveal anything significant. It would be too much to expect them to do so if they knew that all they say — and all that the psychiatrist learns from what they say — may be revealed to the whole world from a witness stand.

Such intensely personal communications may be inhibited unless there is a confidence that they will not be disclosed. Furthermore, it is almost universally accepted that confidentiality is necessary to the satisfactory maintenance of the therapeutic relationship between the parties.[18]

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16. 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961) [hereinafter cited as WIGMORE] (emphasis in original).

17. M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952), *cited in* Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955).

18. *E.g., "This Committee believes that confidentiality is essential to psychiatric treatment."* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REP. NO. 45, at 93 (June 1960) [hereinafter cited as GAP] (emphasis in original).

"The overwhelming view of psychiatrists is that patients need and expect assurance that their disclosures will remain confidential." Goldstein & Katz, *Psychiatrist-Patient Privilege: the GAP Proposal and the Connecticut Statute,* 36 CONN. B.J. 175, 178 (1962).

"[T]he demonstrable need is for confidentiality for communications between a patient and his licensed or otherwise authorized psychodiagnostician and psychotherapist, whether the professional practitioner be a medical psychiatrist or a non-medical psychologist." Louisell, *supra* note 2, at 744.

Wigmore's third condition is also satisfied by the psychotherapist-patient relationship. Ever since society first recognized the existence of mental illness, it has striven to abolish it, and psychotherapy, by definition, is the means of overcoming mental illness.

Application of Wigmore's fourth condition to the psychiatrist-patient relationship requires an investigation into the effect which the threat of disclosure of the communications would have on the relationship. Since the patient approaching psychotherapy demands assurance of confidentiality before he will partake in the communications necessary to treatment, it is highly improbable that, after disclosure of confidential communications by a psychotherapist, he would accept any future assurance of confidence from the same or any other psychotherapist. This distrust of psychotherapy could work severe harm, not only to the individual relationship, but also to society in general, because it cuts off the mentally disturbed person, whom society has an interest in curing, from the only source of that cure. Furthermore, disclosure, if publicized, would affect other psychotherapist-patient relationships and perhaps destroy them as well. "The publicity from just one bad case [of disclosure] would cause irreparable damage in terms of mistrust and confusion and keep many needy patients from receiving adequate treatment."[19]

Given the injury to the relationship caused by the disclosure, Wigmore's fourth condition still requires that this injury be "greater than the benefit thereby gained for the correct disposal of the litigation."[20] Privileges are barriers to the ready ascertainment of facts; therefore, this condition requires that, in order to justify the creation of a privilege, there must be a strong benefit deriving from such privilege to offset this obstacle to the discovery of facts which the privilege will present.

Privileges should not be created in an offhand fashion. Further, it may be argued that the hearsay rule makes the privilege unnecessary; the psychotherapist may not testify concerning the substance of statements made by the patient when such evidence is offered to prove the truth of the statements. True, the rule is ordinarily applicable, but there are so many exceptions, including admissions by parties, witnesses' declarations against interest, and declarants' statements offered to show state of mind,[21] that it does not seem sufficient to bar the psychotherapist from testifying and thereby to protect the confidential relationship. Therefore,

19. Rappeport, *Psychiatrist-Patient Privilege,* MD. S. MED. J., Feb. 1963, at 3.
20. 8 WIGMORE, *supra* note 16.
21. *Cf.* Note, *A Suggested Privilege for Confidential Communications with Marriage Counsellors,* 106 U. PA. L. REV. 266 (1957).

in order to protect completely psychotherapist-patient communications, a privilege will have to be created that will shut off these communications from the inquiry of the courts.

However, the question remains whether granting the privilege will greatly hinder the ascertainment of facts. What is the evidentiary value of psychotherapist-patient communications? The material adduced in psychoanalysis is often based upon unrealities or fantasies; it would seem to have little value in a judicial proceeding unless accompanied by an expert explanation.[22] Even with such explanation the material may still not lend itself to an objective evaluation by an inexpert jury. The terms used by the psychotherapist in explaining the patient's condition — terms such as "homosexual" or "Oedipus complex" — may elicit connotations in the minds of a jury that would prejudice them against the patient.

The fact that privileges hinder the discovery of certain facts and therefore may prevent the "correct disposal of litigation" has given rise to strong criticism of privileges in general and of the physician-patient privilege in particular.[23] But Judge Edgerton has made a distinction which argues strongly for a psychotherapist-patient privilege even if a doctor-patient privilege is found undesirable: "Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him."[24] In a landmark case in Illinois[25] a trial judge recognized a psychiatrist-patient privilege on common-law grounds. Although acting without any statutory authority, the court "carefully distinguishes between a psychiatrist and practitioners in other fields of medicine, extending the privilege to the former only."[26] The Illinois legislature has since ratified the judge's action by enacting a psychiatrist-patient statute.[27]

Nevertheless, the above discussion does not concede the validity of the arguments that the physician-patient privilege should be abolished. On the contrary, it is the interpretation which has been given to the privilege by the courts that should be abolished. The "strength" of the argument against a physician-patient privilege lies in the citation of a legion of cases which

22. Slovenko, *supra* note 15, at 195.

23. Dean Wigmore has set the tone of such criticism. *See* 8 WIGMORE, *supra* note 16, §§ 2380a ff.

24. Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955).

25. Binder v. Ruvell, Civil No. 52C 2535, Cir. Ct. of Cook County, Ill., June 24, 1952.

26. Note, *supra* note 2, at 386.

27. ILL. ANN. STAT. ch. 51, § 5.2 (Smith-Hurd 1966).

allow the invocation of a privilege where no privilege was ever intended to be conferred. The courts have indeed abused the physician-patient privilege, but it is certainly faulty reasoning that identifies the abuse of the privilege with the privilege itself. The fact that the courts have overextended the privilege does not compel its abolition. Rather, what is needed is a case-by-case awareness and evaluation of the purposes of the privilege. Such a procedure would result in the allowance of the privilege only where it was intended to be allowed. The Supreme Court of Wisconsin articulated such a procedure in 1938:[28]

> The reason of the rule of the statute, as far as it has any, is that patients may be afflicted with diseases or have vicious or uncleanly habits necessary for a physician to know in order to treat them properly, disclosure of which would subject them to humiliation, shame, or disgrace, and which they might refrain from disclosing to a physician if the physician could be compelled to disclose them on the witness stand . . . . If the disclosures to the physician be such as not to subject the patient to shame or affect his reputation or social standing, there is no reason why a physician should not disclose them and sound reason why in the interest of truth and justice he should be compelled to disclose them.

The proposed Act's delineation of communications which are to be privileged should be interpreted with the same awareness of basic purposes with which the Wisconsin court interpreted its statute. Because of the intimate nature of psychotherapist-patient communications, there will be few instances where communications between psychotherapist and patient will not be "in the course of dianosis or treatment."[29] However, there will be some such instances, and the courts must bear in mind that any privilege statute extends only to those communications intended or understood to be confidential. Purely social conversation, for example, would not be confidential communication and would not be privileged.

The psychotherapist-patient privilege satisfies all the conditions set up by Wigmore. Its adoption will extricate the psychothera-

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28. Prudential Ins. Co. v. Kozlowski, 226 Wis. 641, 276 N.W. 300, 301-02 (1937).

29. "Psychoanalytic theories regarding the unconscious make practically everything the patient says relevant, even though the relevance may not be logically apparent." M. GUTTMACHER & H. WEIHOFEN, *supra* note 17, at 279. Such theories perhaps go too far but they nevertheless exhibit the tendency of phychotherapists to include all communications as part of "diagnosis or treatment."

pist from the dilemma in which he may find himself under present law. Either he must disclose confidential communications and breach an ethical obligation or he must keep silent and risk being held in contempt. Such a dilemma can be legislated out of existence.

III. EXISTING STATUTES

Nineteen states have enacted psychologist-client statutes.[30] Ten of these states[31] have adopted the statute proposed by the Group for the Advancement of Psychiatry as a psychiatrist-patient privilege: "The confidential relationship and communication between psychiatrist and patient shall be placed on the same basis as regards privilege, as provided by law between attorney and client."[32] The ten statutes mentioned do little more than substitute "psychologist and client" for "psychiatrist and patient."[33] Since the attorney-client privilege protects any[34]

> communication made to the attorney in the course and for the purpose of employment, so long as it is not in furtherance of a criminal or fraudulent act, the psychologist-client privilege is broader in scope than the physician-patient privilege.

The inadequacy of a wholesale conversion of a privilege established for one relationship to another relationship has already been pointed out.[35] Psychotherapy, whether practiced by a psy-

30. ALA. CODE tit. 46, § 297(36) (Supp. 1965); ARIZ. REV. STAT. ANN. § 32-2085 (Supp. 1966); ARK. STAT. ANN. § 72-1516 (1957); CAL. BUS. & PROF. CODE § 2904 (West 1962); COLO. REV. STAT. ANN. § 154-1-7(8) (Supp. 1966); DEL. CODE ANN. tit. 24, § 3534 (Supp. 1964); FLA. STAT. ANN. § 490.11 (Supp. 1965); ILL. ANN. STAT. ch. 91 1/2, § 406 (Smith-Hurd 1966); MICH. STAT. ANN. §14.677(18) (Supp. 1965); MONT. REV. CODES ANN. § 93-701-4(6) (Supp. 1965); NEV. REV. STAT. ANN. § 48.085 (1963); N.H. REV. STAT. ANN. § 330-A: 19 (1966); N.M. STAT. ANN. § 67-30-17 (Supp. 1965); N.Y. EDUC. LAW § 7611 (McKinney Supp. 1966); OKLA. STAT. tit. 59, § 1372 (Supp. 1966); ORE. REV. STAT. § 44.040(1)(d) (1965) (regular physician or surgeon); UTAH CODE ANN. § 58-25-9 (1953); WASH. REV. CODE ANN. § 18.83.110 (1961); WYO. STAT. ANN. §33-343.4 (Supp. 1965).

31. Alabama, Arizona, Arkansas, California, Delaware, Nevada, New Hampshire, New York, Oklahoma, and Washington.

32. GAP, *supra* note 18, at 112.

33. *See, e.g.*, ALA. CODE tit. 46, § 297(36) (Supp. 1965); "For the purpose of this chapter, the confidential relations and communications between licensed psychologist and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."

34. Zenoff, *Confidential and Privileged Communications,* 182 A.M.A.J. 657, 659 (1962).

35. Goldstein & Katz, *supra* note 18; Fisher, *supra* note 2.

chiatrist or psychologist, has characteristics and purposes which are distinct from those of the communications between attorney and client.

Nine other states have adopted psychologist-client statutes of various types.[36] The Colorado statute may be taken as illustrative:[37]

> A certified psychologist shall not be examined without the consent of his client, as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor shall a certified psychologist's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact the knowledge of which he has acquired in such capacity.

This statute, as well as the eighteen other psychologist-client statutes, limits the privilege to communications involving a "certified," "licensed," or otherwise "qualified" psychologist.

Four states have psychiatrist-patient statutes.[38] The best and most influential is the Connecticut statute, which was drafted by a blue ribbon panel of lawyers, law professors, and psychiatrists.[39] The statutes in Illinois and Florida are almost verbatim copies of the Connecticut statute.

The only other psychiatrist-patient statute is the Georgia statute. This statute is simplicity itself:[40]

> There are certain admissions and communications excluded from consideration of public policy. Among these are: . . .
> 5. Psychiatrist and patient.

The Georgia statute is confusing in its simplicity because it leaves open to interpretation questions as to whether all communications between psychiatrist and patient are privileged, whether communications in group therapy are privileged, and so on.

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36. Colorado, Florida, Illinois, Michigan, Montana, New Mexico, Oregon, Utah, and Wyoming.

37. COLO. REV. STAT. ANN. § 154-1-7(8) (Supp. 1966).

38. CONN. GEN. STAT. ANN. § 52-146a (Supp. 1965); FLA. STAT. ANN. § 90.242 (Supp. 1966); GA. CODE ANN. § 38-418(5) (Supp. 1966); ILL. ANN. STAT. ch. 51, § 5.2 (Smith-Hurd 1966).

39. *See* Goldstein & Katz, *supra* note 18 (article commenting on the statute by two of its draftsmen).

40. GA. CODE ANN. § 38-418 (Supp. 1966).

IV. THE PROPOSED ACT

The accompanying draft is based upon the Connecticut statute.[41] However, there have been amendments and additions to the basic statute, the most significant of which is the extension of the privilege to licensed or certified psychologists. Some of the amendments are similar to amendments proposed to the Connecticut legislature in 1963 by the original draftsmen. The preponderance of the changes serves to extend the scope of the privilege in some situations and to restrict it in others; however, some alterations are intended to make explicit that which is merely implicit in the Connecticut statute.

Important amendments are contained in the exceptions to the privilege. Each exception is the product of a policy judgment that in the particular situation described the benefit to litigation in eliciting the information exceeds the injury to the relationship. In other words, these exceptional situations fail to satisfy Wigmore's fourth condition.[42]

A detailed analysis of the proposed Act is contained in the Comments accompanying the Act.

SECTION 101. *Title.*

This Act shall be known, and may be cited, as the Psychotherapist-Patient Privilege Act.

SECTION 102. *Definitions.*

As used in this Act:

(a) "Patient" means a person who, during the course of diagnosis or treatment, communicates with a psychotherapist.

(b) "Psychotherapist" means a person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry, [or a psychologist skilled in the diagnosis and treatment of mental disorders], or a person reasonably believed by the patient to be qualified under either of these headings [this heading].

(c) "Authorized representative" means a person empowered by the patient to assert the privilege granted by this Act and, until given permission by the patient to make disclosure, any person whose communications are made privileged by this Act.

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41. CONN. GEN. STAT. ANN. § 52-146a (Supp. 1965).
42. *See* note 16 *supra.*

(d) "Communications" includes conversations, correspondence, actions, and occurrences relating to diagnosis or treatment, before or after institutionalization, regardless of the patient's awareness of such conversations, correspondence, actions, and occurrences, and any records, memoranda, or notes of the foregoing.

COMMENT: The Act first establishes the definitions essential to the operative sections. "Patient" is defined to include all persons receiving care from a psychotherapist on the theory that passive and reluctant patients should be protected as well as those who have evinced willingness to communicate by actively seeking help. This enlarged definition marks a change from the Connecticut statute, which might be interpreted as requiring a volitional act by the patient. The definition must be read with the definition of "communications." By declaring that a "patient" is one who "communicates" in the course of psychotherapeutic contacts, uniformity of terminology is achieved and the volitional connotations of "consults," the term used in the Connecticut definition, are avoided. Finally, the definition makes privileged only those communications made during a professional, as contrasted with a social, relationship.

"Psychotherapist" is defined to include both licensed medical practitioners specializing in psychiatry and licensed or certified psychologists skilled in the techniques of psychotherapy. However, in states which do not license or certify psychologists, the privilege established by this act extends only to medical practitioners specializing in psychiatry.

In order for the patient to know beforehand whether his communications will come under the privilege afforded by this Act, it is necessary to define precisely the communications that are to be privileged. Psychologist-patient communications cannot be so defined unless a "psychologist" is a member of a precisely defined class Such clear definition is impossible in states which do not license or certify psychologists. Thus, the exclusion of psychologists from the privilege in these states is a concession to practical realities even though such exclusion creates a logical inconsistency. The psychiatrist, as a licensed medical practitioner, can readily be distinguished from other psychotherapists. However, it is difficult to distinguish between the psychotherapeutic treatment practiced by the psychologist and that practiced by the psychiatrist. Both rely upon confidentiality for their effectiveness. The fine lines of distinction that might be drawn between the two kinds of treatment do not warrant the grant of a privilege to one and not to the other. Indeed, the illogic of limiting the present privilege to psychiatrists is a strong argument in favor of state licensing of psychologists.

It should be noted that relevant communications to a psychologist are privileged only when the psychologist is skilled in the diagnosis or treatment of mental disorders. The Act thus does not make privileged the communications made to the experimental psychologist, the individual psy-

chologist, or other psychologists who do not use the techniques of psychotherapy.

In two situations persons other than psychotherapists are silenced. First, the definition protects the reliance interest of patients communicating with non-psychotherapists with the reasonable expectation that their disclosures would be confidential. Whether the facts of a particular case bring it within this language is a matter for the court. Secondly, section 103, the operative portion of the statute, silences colleagues and agents of psychotherapists.

The definition of "authorized representative" is unchanged from the Connecticut statute. The "authorized representative" usually will be the patient's lawyer.

The definition of "communications" seeks to make explicit that which is merely implicit in the Connecticut statute. All information, however gathered, is encompassed within the Act, whether it comes from the words and actions of a willing patient or from someone who is unconscious. Thus the correct test is whether the patient, if he were comprehending, would demand confidentiality. All written evidence of the foregoing is likewise privileged. Communications in a public or social setting are not automatically privileged but, because of the all-inclusive nature of psychotherapy, the presumption should be for including communications within the privilege. Communications between a patient and psychotherapist after institutionalization, insofar as they relate to diagnosis or treatment of the patient's mental condition, are privileged under this Act; insofar as the communications between a patient and a psychotherapist after institutionalization relate to an attempt to determine the patient's mental condition, such communications may not be privileged under exception (b).

SECTION 103. *Creation of the Privilege.*

Except as hereinafter provided, in civil, criminal, and juvenile cases, in proceedings preliminary thereto, and in legislative and administrative proceedings, a patient, or his authorized representative, has a privilege to refuse to disclose, and to prevent a witness from disclosing, communications wherever made, relating to diagnosis or treatment of the patient's mental condition between patient and psychotherapist, or between members of the patient's family and the psychotherapist, or between any of the foregoing and such persons who participate, under the supervision of, or in cooperation with, the psychotherapist in the accomplishment of the objectives of diagnosis or treatment.

COMMENT: The operative section of the Act commences by establishing that in all proceedings communications shall be privileged. However, explicit reference to juvenile matters has been added to the Connecticut

version to preclude any argument that juvenile cases may not be included in "civil and criminal cases" and therefore may be outside the privilege.

A patient or his authorized representative may object to disclosure by a "witness" of confidential communications. This unchanged language is to be read to prevent the "eavesdropper" exception to the privilege. In support of this exception it is sometimes said that a hidden eavesdropper can testify because his unknown presence cannot discourage communications, but this reasoning is unpersuasive on several grounds. The prospect of an eavesdropper can restrict communications and unnerve the patient; electronic "bugging" can render ineffective a simple search for eavesdroppers; and the rationale encourages eavsdropping whereas modern law discourages invasion of privacy. It is also said that a patient who communicates knowing of the presence of an eavesdropper thereby waives confidentiality. To be sure, public disclosures are not privileged, but a patient's statements made with an eavesdropper present should not be considered public disclosures.

"Wherever made" is a minor addition to the Connecticut statute and means only that the locale of the communications shall not be important. Privileged communications can take place in the patient's home, the psychotherapist's office, a car, or any place not patently public.

The only communcations that are privileged by this Act are those relating to diagnosis or treatment of the patient's mental condition. However, in defining such communications, it would be unrealistic to grant a privilege only to those communications between patient and psychotherapist. In order to carry out an effective program of psychotherapy, it may be necessary for the psychotherapist to communicate with the members of the patient's family. On the other hand, the family may seek a psychotherapist in order to determine whether the patient is in need of psychotherapy. Regardless of which side supplies the initiative, communications between the psychotherapist and the members of the patient's family, insofar as they relate to diagnosis or treatment of the patient's mental condition, are privileged.

The complexity of modern psychotherapy may also require the involvement of other persons working under the supervision of or in cooperation with the psychotherapist. A psychiatrist may find it necessary to consult with another psychiatrist in diagnosing or in treating the patient's mental condition, or he may use other persons as means of communicating with the patient; these persons may include the patient's physician, marriage counselor, or others working under the supervision of the psychiatrist. In addition, the beneficial practice of group therapy requires communications by the patient to persons within the group. All of the preceding situations are intended as examples of persons who might participate with the psychotherapist in the accomplishment of the objectives of diagnosis or treatment; the situations described are not intended to be an exhaustive listing of those situations which would give rise to privileged communication.

SECTION 104. *Patient Incompetent to Waive Privilege.*

When a patient is incompetent to assert or to waive the privilege, a guardian shall be appointed and shall act in place of the patient under this Act. A previously appointed guardian shall be authorized to so act.

COMMENT: An incompetent patient must have a guardian to act in his best interests under this statute. The guardian has complete discretion, as would the patient in whose place he stands, to exercise or to waive the privilege.

SECTION 105. *No Adverse Inference from Exercise of Privilege.*

Upon the exercise of the privilege granted by this Act, the judge or presiding officer shall upon the request of the patient instruct the jury that no adverse inference may be drawn from the assertion of the privilege.

COMMENT: The Act provides that, upon the request of the patient, the judge shall instruct the jury that the exercise of the privilege warrants no inference that the patient has anything to conceal. This technique should ensure maximum effectiveness of the privilege granted.

SECTION 106. *Exceptions to Privilege.*

There shall be no privilege for any relevant communications under this Act:

(a) When a psychotherapist, in the course of diagnosis or treatment of the patient, finds it necessary to disclose such communication either for the purpose of placing the patient in a hospital for mental illness or for the purpose of retaining the patient in a hospital for mental illness (provided however that the provisions of this Act shall continue in effect after the patient is in said hospital) or for the purpose of placing the patient under arrest or under the supervision of law enforcement authorities because of the threat of imminently dangerous activity by the patient against himself or another person.

(b) If a judge finds that the patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of a psychiatric examination ordered by the court, provided that such

communications shall be admissible only on issues involving the patient's mental condition, but not admissions of guilt.

(c) In all proceedings except those involving child custody in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when said condition is introduced by any party claiming or defending through or as a beneficiary of the patient, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected.

(d) In child custody cases in which either party raises the mental condition of the other party as part of a claim or defense and the psychotherapist believes that disclosure is necessary because the patient's mental condition seriously impairs the patient's ability to care for the child.

(e) In all proceedings between the patient and the psychotherapist in which disclosure is necessary to a defense of the psychotherapist.

COMMENT: Exception (a) permits disclosure of relevant communications in four situations. The psychotherapist may disclose such communications for the purpose of placing or retaining the patient in a hospital for mental illness, or for the purpose of placing the patient under arrest or under the supervision of law enforcement authorities because of the threat of imminent self-inflicted harm or danger to another person. This provision extends beyond the similar provision in the Connecticut statute insofar as it incorporates a "future crime" exception. Thus, it is considered more important to protect relevant communications when crimes that are not danerous to the patient, the psychotherapist, or a third person are disclosed to the psychotherapist. Such crimes are not such a serious threat to society that the relationship between patient and psychotherapist should be jeopardized by permitting disclosure.

This exception is narrower than that in the Connecticut statute in that it permits disclosure for the purpose of placing the patient in a hospital for mental illness only when such disclosure is necessary to prevent imminently dangerous activity by the person against himself or another person. Thus, the psychotherapist is not free to disclose relevant communications for the purpose of placing the patient in a hospital for mental illness merely because the patient is mentally ill or mentally deficient in such a way that is not dangerous to himself or another person. This exception also permits disclosure when it is necessary for the purpose of retaining the patient in a hospital for mental illness because of the threat of imminent self-inflicted harm or danger to another person. Such a situation might arise when the patient's original commitment to the institution was voluntary.

This exception allows disclosure only when the activity threatened is *imminently* dangerous; it does not permit the disclosure of past criminal acts except insofar as past criminal acts indicate a threat of imminent danger.

The privilege granted by this Act shall continue in effect after the patient is in a hospital for mental illness. If the patient, after hospitalization, should participate in any of the privileged communications, the communications may not be disclosed.

Exception (b) is taken verbatim from the Connecticut statute. Confessions made by the patient to the examining psychotherapist are not excluded from the privilege by this exception; a confession does not involve the patient's mental condition. The person being examined should be clearly informed that notes are being taken and that a report will be sent to the court and he should be advised that he may decline to answer questions which he does not want included in the report.

This Act does not provide any specific exception for cases in which a person accuses another person of personal injury, especially sexual assault, even though such accusations by a mentally disturbed person may be the product of hallucinations. It is felt that exception (b) will cover these situations. If, in such a case, a judge feels that an accusation might be the product of the accuser's mental condition he should order a psychiatric examination.

Exception (c) is grounded on the theory that it is undesirable to permit persons to attempt to establish a claim or defense through a reliance on their mental condition and then to close off all further inquiry into that condition. By the terms of the exception the judge or presiding officer will make his own preliminary investigation as to whether or not a just resolution of the case demands that the communication be disclosd to the jury or to the public. This will protect a person from having any irrelevant communications disclosed. It will be observed that exception (c) has been altered from the parallel provision of the Connecticut statute. The provision has been expanded to include criminal cases (whereas child custody cases are not included, see exception (d)). Both judges and presiding officers are empowered to authorize disclosure of otherwise privileged communications so that parties to administrative proceedings will not be able to rely on their mental condition, secure in the knowledge that this condition will not be subject to scrutiny.

Exception (d) will not be found in the Connecticut statute. It has been added because any doubt by one parent about the capacity of the other to care for the child should be available for consideration. However, it is important to note that the question of disclosure is left in the hands of the psychotherapist. The party questioning the capacity of another to care for the child cannot force the psychotherapist to make disclosures. The psychotherapist himself must determine whether communications made to him by his patient indicate that the patient's mental condition seriously impairs his ability to care for the child; if the psychotherapist believes such a mental condition exists he should disclose any relevant communications.

Exception (e) is also new. It has been added to protect a psychotherapist who may find himself engaged in judicial or administrative proceedings with his patient. Such proceedings may be initiated by the patient, the psychotherapist, or a third party. To the extent that it is necessary for a defense of the psychotherapist, disclosure is permitted by this Act.

SECTION 107. *Effective Date.*

This Act shall go into effect 120 days after it is enacted.