CURRENT LEGISLATION

CIVIL RIGHTS

THE PROPOSED UNIFORM STATE CIVIL RIGHTS ACT: AN ANALYSIS WITH RECOMMENDATIONS

Recent statistical studies of the American labor force since 1950 reveal that discrimination in employment has continued unabated despite the development of state and federal equal employment policies. Among the disturbing figures are the following: (1) The white unemployment rate has declined 67% since the peak year 1940, while the Negro rate has declined only 51%;[1] (2) the median income of non-white males in 1962 was only 55% of the median income of white males;[2] (3) a Negro with a college education can expect to earn less over his lifetime than a white with an eighth-grade education.[3] In addition, since World War II there has been a steady decline in unskilled occupations ("traditionally Negro") and an increase in skilled work opportunities, a trend which seems certain to continue.[4] Frustrated in the labor market and unable to acquire or afford the education necessary to develop skills, many Negroes have resigned themselves to joblessness or menial labor, and are thus unqualified for the increasing skilled opportunities.[5] Yet, if they had confidence that jobs would be available to them according to their qualifications, the resignation might end: the result would be a stronger labor force in this country.[6]

State fair employment practice commissions (FEPC) have been struggling to provide equal employment opportunity since 1945, but many commentators feel that their efforts have not been fruitful and/or that their methods are outmoded.[7] A Uniform State Civil Rights Act, drafted by a

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1 Norgren & S. Hill, Toward Fair Employment 76 (1964).

2 Hearings Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Welfare, 88th Cong., 1st Sess. 323 (1963) [hereinafter cited as Senate Hearings]. The percentage has been sporadically declining since the peak war year 1951 when it was 62%. Ibid.

3 Id. at 325. For comments and more specific statistics in the same area, including a comparative study of white and Negro incomes according to particular occupations, see id. at 321-88.

4 Norgren & S. Hill, op. cit. supra note 1, at 88-90.

5 Ibid. See Mendelson, Discrimination 70 (1962); Senate Hearings, supra note 2, at 377; Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62-63 (1964).

> Negroes who are forced to take jobs beneath their capabilities and cannot aspire for advancement do not inspire their children to improve their education to meet a similar blank wall.

Senate Hearings, supra note 2, at 99 (statement of Under Secretary of Labor John F. Henning).

6 See Bonfield, State Civil Rights Statutes: Some Proposals, 49 Iowa L. Rev. 1067, 1079-80 (1964).

7 Although most of the authors cited in this article have criticized the inadequacies of present FEP legislation, by far the most outspoken and critical is Herbert Hill, National Labor Secretary of the NAACP. For example:

Special Committee of the National Conference of Commissioners on Uniform State Laws, has now crystallized progressive policies and improved administrative techniques into proposals for new legislation. It is the intent and purpose of this comment to analyze and evaluate this Uniform Act in the light of the past twenty years of state FEPC experience.

I. The Need for a Uniform State Civil Rights Act

The first FEPC was created by President Roosevelt in 1941,[8] and, in following years, for varying terms, four more commissions succeeded each other. These presidential commissions were limited to preventing discrimination in the federal civil service, government contracts, and essential wartime industries.[9] In 1964, under the constitutional power of the commerce clause, Congress passed a Civil Rights Act[10] (CRA) which proclaimed equal employment opportunity to be a national policy and declared mandatory standards for employers to follow. Since optimum implementation of this policy can only occur on the state level, the Equal Employment Opportunity Commission (EEOC) created by the CRA will defer processing a complaint where the state of origin offers adequate relief.[11] Assuming that states naturally desire the minimum of federal intervention, it is expected that legislatures, even in the South, will be developing civil rights legislation which will be satisfactory under the CRA.[12] The proposed Uniform Act, then, offers states that are willing to adopt it, in whole or in part, an opportunity for real improvement in this area.

State FEPCs have endured various growing pains in their sporadic development since the first was created by New York in 1945. They have suffered from low budgets, limited powers, small staffs, public apathy, and political and business pressures.[13] One high official in the National Association for the Advancement of Colored People (NAACP) has declared:

> It is evident that state commissions are much too concerned with avoiding hostility from businessmen, too careful to refrain from

> Given the significant developments in the American economy during the last twenty years together with the current status of the Negro wage-earner in states with FEPC laws we must conclude on the basis of the evidence that state FEPC laws have failed.

H. Hill, Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations, 14 Buff. L. Rev. 22, 23 (1964).

8 Exec. Order No. 8802 (June 25, 1941). This order was the result of a threatened march on Washington by an estimated 100,000 discontented Negroes seeking to share equally in the wartime boom in jobs. Lockard, The Politics of Antidiscrimination Legislation, 3 Harv. J. Leg. 3, 4-5 (1965).

9 For a history of the growth and development of federal FEPC and the futile efforts to establish a permanent agency, see Norgren & S. Hill, op. cit. supra note 1, at 149-79.

10 Civil Rights Act of 1964, 78 Stat. 241 (1964), 42 U.S.C. 2000a (1964) [hereinafter cited as CRA].

11 CRA § 706(b).

12 Thirty-six states presently have FEPCs. Four of these states, Arizona, Nebraska, Nevada, and Utah, enacted their laws in 1965; one state, Kentucky, added its statute in 1966.

13 In addition, there were often lengthy and bitter political battles prior to the passage of FEP legislation. See generally Lockard, supra note 8.

> interfering with the stability of manufacturing enterprise or union power, and insufficiently concerned with the welfare of the Negro job seeker.[14]

Increasing criticism of the administration of FEP laws brought about congressional legislation; it must also prod the states into an examination and improvement of their provisions for the protection of equal employment opportunity.

In the Fall of 1963, the National Conference appointed a Special Committee on Civil Rights Legislation which shortly thereafter retained Professor Norman Dorsen of New York University Law School as its draftsman. Professor Dorsen's First Tentative Draft was approved in August 1965 as to basic policy matters, and he was authorized to prepare a Second Tentative Draft, which draft is the focal point of this comment. Primarily, the proposed act offers to the states legislation designed to fulfill the purposes and requirements of the CRA, but Professor Dorsen has also included various sections which would provide, for states that desire it, "a complete law against discrimination." Taken as a whole, these additional sections comprise what the draftsman refers to as the "Model Act." Interwoven with the provisions of the basic Uniform Act, the Model Act extends, broadens, and strengthens fundamental civil rights legislation.[15] Consequently, it is the Model Act which will receive primary attention in this comment.[16]

As with previous proposed uniform laws, the National Conference intends to press for substantial acceptance of their civil rights act in all states. Uniformity in this area of the law, besides adhering to the policies of the federal act, would have several advantages.[17] It would allow for the possible creation of a central clearing house for state FEP statistics and other information, through which the various commissions could exchange problems, solutions and suggestions.[18] It would allow for greater interstate cooperation when one or more complainants contest the policies of a company doing business within several states.[19] And it would give assurance to the Negro laborer, technician, salesman or union member[20] that he may move to a new locality,

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14 H. Hill, supra note 7, at 38.

15 There are further distinctions between the National Conference's definitions of "uniform" and "model" acts. See Dunham, A History of the National Conference of Commissioners on Uniform State Laws, 30 Law and Contemp. Prob. 233, 247 (1965).

16 To avoid confusion, the proposed State Civil Rights Act will henceforth be consistently termed the "Model Act."

17 Professor Dorsen submitted a memorandum to the Special Committee in September 1964 analyzing the beneficial possibilities of a uniform civil rights act. Dorsen, The Prospects For a Uniform or Model Civil Rights Act (1964).

18 Granting that such a clearing house would be valuable even without a uniform civil rights law, it would be considerably more effective if all the contributors were utilizing similar administrative techniques. For example, since only a few states permit civil rights groups to file complaints about discrimination in employment, it is very difficult to assess the benefits and disadvantages of such permission. A wider spectrum of experience is needed. On the value of a uniform reporting system, see Greenberg, Race Relations and the Law 201 (1959).

19 See Bamberger & Lewin, Antidiscrimination Commissions, 74 Harv. L. Rev. 526, 576-77 (1961); Senate Hearings, supra note 2, at 316.

20 Despite professed national union policies, the Negro laborer is completely at the

work for the same interstate employer, and not forfeit an opportunity for advancement equal to that held in the original state. Such benefits from a uniform civil rights law would be potent weapons in eliminating employment discrimination, which traditionally forms in regional or sectional patterns, because it would enable cooperating state FEPCs to attack the roots of the problem even though outside the jurisdiction of any particular commission.[21]

II. Analysis of the Model Act

A. *Inclusions and Exemptions*

Most of the definitions and provisions of the Model Act are put in the broadest terms so that the states may make them as inclusive as they wish. Section 201(a) defines "person" similarly to the CRA,[22] but adds "or other legal or commercial entity" as a catch-all supplement to the various designated individuals and associations. The state and its agencies are also defined as "persons" under the act,[23] since every state with FEP legislation now extends that law to its own employees.

Section 301(a), defining "employer," leaves open to the states the question of how many employees will bring one within the jurisdiction of the act. A state wishing only to satisfy the federal law need not include employers of fewer than twenty-five under the statute.[24] Presently the number necessary varies greatly among the states,[25] with the majority designating from four to eight employees as sufficient to invoke jurisdiction.[26] It would seem to be a wise policy for adjoining states with similar industries to designate the same number of employees for coverage under their statutes. Such cooperation would better serve to eliminate discriminatory policies within interstate businesses by thwarting the prejudiced employer who does his hiring in a state with less extensive jurisdiction.[27]

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mercy of his local, and the local decides whether he works or waits. Caldwell, Discrimination and Fair Employment Practice Laws, 16 Lab. L.J. 394, 395 (1965). Correcting the discriminatory practices of labor unions is mainly a problem of enforcement, and interstate cooperation is essential. See generally Norgren & S. Hill, op. cit. supra note 1, at 40-55; H. Hill, supra note 7, at 59-66.

21 It may be necessary to include in the various state statutes provisions authorizing cooperation with a central clearing house and the commissions of other states. Section 702(e) of the Model Act empowers the Human Rights Commission to cooperate with the Federal EEOC and "other federal and local agencies." This section could easily be broadened to include other state FEPCs.

22 CRA § 701(a).

23 Presently half of the states having FEP laws define the state itself as a "person," while most of the others include it as an "employer." E.g., Mass. Ann. Laws ch. 151B, § 1(1) (1965) ("person"); Ohio Rev. Code Ann. § 4112.01(B) (Baldwin 1964) ("employer"). New York's statute does not include the state under either definition, but the state's highest court has ruled that the Human Rights Commission has jurisdiction over all public agencies. Board of Higher Education v. Carter, 14 N.Y.2d 138, 199 N.E.2d 141 (1964).

24 CRA § 701(b).

25 E.g., Alaska (1); Arizona (20); Illinois (50); Nevada (15); Wisconsin (1).

26 E.g., Colorado (6); Connecticut (5); Michigan (8); New York (4).

27 Herbert Hill of the NAACP gives an example of this situation: when the New York Human Rights Commission charged Eastern Airlines with discrimination in the hiring of stewardesses from New York, the airlines responded that, if pressed, it would do all its hiring in Florida, which has no civil rights statute. Interview with Herbert Hill

The definition of "employment agency" in Section 301(c) of the Model Act is written in terms of the statutorily-defined "person," and thus includes state employment agencies since the state is a "person." Those FEP statutes which include the state as an "employer," and not as a "person," but define an employment agency in terms of a "person," could have construction difficulties bringing a public employment service within the jurisdiction of the statute.[28]

The "labor organization" definition of section 301(d) is the standard comprehensive provision used in the CRA[29] and most state acts.

Section 301(a)(2) of the act, following CRA section 701(b)(2), suggests an exemption for "a bona fide membership club (other than a labor organization) exempt from taxation under Section 501(c) of the Internal Revenue Code of 1954." This section of the IRC exempts sixteen separate types of fraternal and non-profit organizations,[30] but there seems to be no policy reason for the state to include this exemption within its civil rights statute,[31] and the Model Act does not recommend it. A fraternal organization should be free to select its members, but, like any other employer, it should not be allowed to discriminate when hiring people to work for it. Nevertheless, Arizona and Nevada, two states which recently enacted civil rights legislation, have included the CRA exemption in their statutes,[32] and Utah's new law exempts *any* "bona fide private membership club."[33] New York, on the other hand, recently repealed a similar exemption which had been in its laws since 1945.[34] Other states vary the general exemption or leave it out completely.[35]

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at Boston College Law School, Feb. 1, 1966. Of course the federal CRA would now cover this case; but, if the employer had less than the jurisdictional number of employees, the EEOC could not intervene. In that latter situation, *no* commission could control the discriminator.

28 Several states have made this apparent legislative oversight. E.g., Cal. Lab. Code § 1413 (Supp. 1965); Ohio Rev. Code Ann. § 4112.02 (Baldwin 1964). Illinois and Kansas avoid the issue by specifically including state employment services. Ill. Ann. Stat. ch. 48, § 852(e) (Smith-Hurd Supp. 1965) ("public employment agencies"); Kan. Gen. Laws § 44-1002(e) (Supp. 1961) ("governmental agencies").

29 CRA § 701(d).

30 E.g., agricultural or horticultural associations, fraternal, religious, or educational associations.

31 Bamberger & Lewin, supra note 19, at 562. The theory behind the Internal Revenue Code's exemption for certain religious, educational and fraternal non-profit associations is that these groups perform a public purpose by relieving the public, to some extent, of a burden properly belonging to it. Duffy v. Birmingham, 190 F.2d 738, 740 (8th Cir. 1951). But if these groups discriminate in their hiring practices, is it not true that a "public purpose"—equal employment opportunity—is being frustrated, rather than advanced?

32 Ariz. Rev. Stat. Ann. § 41-1461(A) (Supp. 1965); Nev. Laws 1965, ch. 332, § 10(1)(c).

33 Utah Code Ann. § 34-17-2(5) (Supp. 1965).

34 N.Y. Laws 1965, ch. 851, amending N.Y. Executive Law § 292(5). Apparently New York got tired of separating the genuine "private membership clubs" from those which were merely façades to evade the law. See, e.g., Castle Hill Beach Club v. Arbury, 208 Misc. 35, 142 N.Y.S.2d 432 (Sup. Ct. 1955), aff'd, 2 N.Y.2d 596, 142 N.E.2d 186 (1957).

35 E.g., Mass. Ann. Laws ch. 151B, § 1(5) (1965) (exemption for any non-profit

Religious corporations and associations are permitted to use religion as a criterion for employment under section 308(b) of the act, but only where an individual is being employed "to perform work connected with the carrying on . . . of its religious activity." Although many states fail to include this last clause,[36] there is no satisfactory reason why a church or charity need hire only members of its own faith for janitorial or secretarial jobs,[37] and several states qualify the exemption as does the Model Act.[38]

Where an educational institution is controlled by a religious group, the Model Act suggests, in section 309(b), that an exemption apply only where "the choice of employees is calculated by such organization to promote the religious principles for which it is established or maintained." This is a more limited qualification than that provided for in the comparable section of the CRA,[39] and is in keeping with the principle of Section 308(b) of the Model Act. New York's 1965 amendments added this exact qualification,[40] but the recent enactments in Arizona,[41] Nevada[42] and Utah[43] followed the CRA exemption verbatim. It has been suggested that the selective criteria used by religious institutions be exempted from civil rights statutes where related to "a bona fide religious purpose"[44] or "a bona fide occupational qualification for employment,"[45] but these provisions are too ambiguous. The phraseology of the Model Act takes a long step toward defining just what a "bona fide religious purpose" is. Some states allow religious institutions a blanket ex-

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social club or fraternal association); Minn. Stat. § 363.02(3) (1961) (exemption for fraternal organizations with respect to bona fide religious qualifications in hiring); Mich. Comp. Laws § 423.302 (Supp. 1961) (no exemption stated).

36 E.g., Mo. Ann. Stat. § 296.010(3) (1965).

37 See statement of Edward Howden of the California FEPC, Senate Hearings, supra note 2, at 230:

> There is no question here of membership in such non-profit associations; only employment by them is at issue. And in point of fact many of the jobs filled by non-profit hospitals and clubs bear no relationship at all to the religious, fraternal, or other sponsorship of the institution. My suggestion is, therefore, that there should be qualified exemption of non-profit employers of a religious or a fraternal nature so that . . . they would not be exempt with respect to those jobs for which no such requirements exist.

But see Cal. Lab. Code § 1413(d) (Supp. 1965) (unqualified exemption for fraternal or non-profit organizations).

38 E.g., Neb. Laws 1965, L.B. 656, § 3(1).

39 CRA § 703(e)(2) reads:

> it shall not be an unlawful employment practice for [an] . . . educational institution . . . to hire and employ employees of a particular religion if such . . . educational institution . . . is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion . . . .

40 N.Y. Laws 1965, ch. 851, amending N.Y. Executive Law § 296(9).

41 Ariz. Rev. Stat. Ann. § 41-1463(2) (Supp. 1965).

42 Nev. Laws 1965, ch. 332, § 14(2).

43 Utah Code Ann. § 34-17-6(2)(b) (Supp. 1965).

44 Bonfield, supra note 6, at 1108.

45 Minn. Stat. §§ 363.02(1), (3) (1961).

46 E.g., Cal. Lab. Code § 1413(d); Ill. Ann. Stat. ch. 48, § 852(d) (Smith-Hurd Supp. 1965). But see Colo. Rev. Stat. Ann. § 80-21-2(5) (1963) (religious organizations exempt unless "supported in whole or in part by money raised by taxation or public borrowing").

emption,[46] while others permit no exemption whatsoever,[47] but the better view is to allow a specific qualified exemption. In that way a legal compromise is struck between freedom of religion and equal employment opportunity.

The qualified exemptions for religious associations and institutions suggested by sections 308(b) and 309(b), while employing different terminology, are, in fact, identical. In view of this, to consolidate the ideas and avoid confusion, it is submitted that one exemption will suffice, as it does in most states.[48] The terminology of section 309(b) is preferable as being less susceptible to problems of construction.[49]

The Model Act does not recommend an exemption for educational institutions, although many states exclude them from the definition of "employer."[50] As the Comment to Section 308(c) of the Model Act quite reasonably points out, "if discrimination against students is forbidden, there seems little ground to permit discrimination against individuals seeking jobs as their teachers and deans."

Following the list of unlawful practices in the Model Act and all state statutes is a clause permitting the use of what would otherwise be discriminatory criteria if relevant to a "bona fide occupational qualification." The term has caused much confusion and administrative uncertainty, with the first two words usually being construed according to public policy.[51] "The desires of co-workers, traditional patterns of employment, and preferences of customers have not been accepted as legitimate qualifications."[52] It seems perfectly reasonable and consistent with public policy to allow selection on the basis of race or nationality where such criteria are clearly necessary to the operation of a business. It would avoid many problems if an employer who wishes to specify a particular race, religion, or nationality was compelled

47 See, e.g., Mich. Comp. Laws §§ 423.301-.311 (Supp. 1961) (no exemption stated). Perhaps states which make no specific exemption for religious organizations or institutions feel that the problem is handled by the general exemption for a "bona fide occupational qualification." Yet such an attitude seems merely to shift the responsibility from the legislative to the judicial branch.

48 E.g., N.Y. Executive Law § 296(9), as amended, N.Y. Laws 1965, ch. 851.

49 Herbert Hill suggests that there would be no construction problem whatsoever if, as he recommends, the exemption were limited to situations where a "religious function is to be performed by the employee." Interview with Herbert Hill at Boston College Law School, Feb. 1, 1966.

50 E.g., Mass. Ann. Laws ch. 151B, § 1(5) (1965); Ore. Rev. Stat. § 659.010(6) (1959).

51 New York courts found themselves in a quandry a few years ago when the local representative of an Arabian oil company sought to restrict his hiring to non-Jewish persons on the grounds that the foreign country would not grant visas to Jews. The court of appeals ultimately held that New York's antidiscrimination policies would not yield to the influence of a foreign power. American Jewish Congress v. Carter, 19 Misc. 2d 205, 190 N.Y.S.2d 218 (Sup. Ct. 1959), modified, 10 App. Div. 2d 833, 199 N.Y.S.2d 157 (1960), aff'd, 9 N.Y.2d 223, 173 N.E.2d 788 (1961).

52 Bamberger & Lewin, supra note 19, at 560. Thus, the Michigan Civil Rights Commission refused to allow a local school board to discriminate against Negro teachers applying for jobs, despite the board's belief that student reaction would be highly unfavorable. Ross v. School Board, 5 Race Rel. L. Rep. 1247 (Mich. 1960). Nor did the Michigan Commission accept a theater owner's excuse that hiring Negroes as ticket-takers would result in a drop in attendance. Jimmerson v. Savoy Theater, 5 Race Rel. L. Rep. 914 (Mich. 1960).

to petition the state FEPC, *before* advertising or hiring, for certification as a "bona fide occupational qualification." At least two states, Ohio[53] and Rhode Island,[54] already employ this technique. If followed uniformly, prior certification would lead to a precedential list of specific exemptions which would apprize the employer and the commission of the merit of a particular request.[55] It is therefore submitted that the Model Act should add a provision requiring FEPC certification of any employment practice which discriminates under claim of a "bona fide occupational qualification."

B. *Unlawful Practices*

Sections 302 to 306(a), delineating the employment practices proscribed by the act, are patterned after the CRA[56] and are fairly standard throughout the states. Section 306(b) is a provision recommended "for states that wish to go beyond the CRA." This section prohibits the use of questions on applications for employment which directly or indirectly require the applicant to reveal his race, religion[57] or nationality. Several states already have such provisions and offer a list of prohibited questions.[58] It would be unlawful, for example, to require the applicant to submit a photograph of himself *before* he is hired; *after* hiring, submission of a photo for identification purposes is allowed.[59] Such provisions would probably be waived where a "bona fide occupational qualification" requires, *e.g.*, a photograph from a woman applying for a job as a cocktail waitress or a model.

The Model Act, in addition to prohibiting discriminatory questionnaires from employers, recommends making it unlawful for one seeking employment to specify, in a commercial publication, his own race, religion or nationality, or to make such inquiries of his prospective employer. Section 307 thus would prevent someone "from trying to induce discrimination in [his] favor"[60] when applying for a job. This seems to be an excellent provision, since the purpose behind the civil rights statute is to eliminate discrimination wherever it orig-

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53 Ohio Rev. Code Ann. § 4112.02(E) (Baldwin 1964).

54 R.I. Gen. Laws Ann. § 28-5-7(D) (1956).

55 Employment services could also benefit from such a list, since it would not be necessary to check with the FEPC every time a questionable application was received. A Hollywood movie producer, for example, was referred to the FEPC by the California State Employment Service when he requested several thousand Caucasian actors to play the parts of delegates to a political convention at which no Negroes were present. Bamberger & Lewin, supra note 19, at 580.

56 CRA §§ 703-04.

57 The majority view is that an employer is prohibited from asking not only what the applicant's religion is, but even whether he has one at all. A request such as the latter would still technically involve discrimination on grounds of religion. Opinion of Oregon Attorney-General, 1 Race Rel. L. Rep. 1163 (1956); Cal. Pre-Employment Inquiries, 6 BNA Lab. Policy & Prac. 451:156 (May 13, 1965); Hawaii Pre-Employment Inquiries, id. at 451:296 (Feb. 3, 1966). Contra, N.M. Pre-Employment Inquiries, id. at 451:857 (Sept. 30, 1965); R.I. Pre-Employment Inquiries, id. at 451:1083 (1965); Spitz, Tailoring the Techniques to Eliminate and Prevent Employment Discrimination, 14 Buff. L. Rev. 79, 89 (1964).

58 E.g., California, Massachusetts, Minnesota, Ohio, Washington.

59 Ohio Pre-Employment Inquiries, 6 BNA Lab. Policy & Prac. 451:947 (1965); Wash. Pre-Employment Inquiries, id. at 451:1245 (Aug. 19, 1965).

60 Model Act § 307, Comment.

inates, and removing this temptation would be a valuable "ounce of prevention." A few states already have provisions similar to section 307,[61] and others might come to the same result under a general section prohibiting any person from aiding, inciting or compelling another to commit a discriminatory act.[62]

Chapter Eight of the Model Act recommends several important supplementary sections which would round out and strengthen civil rights legislation. Only found in a minority of state statutes, these provisions are essential to a meaningful, respected FEP law. Chapter Eight makes it an unlawful practice for a person, or two or more persons conspiring,[63] to retaliate or discriminate against one who has filed a complaint or, in some other way, assisted the commission;[64] to attempt to commit discriminatory practices;[65] to willfully obstruct a person from complying with the act;[66] to willfully resist or impede the commission or its members.[67] Such provisions clothe the commission with the indicia of effective legal authority and will cause the Negro to develop the confidence in that body which leads to his essential cooperation with it.

There has been much discussion on whether existing racial imbalances ought to be corrected or adjusted through "quota systems" or preferential treatment.[68] Both the Model Act and the CRA[69] declare that nothing in the statute "requires"[70] such corrective measures, but top Negro leaders have often argued that preferential selection is necessary to "overcome the historical disadvantage under which the Negro has suffered."[71] The obvious

[61] E.g., Mich. Comp. Laws § 423.303(e) (Supp. 1961); Ohio Rev. Code Ann. § 4112.02(F) (Baldwin 1964); Pa. Stat. Ann. tit. 43, ch. 17, § 955(g) (1964).

[62] Such a section is found in almost all FEP statutes. E.g., Model Act § 801(b); N.Y. Executive Law § 296(6) (1962).

[63] The conspiracy provision is not found in any existing state statute, but was suggested by a model act proposed by the Harvard Journal of Legislation. A Proposed Model State Civil Rights Act, 3 Harv. J. Leg. 63, 81 (1965).

[64] Accord, CRA § 704(a); Mich. Comp. Laws § 423.303(f) (Supp. 1961); Ragland v. Detroit, 4 Race Rel. L. Rep. 1069 (Mich. 1959).

[65] Accord, R.I. Gen. Laws Ann. § 28-5-7(F) (1956).

[66] Accord, Utah Code Ann. § 34-17-6(e) (Supp. 1965).

[67] Accord, Minn. Stat. § 363.03(7) (1961).

[68] E.g., Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62, 77 (1964); Lichtman, The Ethics of Compensatory Justice, 1 Law in Trans. Q. 76, 84-103 (1964); Robison, Giving Reality to the Promise of Job Equality, id. at 104; Rosen, The Law and Racial Discrimination in Employment, 53 Calif. L. Rev. 729, 756-70 (1965).

[69] CRA § 703(j).

[70] Quaere: Does use of the word "require" imply that a least some amount of preferential treatment will be allowed by the FEPC?

[71] Hearings Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Welfare, 88th Cong., 1st Sess. 225 [hereinafter cited as Senate Hearings] (statement of James Farmer, National Director, CORE); see id. at 203-05 (statement of Roy Wilkins, Executive Director, NAACP). Herbert Hill, National Labor Secretary, NAACP, believes that

> although the argument for preferential treatment may have important legal weaknesses, they are overcome by sociological necessity. You just can't expect the Negro to compete effectively with the white man in the labor market; he is not equipped well enough. In this respect, equal employment opportunity is really

rebuttal is that legislation which acquiesces in the adjustment of imbalances by such methods would not only be "discrimination in reverse,"[72] but would be tantamount to an unconstitutional ex post facto law.[73] It is one thing to encourage equal employment *opportunity*, but quite another to encourage equal employment.

As a realistic compromise between the advocates of preferential treatment and its opponents, certain affirmative programs could be instigated by state FEPCs. For example, commissions should encourage employers to make job openings known to the Negro community, such as by advertising in Negro newspapers or magazines and interviewing at Negro schools and colleges.[74] Unions should be urged to expand their apprenticeship and training programs to provide greater opportunities for Negroes seeking to improve themselves and develop skills.[75] In addition, by the discreet application of informal civic and social pressures,[76] the commission could convince the business community of its determination to implement its policies. Such programs as those mentioned above are more subtle and more effective in the long run than blatantly substituting preferential selection for prior adverse discrimination, and they would bring more Negroes within the protective provisions of the civil rights statute by placing opportunities for employment within their grasp. In this way the FEPCs could direct a strong attack against two prime factors producing patterns of discrimination: The Negro's lack of confidence in his

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> an obsolete concept. We must equalize the Negro himself, economically and educationally, before we can truly equalize the opportunities.

Interview with Herbert Hill at Boston College Law School, Feb. 1, 1966.

72 Opinion of Calif. Attorney-General, 9 Race Rel. L. Rep. 1051 (1964). Attempts to compel employers to hire more Negroes have generally been held unlawful:

> [P]icketing to obtain replacement of white employees by Negroes or any other attempt to obtain racial discrimination in employment is a violation of the public policy of this state as set out in the Fair Employment Practice Act . . . .

Fair Share Organization, Inc. v. Mitnick, 134 Ind. App. 675, 685, 188 N.E.2d 840, 845 (1963); accord, Ex parte Ford, 58 L.R.R.M. 2087 (E.D. Mo. 1964); Hughes v. Superior Court, 32 Cal. 2d 850, 198 P.2d 885 (1948), aff'd, 339 U.S. 460 (1950); In re Young, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961).

73 An ex post facto law is "a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." Black, Law Dictionary 662 (4th ed. 1951). Thus, the racial imbalances which existed in certain businesses prior to the passage of the civil rights legislation would have the legal consequence of compelling those employers to now grant preferential treatment to Negroes.

74 See Norgren & S. Hill, Toward Fair Employment 87-88 (1964); Girard & Jaffe, Some General Observations on Administration of State Fair Employment Practice Laws, 14 Buff. L. Rev. 114, 116 (1964).

75 See State Comm'n For Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. 1964) (with Commission's proposed program); Norgren & S. Hill, op. cit. supra note 74, at 272-75; H. Hill, Twenty Years of State Fair Employment Commissions: A Critical Analysis With Recommendations, 14 Buff. L. Rev. 22, 59-61 (1964).

76 These pressures might include

> unfavorable publicity, difficulties with other government agencies, problems with civil rights groups, . . . as well as appeals to the conscience, the sense of social responsibility, the publicly proclaimed principles of those who control economic opportunities. . . .

Girard & Jaffe, supra note 74, at 115.

ability to acquire a decent job and his lack of qualifications. The draft of the Model Act under consideration suggests, in the comment to section 314, that correction of racial imbalances be left to the states. This has been done because "state and local commissions should be free to experiment and not subjected to inadequately tested restrictions." Yet the Model Act includes many rarely-tested provisions, recommendations and alternative proposals. In this instance it would certainly be highly valuable if the Special Committee on Civil Rights Legislation, with its background and experience, would suggest affirmative programs, similar to those above, which would lead to gradual adjustment of this social problem.[77]

C. *The Administrative Agency*

Under the CRA, the EEOC will defer to a state civil rights statute where it creates an "authority to grant or seek relief from" an unlawful employment practice.[78] According to N. Thompson Powers, Executive Director of the EEOC, mere criminal proceedings as the only method of enforcement will not merit deferment by the Federal Commission.[79] In view of this, the Model Act creates a Commission on Human Rights with enforceable, quasi-judicial powers.[80] The commission, under sections 701(a) and (b), should be bipartisan, appointed for staggered terms (to preserve continuity), and independent of other state agencies.[81] The governor should appoint the chairman,[82] "to discourage internal politicking." The number of commissioners is left to the states to decide, based on "the volume of activity expected." The states now vary from four to eleven,[83] although it seems practical to have an odd number to avoid deadlock votes,[84] unless the chairman either abstains or is

[77] Such affirmative programs must become a definite function of the FEPC if real progress is ever to be made toward effectuating equal employment opportunity. Dependence on the complaint-adjustment system may lead to appeasement of the Negro individual, but never to rehabilitation of the Negro class.

[78] CRA § 706(b).

[79] Dorsen, Uniform Civil Rights Act, Prefatory Note (Tent. Draft No. 2, 1965). Thus, some recent state statutes which create only criminal penalties will not merit deferment: e.g., Me. Rev. Stat. Ann., ch. 7, § 851 (Supp. 1965); Vt. Stat. Ann. tit. 21, § 495 (Supp. 1965).

[80] But cf. Draper v. Clark Dairy, Inc., 17 Conn. Supp. 93, 96 (1950) (argument that the commission proceedings are inquisitorial rather than quasi-judicial).

[81] Independence tends to produce decisions uninfluenced by external political and administrative circumstances. Complaints and investigations of discrimination could get delayed or de-emphasized among the activities of the parent agency. Yet, in several states, the FEPC is part of a larger department; e.g., Hawaii (Labor and Industrial Relations); New Jersey (Law and Public Safety); Oregon (Labor); Pennsylvania (Labor and Industry); Utah (Industrial Commission); Wisconsin (Industrial Commission).

[82] Under the Federal Civil Rights Act, the President appoints the Chairman of the Commission. CRA § 705(a).

[83] E.g., Massachusetts (4); Rhode Island (5); New York (7); Minnesota (9); Connecticut (10); Pennsylvania (11). Since the number of FEP commissioners should vary proportionately to the Negro population of the state, the effectiveness of the Massachusetts Commission is immediately questionable. According to the 1960 census, Massachusetts had a Negro population almost six times that of Rhode Island (18,332) and Minnesota (22,263). Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States, table no. 23 (86th ed. 1965).

[84] Report of the Special Study Comm'n to Review the Functions and Policies of the Mass. Comm'n Against Discrimination 12 (Dec. 30, 1964).

allowed to break ties. Various other geographical and residential considerations enter into the selection of commissioners by the states,[85] but the Model Act avoids them "because they could foreclose certain competent people from serving on the Commission."[86]

A significant defect in the Model Act, and, without apparent exception, all state civil rights acts, is the lack of any educational, occupational or professional qualifications for membership in the commission. It has long been a complaint of Negro leaders that all too often these jobs go to housewives, relatives of legislators or mere "political job-seekers" who are usually unfamiliar with the problems involved and thus ineffectual as commissioners.[87] Although the approval of the state senate is required for the appointments in most states, this vote is a mere formality, and instances of rejection are extremely rare.[88] It is therefore submitted that qualifications such as the following should become an integral part of state civil rights statutes: Any person appointed to the Human Rights Commission must have (1) a background of business, civil rights activity or labor relations;[89] (2) a reasonably contemporary affiliation with, or knowledge of, the employment practices in the state;[90] (3) a genuine interest in, and desire to implement, the state's policies on fair employment practices;[91] (4) the time to give matters of equal employment opportunity full and complete consideration.[92] The application of criteria such as those suggested would produce a commission of optimum

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85 Colo. Rev. Stat. Ann. § 80-21-4 (1963) (geographical area representation); Ill. Ann. Stat. ch. 48, § 855(a) (Smith-Hurd Supp. 1965) (residence in state for last five years); Nev. Rev. Stat. § 233.040 (1963) (representative of religious, racial, and ethnic groups in state).

86 Model Act § 701(a), Comment.

87 Interview with Herbert Hill at Boston College Law School, Feb. 1, 1966.

88 When instances of rejection do appear, they are usually heavy with political overtones. When the Illinois FEPC was created, for example, the state senate, fearing a strong commission, rejected two highly-qualified nominees: one was a prominent Negro businessman who had served on President Roosevelt's FEP Committee, and the other was a white Jewish labor leader whose union had continually backed civil rights programs. "They were rejected purely because of prior associations and affiliations." Minsky, FEPC in Illinois: Four Stormy Years, 41 Notre Dame Law. 152, 158 (1965).

89 Besides assuring the commissioner's familiarity with the problems, this requirement should lead to appointments of people who will have respect from, and influence upon, those citizens most affected by the civil rights law. This will be especially important in conciliation attempts.

90 The commission should not include "retired old businessmen" or men who have been members of other governmental agencies which had nothing to do with fair employment problems.

91 A commission can be only as effective as its individual members. A lackadaisical, disinterested commissioner causes delays and unsatisfactory adjustment of complaints.

92 One of the principal factors causing the disturbing delays in the final settlement of complaints is that FEP commissioners cannot spare the necessary time from their businesses or professions. In California, for example, the commissioners devote only "seven to ten days a month to FEPC activity." Note, The California FEPC: Stepchild of the State Agencies, 18 Stan. L. Rev. 187, 188 (1965). In view of this, it has even been suggested that FEP commissioners have no other business or employment. Note, A Proposed Model State Civil Rights Act, 3 Harv. J. Leg. 63, 77 (1965). But this requirement seems unnecessarily restrictive; a more flexible rule allows for the appointment of a valuable person whose business or employment does allow sufficient time.

efficiency, experience and dedication, and one acceptable to both employer and employee.

Section 701(d) of the Model Act suggests that each member of the commission receive an annual salary plus expenses so that they "treat their responsibilities as a fulltime job." Many states now provide only for expenses,[93] or a per diem wage,[94] with only a few offering annual salaries.[95] If commissioners are to be expected to take time away from their professions and businesses and make themselves available to complainants, it would seem that the act's proposal must be adopted. Well-paid commissioners will also be more likely to sense the obligations and responsibilities of their positions; they will tend to probe deeper into patterns of discrimination and look beyond the individual complainants. In addition, more competent men will accept such positions if the remuneration is substantial.[96]

The commission is authorized, by Section 702 of the Model Act, to set up as many offices throughout the state "as it deems necessary,"[97] to appoint a sufficient staff, to establish local commissions, to cooperate with the EEOC,[98] to publish studies and submit reports and to create advisory agencies.[99] Procedurally, the commission may "receive, initiate, investigate, seek to conciliate, and pass upon complaints alleging violations of this Act." Except for the power to "initiate" complaints,[100] these provisions are standard. The Special Committee on Civil Rights Legislation is completely in favor of commission-originated complaints, a practice which is authorized under the CRA[101] and many state acts.[102] In the 1963 Senate Hearings on Equal Employment Opportunity many prominent political and civic leaders stressed the importance of the power to initiate action,[103] and there has been a wealth

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93 E.g., Colo. Rev. Stat. Ann. § 80-21-4 (1963); Conn. Gen. Stat. Ann. § 31-123 (1960).

94 E.g., Cal. Lab. Code § 1416 (Supp. 1965) ($50); Pa. Stat. Ann. tit. 43, § 956 (1964) ($15); Wash. Rev. Code Ann. § 49.60.070 (1962) ($20).

95 E.g., Ohio Rev. Code Ann. § 4112.03 (Baldwin 1964) ($5000); R.I. Gen. Laws Ann. § 28-5-11 (1956) ($2500).

96 Norgren & S. Hill, op. cit. supra note 74, at 275.

97 Although it is essential to the program of the FEPC to make itself available to complainants, few state commissions have more than one main office. New York has seven regional offices, and Ohio has five, but only three more states have even two offices. Id. at 145. See Note, The California FEPC, supra note 92, at 197-99 (criticizing the inaccessibility of the offices of the California FEPC).

98 The reciprocal power of the EEOC to cooperate with state civil rights agencies is found in CRA § 709(b).

99 The primary function of the advisory agencies would be "public education," an activity which a twelve-state conference of FEP commissioners in 1958 voted the best means of overcoming discrimination. Within the category of "public education" the conference included community meetings with majority and minority group leaders, labor-management conferences, pamphlets, and bulletins. Konvitz & Leskes, A Century of Civil Rights 215-16 (1961).

100 Model Act § 702(g), Comment.

101 CRA § 706(a).

102 E.g., Conn. Gen. Stat. Ann. § 31-125(e) (1960); Pa. Stat. Ann. tit. 43, § 957(f) (1964). New York recently amended its statute to include the power to initiate complaints. N.Y. Executive Law § 295(6)(b), as amended, N.Y. Laws 1965, ch. 851.

103 E.g., Senate Hearings, supra note 71, at 153 (statement of George Meany); id.

of law review support.[104] Professors Girard and Jaffe present the majority view when they argue that, if limited to the settling of individual complaints by citizens, FEPCs are ineffectual in combatting discrimination patterns:

> Some commissions appear to do little more . . . than adjust the well-founded grievances of particular complainants, and then only if they persist to the end in their demand for relief. Action on this basis seems plainly inadequate—an indefensible frittering away of the commissions' resources and potentialities, like trying to drain a swamp with a teaspoon.[105]

State FEP statutes are generally exercises of the police power, aimed at promoting and protecting the public welfare,[106] rather than providing a remedy for private grievances. Thus, it seems unnecessary and self-defeating to restrict commission action to citizen complaints. A member of the commission, acting as a representative of the state, should be allowed to file a complaint when he learns of any discrimination in employment practices.

Linked with the power to initiate complaints is the power to conduct investigations without anyone, citizen or commissioner, filing a written complaint. The Model Act implies that investigation can only follow a legitimate complaint, a limitation which may result from the fear of a McCarthy-like inquisition. Yet many commentators see such commission action as the best way to attack patterns of discrimination in employment;[107] their view is that the commission should "regard itself as a means set up by the state to combat discrimination whenever and wherever it has reason to believe it exists and is amenable to its powers."[108] Although several states allow the commission to initiate complaints,[109] only a few specifically allow it to investigate freely areas of employment discrimination without the filing of a formal complaint.[110] Richard K. Berg, now Deputy General Counsel of the EEOC, has criticized the CRA for denying this power to the commission:

at 465-66 (statement of Jacob Sheinkman, AFL-CIO); id. at 282 (statement of Governor Endicott Peabody).

104 See, e.g., Norgren & S. Hill, op. cit. supra note 74, at 251-52; Bamberger & Lewin, Antidiscrimination Commissions, 74 Harv. L. Rev. 526, 528-32 (1961); Sutin, The Experience of State Fair Employment Commissions: A Comparative Study, 18 Vand. L. Rev. 965, 1045-46 (1965).

105 Girard & Jaffe, supra note 74, at 115.

106 See, e.g., N.Y. Executive Law § 290 (1962) (". . . an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state . . . ."); Rabkin, Enforcement of Laws Against Discrimination in Employment, 14 Buff. L. Rev. 100, 107-08 (1964).

107 Senate Hearings, supra note 71, at 231 (statement of Edward Howden, Executive Officer, California FEPC); Norgren & S. Hill, op. cit. supra note 74, at 230-33; Bamberger & Lewin, supra note 104, at 536-38; Minsky, supra note 88, at 178-79; Sutin, supra note 104, at 1045-46; Note, The California FEPC, supra note 92, at 203-05.

108 Rabkin, supra note 106, at 108.

109 See statutes cited note 102 supra.

110 E.g., N.Y. Executive Law § 295(6)(b), as amended, N.Y. Laws 1965, ch. 851; Ohio Rev. Code Ann. § 4112.04(B)(2) (Baldwin 1964); Utah Code Ann. § 34-17-5(4) (Supp. 1965). The Philadelphia FEPC has also made use of investigatory powers. Comm'n of Human Rel. v. Greater Phila. Rest. Operators Ass'n, 6 Race Rel. L. Rep. 337 (Pa. 1960).

> The Federal Commission is not authorized . . . to conduct an investigation in the absence of a formal charge. This is a serious lack since experience has shown that nondiscrimination agencies can achieve more positive results through broad investigations of employment patterns and practices than through procedures geared to the resolution of individual complaints.[111]

Perhaps the power to investigate is inferable as a necessary prior adjunct to the power to initiate complaints,[112] but a specific legislative grant would eliminate the possibility of a restrictive judicial construction of the scope of authority. It would also encourage broad use of commission weapons. The cautiousness and conservatism with which commissions operated in their early formative years should now give way to an enlightened use of their enlarged powers. The case-by-case attacks on the visible portion of the discrimination iceberg must now be equaled by systematic assaults on that part hidden below the surface—the patterns of discrimination formed by habit, prejudice and ignorance.

It is often insisted that governmental administrative bodies must avoid incorporating, in one agency, the powers of accusation, investigation, prosecution and adjudication.[113] There appears to be a constitutional objection, on the grounds of violation of the due process provisions of the fourteenth amendment, to having one body perform all these functions.[114] The main thrust of this argument is that one who has investigated, discussed and advocated one side of an issue cannot be expected to be an impartial judge in the end. The Model Act and most state civil rights statutes attempt to avoid this problem by a separation of powers within the commission itself.[115] Under sections 703(a) and (b) of the act, the commission's staff investigates complaints—filed by a citizen or a commissioner—to determine probable cause; if probable cause is found, one member of the commission attempts to eliminate the discriminatory practice through "conference, conciliation, and persuasion"; if probable cause is denied, the complainant may receive a "de novo" review before three commissioners (or the chairman); finally, if a hearing does become necessary, section 703(g)(2) prohibits the three (or one) review commissioners and the conciliating commissioner from serving on the three-man hearing board. They may not "participate in the hearing or in the subsequent deliberation of the Commission." Thus, according to the Model Act, to fully protect the rights of the respondent and insure a fair hearing of the case, a minimum of seven commissioners would be necessary, five if

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111 Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62, 82 (1964).

112 See Bamberger & Lewin, supra note 104, at 536-37.

113 See, e.g., Administrative Procedure Act § 5(c), 60 Stat. 239 (1946), 5 U.S.C. § 1004(c) (1964).

114 See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). But cf. Marcello v. Bonds, 349 U.S. 302 (1955).

115 Even this "internal separation" comes up against frequent opposition. Many critics believe that the only fair procedure is to divorce completely the investigating and prosecuting agency from the adjudicating. Davis, Administrative Law Text § 13.05 (1959).

the chairman conducts the review.[116] For some reason the Model Act does not foreclose a commissioner who files a complaint from acting as a hearing examiner. This is a serious oversight, since it is fundamental justice that the accuser must not be the judge. To correct this error, therefore, an eighth commissioner is needed.

Some states provide for an independent board of "hearing examiners" whose only connection with the commission is adjudicatory.[117] This could be a very inefficient method of meeting the separation-of-functions requirement, since the hearing examiners, convening only rarely, will have only a limited knowledge and understanding of the problems involved.

The jurisdiction of the commission is, of course, state-wide and primary in cases of employment discrimination.[118] The fact that the same employment practices of one employer may be subject to review by other state agencies does not detract from commission jurisdiction. Nor is the commission bound by the findings or rulings of those other bodies.[119] As a matter of fact, if another state agency commits a violation of the civil rights statute, that agency might find itself the respondent in an action brought by the Human Rights Commission.[120]

Since the FEPC is the most knowledgeable "fact-finder" in cases involving discriminatory labor practices, legislation is often designed to make the commission remedy, rather than an available civil or criminal action, considerably more attractive to the complainant.[121] The greatest advantage of the commission procedure over the civil suit is that the former will cost the complainant nothing. The civil action should not be statutorily eliminated, however; a plaintiff should have the right to expose his grievance in open court and seek, from a jury, exemplary damages greater than the commission could offer.[122]

New York courts recently clarified their law relating to jurisdiction of the Human Rights Commission. In *Board of Education v. Carter*,[123] it was held that the board's status as a statutorily-exempt "educational organiza-

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116 Model Act § 703(g)(2), Comment.

117 E.g., Conn. Gen. Stat. Ann. § 31-124 (1960); Wash. Rev. Code Ann. § 49.60.250 (1962).

118 The state FEPC also has jurisdiction over any interstate employers who hire within the state. Colorado FEPC v. Continental Airlines, 372 U.S. 714 (1963); Atchison, T. & S.F. Ry. v. FEPC, 7 Race Rel. L. Rep. 164 (Cal. 1962).

119 Ragland v. Detroit, 4 Race Rel. L. Rep. 1069 (Mich. 1959).

120 See note 23 supra and accompanying text.

121 In addition, a complainant who has instituted a civil or criminal action is foreclosed, in many states, from later seeking commission remedies. E.g., N.Y. Executive Law § 300; Pa. Stat. Ann. tit. 43, § 962(b) (1964); Wash. Rev. Code Ann. § 49.60.020 (1962). On election of remedies, see Bamberger & Lewin, supra note 104, at 573-74. For a comparison between civil, criminal, and commission remedies, see Bonfield, State Civil Rights Statutes: Some Proposals, 49 Iowa L. Rev. 1067, 1110-14, 1118-19 (1964). For discussion on the NLRB as a means of relief for discrimination in employment, see Norgren & S. Hill, Toward Fair Employment 213-17 (1964); Rosen, The Law and Racial Discrimination in Employment, 53 Calif. L. Rev. 729, 781-98 (1965).

122 See Bonfield, supra note 121, at 1118.

123 14 N.Y.2d 138, 199 N.E.2d 141 (1964).

tion"[124] did not remove it from the commission's jurisdiction over state agencies; and, in *Gaynor v. Rockefeller*,[125] a court of equity refused relief to a Negro group seeking union membership because a "full and adequate remedy is . . . available to the plaintiffs by way of resort to the State Commission For Human Rights. . . ."[126]

Local FEPCs, with powers similar to the parent agency, may be created in municipalities under Chapter Nine of the Model Act.[127] Their jurisdiction is subordinate to that of the commission, and their rulings must be compatible with that of the higher body. Under section 904(a), the commission may refer to the municipal FEPC any case which it believes would be handled better in the original locality.[128] Local commissions are recommended for the same reason that state FEPCs could be more effective than the federal EEOC: the closer the administrative body is to the problem and the more familiar it is with the business and employers involved, the more effective will be its efforts at conciliation and persuasion and the more thorough its understanding of the problems.[129]

D. *Complaint Procedure*

1. *Filing the Complaint.*—Any individual "claiming to be aggrieved by an unlawful practice" may file a complaint with the commission under Section 703(a) of the Model Act. However, the act, like most administrative legislation, does not further explain what is meant by "aggrieved." Different civil rights statutes have established different criteria for standing to sue. In the CRA, for example, the complainant must be "the individual against whom the discrimination was practiced";[130] the same is true in Michigan;[131] but in Ohio, apparently the complainant need only plead the discriminatory practices of the respondent and need not allege his own injury.[132] Two questions are presented by the uncertain definition of the word "aggrieved": (1) Could a person be a legitimate complainant if he applied for a job knowing that he

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124 This exemption was removed by the 1965 amendments to the statute. N.Y. Laws 1965, ch. 851, amending N.Y. Executive Law, § 292(5) (1945).

125 15 N.Y.2d 120, 204 N.E.2d 627 (1965).

126 Id. at 132, 204 N.E.2d at 633.

127 Without such enabling legislation, several states have differed on the constitutional question of whether the local agency is foreclosed by state pre-emption of the area. E.g., Kentucky v. Beasy, 386 S.W.2d 444 (Ky. Ct. App. 1965) (not foreclosed); Mid-West Employers Council, Inc. v. Omaha, 177 Neb. 877, 131 N.W.2d 609 (1964) (foreclosed). Compare Opinion of Mich. Attorney-General, 3 Race Rel. L. Rep. 798 (Mich. 1958) (foreclosed), with Opinion of Mich. Attorney-General No. 4211 (Nov. 18, 1963) (not foreclosed for purposes of education and mediation, only enforcement).

128 The Federal CRA will also defer to municipal FEPCs. CRA § 706(b).

129 See generally Bamberger & Lewin, supra note 104, at 581-84; Bonfield, supra note 121, at 1123-29; Jones, Local Contracts and Sub-Contracts: The Roles of City Government and Private Citizen Groups, 14 Buff. L. Rev. 140 (1964).

130 EEOC Legal Interpretations VIII(A)(1)(a), 6 BNA Lab. Policy & Prac. 401:36 (Nov. 11, 1965).

131 Mich. FEPC Rules of Practice 4(a)(a-1), 6 BNA Lab. Policy & Prac. 451:602 (1965).

132 Ohio Rev. Code § 4112.05(B) (Baldwin 1964) ("Whenever it is charged . . . by a person . . . that any person . . . has engaged or is engaging in unlawful discriminatory practices . . . .").

would be refused but wanting to create the basis for a complaint; and (2) could a group of persons similarly discriminated against complain as a group? In response to the first question, a civil rights act ought to be construed liberally, since it is the elimination of the unlawful practice itself, not the genuineness of the complainant's standing, that should receive the main emphasis.[133] The second question would be answered negatively by the Model Act, partly because section 703(a) specifies an "individual" complainant, and partly because each member of the complaining group would be subject to the personal defenses involving intelligence and qualifications.[134]

Following provisions in the Ohio[135] and Rhode Island[136] statutes, Section 703(a) of the Model Act suggests that chartered civil rights groups be allowed to file complaints.[137] This exception to the "aggrieved person" rule is intended to take care of those cases in which individuals, through fear, ignorance or sheer laziness, refuse to set in motion the administrative machinery. It appears beneficial to vest civil rights groups with this power, if only because their familiarity with the problem can be of value to a commission seeking to eliminate, with the individual complaints, the discriminatory patterns in employment.

The Model Act also provides that the respondent be given a copy of the complaint *before* the staff begins its investigation for probable cause. Although following the federal statute,[138] this provision is contrary to "virtually unanimous state practice."[139] A strong argument in support of the provision is that an employer has the right to know why the commission is examining his affairs: public policy favors informing a man of such investigations against him. The purpose behind the general state practice to delay sending the respondent a copy of the complaint until the hearing (if necessary) is postponement of a formal accusation[140] and subsequent duty to file a binding answer. These states feel that keeping things informal until the conciliation

133 See, e.g., De Matas v. Local 32-B, Bldg. Serv. Employees Union, 6 Race Rel. L. Rep. 1208 (N.Y. 1961) (no discrimination found against complainant but respondent ordered to correct other abuses); Bell v. American Smelting & Ref. Co., 7 Race Rel. L. Rep. 158 (Wash. 1962) (same); Comm'n on Human Rel. v. O'Shea, 5 Race Rel. L. Rep. 1266 (Pa. 1960) (complainant lost standing under statute of limitations; commission still ordered discriminatory practices eliminated).

134 Gaynor v. Rockefeller, supra note 125, at 129, 204 N.E.2d at 631.

135 Ohio Rev. Code Ann. § 4112.05(B) (Baldwin 1964).

136 R.I. Gen. Laws Ann. § 28-5-17 (1956).

137 It has been held that, without such statutory authority, a civil rights group has no standing to sue. American Jewish Cong. v. Hill, 1 Race Rel. L. Rep. 971 (N.Y. 1956). But cf. American Jewish Cong. v. Carter, 19 Misc. 2d 205, 206, 190 N.Y.S.2d 218, 220 (Sup. Ct. 1959). It might be argued that, since the "aggrieved person's agent" may file the complaint under § 703(a) of the Model Act, a civil rights group could qualify as "agent." This may be true; however, the primary purpose for the extension of standing to a civil rights group is to cover the situation where the individual refuses to complain, and, of course, there can be no agent without a principal.

138 CRA § 706(a).

139 Model Act § 703(a), Comment. California and Illinois are two states which provide for the respondent's immediate notification. Cal. Lab. Code § 1422.1; Ill. Ann. Stat. ch. 48, § 858(a) (Smith-Hurd Supp. 1965).

140 California even substitutes the word "accusation" for "complaint" once conciliation attempts fail and a hearing becomes imminent. Cal. Lab. Code § 1423.

process is complete tends to promote more settlements without the necessity of a hearing. The position of the Model Act, that the respondent receive immediate notification, offers employers substantial protection from frivolous claims.[141] More importantly, however, it lessens the possibility of antagonism and resistance toward the activities of the commission. The respondent should be made to realize that his receipt of a copy of the complaint does not formalize charges against him, but rather informs him that the commission seeks his cooperation in a prompt correction of discriminatory practices if they exist. If they do not exist, the commission wants to know what caused the complainant to object and whether the situation could be adjusted to avoid similar problems in the future.

2. *Finding Probable Cause.*—Application of the criterion of probable cause has always been very difficult for jurists, and it is no less so for the investigating staff of a Human Rights Commission. Lacking a legal background, the staff member must apply the test to the complaint as his common sense dictates. Some statutes have sought to clarify the judgment that is necessary by referring, not to probable cause, but to "substantial evidence,"[142] or "reasonable cause."[143] Ohio proceeds to the conciliation stage when "it is probable that unlawful discriminatory practices have been or are being engaged in."[144] California begins the settlement process when the investigator decides "further action is warranted."[145] Section 703(b) of the Model Act retains the use of "probable cause," because the Special Committee "tended to doubt the value of a verbal change in the standard."[146]

If the administrative use of "probable cause" is not obsolete, it is at least unworkable as a fair criterion in its present state of non-uniform application. Too often the commission's layman investigator tends to confuse "probable cause" with a near-positive finding that the unlawful act has been committed,[147] whereas the test should be satisfied when evidence is uncovered

[141] If the employer knows the discriminatory practices charged to him, and he has a valid defense, he might prevent a groundless claim from going beyond the probable cause stage.

[142] E.g., Alaska Stat. § 18.80.110 (Supp. 1965); Ill. Ann. Stat. ch. 48, § 858(a) (Smith-Hurd Supp. 1965).

[143] E.g., Conn. Gen. Stat. Ann. § 31-127 (1960); Neb. Laws 1965, L.B. 656, § 18; the federal CRA and the NLRA also use the "reasonable cause" test. CRA § 706(a); NLRA, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(1) (1964).

[144] Ohio Rev. Code Ann. § 4112.05(B) (Baldwin 1964).

[145] Cal. FEPC Rules of Practice § 19003(c), 6 BNA Lab. Policy & Prac. 451:138 (Aug. 5, 1965).

[146] Apparently the Special Committee has changed its mind: the latest revisions to Chapter Seven of the Model Act (Nov. 1965) include "reasonable cause" instead of "probable cause." But this improvement is actually negligible, alleviating none of the problems underlying the term "probable cause." See note 147 infra.

[147] Conversely, it is highly likely that many findings of probable cause are based on nothing more substantial than the investigator's mere suspicions, knowledge of past employment practices, or desire to "bring to justice" an employer with a reputation for prejudice. A clearer, more precise standard might eliminate two undesirable situations: (1) Where a "timid" investigator, cowed by the respondent's social and business position, is reluctant to make the initial affirmative finding; and (2) where an aggressive investigator, inspired by lofty civil rights ideals, is too quick to find facts which support the complaint.

which indicates a strong likelihood or probability. Rarely does a Negro avail himself of his legal right to appeal when he is confronted with a letter from the FEPC, in legal jargon and quoting statutory sections, announcing that his complaint has been dismissed "for lack of probable cause."[148] The phrase is badly in need of revision or replacement.[149] If the staff investigator is to be expected to apply it correctly, and if the Negro is to be encouraged to turn to his legal remedies, the law must provide directions they can comprehend. This is particularly important in a section, such as "probable cause," with which the layman will likely come into personal contact. The following criterion is therefore proposed as a substitute for "probable cause": The investigating staff member should recommend an attempt at a conciliation conference when he determines that evidence[150] exists which tends to establish the veracity[151] of the complaint.

In addition to recommending a change in the terminology, many commentators advocate a relaxation of the initial requirements for a prima facie case.[152] Their argument is that because of the high rate of complaints immediately dismissed many "aggrieved persons are discouraged from filing valid complaints."[153] New York boasts the most efficient, progressive, highest-

[148] Interview with Herbert Hill at Boston College Law School, Feb. 1, 1966.

[149] Several commentators, however, feel that the very flexibility of the probable cause standard makes it a valuable commission instrument. See, e.g., Carter, Practical Considerations of Anti-Discrimination Legislation—Experience Under the New York Law Against Discrimination, 40 Cornell L.Q. 40, 46-47 (1954); Girard & Jaffe, Some General Observations on Administration of State Fair Employment Practice Laws, 14 Buff. L. Rev. 114, 118 (1964) ("we do not believe . . . that implementation of the laws . . . has been retarded materially by indefiniteness in the probable cause concept."); Sutin, The Experience of State Fair Employment Commissions: A Comparative Study, 18 Vand. L. Rev. 965, 1027-28 (1965); Note, The California FEPC: Stepchild of the State Agencies, 18 Stan. L. Rev. 187, 191-92 (1965). Yet it seems to be manifest injustice to subject complainants, respondents, and the public to the arbitrary or capricious decisions of a layman investigator. Without a statutory explanation of the probable cause standard, the staff investigator is entrusted with a responsibility he is in all likelihood not equipped to discharge.

[150] The word "evidence" is chosen because it implies that the investigator must base his judgment on something substantial and tangible, rather than mere suspicion or intuition. See note 147 supra and accompanying text. In addition, when there is a firm foundation to the initial determination of discrimination, the commissioner in charge of conciliation has the needed weapons to successfully negotiate a satisfactory settlement. The evidence need not constitute positive proof; it should suffice that inferences may be reasonably drawn from it which substantiate the charge of discrimination. For examples of this kind of evidence, see Carter, supra note 149, at 47.

[151] "Veracity" here does not mean the truthfulness of the complainant; his sincerity is presumed. Rather, it means the *correctness* of the complaint, the accuracy of the charge. The fundamental conflict lies between the complainant's assertion of discriminatory intent and the respondent's denial of such intent. Only one of these claims is true, and the investigator should recommend further action only if it is more likely that it is the complainant's assertion which is correct. Thus, the credibility of the respondent is a crucial factor in determining discrimination. See Sutin, supra note 149, at 1028.

[152] E.g., Girard & Jaffe, supra note 149, at 118; H. Hill, Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations, 14 Buff. L. Rev. 22, 24-25 (1964); Note, Employment Discrimination, 16 W. Res. L. Rev. 608, 620-21 (1965).

[153] H. Hill, supra note 152, at 25.

budgeted FEPC in the country, yet between 1945 and 1963 the commission dismissed 73.6% of the complaints received for lack of probable cause.[154] This seems to indicate far too strict an application of the initial test; it is especially surprising because the state's highest court has recognized the difficulty of establishing discrimination.[155] It is arguable that relaxing the standard would leave employers vulnerable to groundless claims and would overload the commission;[156] however, these considerations are outweighed by the importance of putting the Negro's grievances on the discussion table, especially during the first several years of employment integration. Perhaps a reasonable compromise would be a statutory recommendation that those investigating resolve doubtful or ambivalent evidentiary facts in favor of the complainant. Such a qualification relieves somewhat the complainant's burden of proof while still requiring "evidence which tends to establish the veracity of the complaint."

If the complaint is dismissed for lack of probable cause, the complainant may, under section 703(c) of the act, apply for a de novo review within the commission. The respondent, however, may not appeal an affirmative finding of probable cause—to the commission or the courts—as that does not constitute a final determination of the rights of the parties.[157] Review by the commission of a dismissal is available in about half the states.[158] This seems preferable to a court review, since courts rarely disturb an administrative finding anyway, unless it is arbitrary. A double-check in this manner by the commission protects complainants against a poor or hasty judgment by investigating staff members.

3. *"Conference, Conciliation and Persuasion."*—Once the staff has found probable cause, one or more members of the commission, under section 703(d) of the act and most state statutes,[159] will attempt to get the respondent to voluntarily eliminate the unlawful practice. Some commissions frequently entrust the investigating staff with this responsibility,[160] but in a bargaining situation where cajolery, coercion and compromise play such an important role, the leverage of an authoritative position is essential, and one of the commissioners ought to handle the conference.

Techniques for the settlement of the case will, of course, vary with the individual problems involved, but it is advisable for the commission to avoid

[154] Id. at 54. Recent figures in California show 60%-70% of the complaints received are dismissed for lack of probable cause. Note, The California FEPC, supra note 149, at 191 n.34.

[155] Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954) ("we deal with an area in which subtleties of conduct . . . play no small part. . . .").

[156] Bamberger & Lewin, Antidiscrimination Commissions, 74 Harv. L. Rev. 526, 539 (1961).

[157] Application of Local 373, United Ass'n of Journeymen, 40 Misc. 2d 440, 243 N.Y.S.2d 61 (Sup. Ct. 1963). Cf. Jeanpierre v. Arbury, 4 N.Y.2d 238, 149 N.E.2d 882 (1958) (a finding of *no* probable cause is reviewable by the court).

[158] E.g., Mich. FEPC Rules of Practice 6, 6 BNA Lab. Policy & Prac. 451:603 (1965); Mo. FEPC Rules of Practice art. 3, id. at 451:682 (Jan. 6, 1966); Pa. Stat. Ann. tit. 43, § 959 (1964).

[159] The statutes of Nevada and Wyoming make no provision for an intermediate conciliation period between complaint and hearing.

[160] E.g., Conn. Gen. Stat. Ann. § 31-127 (1960); Iowa Laws 1965, H.B. 263, § 9(3).

delays harmful to the complainant; seeking more extensive terms from the respondent is admirable when not at the expense of the complainant's relief. Massachusetts, for example, permits the conciliating commissioner a broad scope of discussion: he is not limited to the discriminatory practice complained of, but may attempt to eliminate "any other discovered during the course of investigation."[161] While this sort of provision is an excellent extension of commission powers, the negotiator must beware, in his zeal, not to compromise the complainant's rights. An employer's promise to employ more Negroes in executive positions does not help the complainant seeking secretarial work.

To protect the complainant from extended, futile conciliation periods, Wisconsin sets a time limit on the proceedings.[162] Another idea, followed in Illinois, is to include the complainant in the conciliation conferences,[163] although this could conceivably make the respondent less willing to yield ground. A third proposal is to make conciliation agreements automatically subject to review by the entire commission,[164] but this could create unreasonable delays in effectuating the terms.

Terms agreed upon during the conciliation process should be reduced to writing, and, as suggested by the Model Act, declared an order of the commission or entered in court as a consent decree.[165] Section 803 of the act makes it unlawful to violate a conciliation agreement. Thus the court may punish[166] the violation of the bargain without reconsidering the original discriminatory practices.[167] Although only half of the states provide for such enforceable compacts,[168] it appears to be an excellent method to insure compliance with the settlement.

4. *The Limitation of Publicity.*—The Model Act, along with almost all the state statutes,[169] forbids disclosure of the conciliation processes.[170] The hope is that such privacy, by offering protection to the respondent who reveals his practices and policies, will lead to frank and honest discussion at

161 Mass. FEPC Rules of Practice 2(b), 6 BNA Lab. Policy & Prac. 451:564 (1965).

162 Wis. Ind. Comm'n Rules of Practice 88.08(3)(b), id. at 451:1280 (Jan. 6, 1966).

163 Ill. Ann. Stat. ch. 48, § 858(a) (Smith-Hurd Supp. 1965).

164 Rabkin, Enforcement of Laws Against Discrimination in Employment, 14 Buff. L. Rev. 100, 108-09 (1964).

165 An order of the commission may be judicially enforced, if necessary, upon application and a showing of procedural regularity. A consent decree is a court-approved contract, upon which the commission could sue for specific performance. See Ill. Ann. Stat. ch. 48, § 858(a) (Smith-Hurd Supp. 1965) (order); N.Y. Executive Law § 297(2)(a) (consent decree),; Wash. Rev. Code Ann. § 49.60.240 (1962) (order).

166 By a contempt citation or other penal sanctions. New York, for example, makes it a misdemeanor to violate a commission order, with the possibility of a $500 fine or a year in jail. N.Y. Executive Law § 299.

167 See, e.g., Local 35, IBEW v. Connecticut Comm'n on Civil Rights, 18 Conn. Supp. 426 (Super. Ct. 1954) (union cited for contempt in failing to follow FEPC order).

168 See note 165 supra.

169 E.g., Mass. Ann. Laws ch. 151B, § 5 (1965); Minn. Stat. § 363.06(6) (1961); Ohio Rev. Code Ann. § 4112.05(B) (Baldwin 1964). Cf. Ill. Ann. Stat. ch. 48, § 858(a) (Smith-Hurd Supp. 1965) (disclosure permitted at respondent's request).

170 The Model Act and most state statutes do not provide penalties for violation of the non-disclosure provision. But cf. CRA § 706(a) ($1000 fine or one year in jail); Ariz. Rev. Stat. Ann. § 41-1481(B) (Supp. 1965) (commissioner or employee may be dismissed); Neb. Laws 1965, L.B. 656, § 18(1) ($1000 fine or one year in jail).

the conferences. The Model Act, however, does permit publication in two instances where state allowance varies: Under section 703(c), the commission may publish an account of a case which was dismissed for lack of probable cause; and, under section 703(d), it may publish the terms of a conciliation agreement.[171] The first exception offers additional protection to employers against frivolous claims;[172] the second encourages potential complainants to have confidence in the commission.

The refusal of many states to publish agreements reached through conciliation is based on the belief that the respondent will be more willing to cooperate with the negotiators if he is assured of secrecy.[173] This belief is a prime example of the sort of negative thinking that has kept FEPCs weak and ineffectual. The respondent is certainly in no position to object to publicity; if he refuses to cooperate in a settlement which will be disclosed to the public, the commission should use its strongest weapon—the open hearing. There are many examples of obstinate respondents who have backed down at the final minute when they realized that the commission would go through with the trouble of a public hearing.[174] If the respondent is made to realize that his choice lies between the publication of a conciliation agreement and the harsh light of a public hearing, he will likely choose the former. At least the settlement shows that he has "voluntarily" adjusted his practices and corrected his "mistakes." The damage that a public hearing can do to some businesses, regardless of the final decision, may be irreparable.

The threat of adverse publicity also has a great deterrent value. With the growing buying power of the Negro and the sympathy a boycott receives,[175] a businessman will be less likely to discriminate if detection means publicity. But if he knows that he can settle quietly, in a private confrontation with the commission, he can indulge his prejudices with little fear of adverse reactions.[176]

5. *The Formal Hearing.*—If the conciliation attempts are unsuccessful, the respondent will receive a second[177] copy of the complaint, requiring a written answer and an appearance at a hearing before three members of the commission. Section 702(h) gives the commission the power to "compel the attendance of witnesses, examine witnesses under oath or affirmation, and require the production of documentary evidence. . . ." The same section suggests that individual commissioners be able to issue subpoenas. Most states

171 See, e.g., Conn. Gen. Stat. Ann. § 31-127 (1960) (allows publication of dismissed complaint and conciliation agreement).; Colo. Rev. Stat. Ann. § 80-21-7(4) (1963) (prohibits publication of both); Pa. Stat. Ann. tit. 43, § 959 (1964) (allows publication of conciliation terms without disclosure of the identities of the parties); R.I. Gen. Laws Ann. § 28-5-27 (1956) (publication of dismissed complaint only).; Wash. Ad. Code § 162-08-005(5) (1962) (publication of conciliation terms only).

172 There are two kinds of protection here: (1) Those who would file groundless claims may be discouraged; and (2) a reputation for discrimination, created by news of the complainant's charges, may be averted.

173 See Rabkin, supra note 164, at 112.

174 See Norgren & S. Hill, Toward Fair Employment 107-08 (1964).

175 Id. at 223-24.

176 This has been emphasized as the greatest drawback to the restriction on publicity. BNA, The Civil Rights Act of 1964, at 68 (1964).

177 See text accompanying note 138 supra.

grant this power,[178] although a few require two or more members to authorize a subpoena,[179] and some require the approval of the chairman.[180] Such formal devices, however, impede commission procedure by creating unnecessary delays and offer only negligible legal protection. A commissioner not responsible enough to be trusted with the power to subpoena should not be on the commission.

One of the commission's own attorneys, under section 703(h)(1) of the act, presents the case for the complainant. Unless the commission has more than one attorney, the problem of overlapping functions reappears[181] at this point, since the commission will probably require legal advice on substantive and procedural matters.[182] It is therefore recommended that the commission retain at least two attorneys, as authorized by Section 702(c) of the Model Act.

The respondent, either personally or through his counsel, may examine and cross-examine witnesses at the hearing. The Model Act also gives this privilege to the complainant, although the majority of the states do not, since it tends to create a "three-party proceeding with two sides aligned against the third."[183] The position of the act is that the direct interest of the complainant in the proceedings warrants giving him the right to intervene.

As in most states, the hearing commissioners are not bound by the strict rules of evidence. Illinois,[184] Kansas[185] and Utah[186] are exceptions to the general rule, but there appears to be no persuasive reason for this restriction, since the problems in detecting and proving an unfair employment practice have long been recognized.[187] Establishing discrimination largely involves proof of intent, a task often so difficult that at least one experienced commentator recommends shifting the burden of proof to the respondent after a prima facie case has been shown.[188]

178 E.g., Mass. FEPC Rules of Practice 6(a)(1), 6 BNA Lab. Policy & Prac. 451:567 (1965); Pa. FEPC Rules of Practice § 106.01, id. at 451:1031 (1965).

179 E.g., Minn. FEPC Rules of Practice § 6(A), id. at 451:647 (Sept. 16, 1965).

180 E.g., Ill. Ann. Stat. ch. 48, § 859(a) (Smith-Hurd Supp. 1965); Wash. Ad. Code § 162-08-095 (1962).

181 See text accompanying notes 113-16 supra.

182 This problem must cause particular difficulty in states such as New Jersey and Oregon, where the state Attorney-General's office serves as counsel for the FEPC. If a commission action against another state agency came to a hearing, the prosecuting attorney, the hearing commissioners, and probably the respondent agency would all look ultimately to the Attorney-General for legal advice, creating great conflicts and confusion. Bamberger & Lewin, supra note 156, at 570-71. See also Minsky, FEPC in Illinois: Four Stormy Years, 41 Notre Dame Law. 152, 174 (1965).

183 Bamberger & Lewin, supra note 182, at 552.

184 Ill. Ann. Stat. ch. 48, § 858(c) (Smith-Hurd Supp. 1965).

185 Kan. Gen. Stat. Ann. § 44-1005 (Supp. 1961).

186 Utah Code Ann. § 34-17-7 (Supp. 1965).

187 See note 155 supra.

188 Professor Rosen suggests:

> [C]ourts could adopt a salutary rule that upon a prima-facie demonstration of racial discrimination or of circumstances that give rise to a strong inference of such discrimination—for example, absence or extreme underrepresentation of Negro employees or union members—the burden of proof permanently shifts and union and employer must not only go forward with the proof, but must also bear the burden of persuasion.

Section 703(h)(1) of the Model Act forbids evidence of the efforts at conciliation from being admitted at the hearing. This is a common provision among the states,[189] analogous to the prohibition against the introduction of attempts at extra-judicial settlements in court.

E. *Remedies Available to the Complainant*

The Model Act, while suggesting a wide selection of remedies for the complainant and sanctions for the respondent, leaves the commission free, under section 705(a), to take any "affirmative action" which "will carry out the purposes of this Act." The most meaningful and effective "affirmative action" proposed by the act is the injunctive relief authorized by section 703(f). This provision insures that while the complainant waits out the administrative processes, the job or promotion he sought will not be given to someone else. In this way, his victory becomes more than merely a technical one. The commission may petition for the injunction any time after probable cause has been established;[190] it will be issued, after a hearing, by a court in the county where the respondent resides or transacts business, and will last "until final determination of proceedings." Few states offer such relief; Massachusetts is one that does, but, in the language of the statute, it is restricted to "housing accommodations or public accommodations."[191] Since few complainants can afford to take the time to await an administrative decision, the possibility of injunctive relief at an early stage will encourage many whose rights have been denied.

After the hearing, the injunction may yield to a cease-and-desist order which is judicially enforceable. In addition, the commission may award hiring, promotion, admission to a union, back pay or even damages. The awarding of pay the complainant would have received if on the job during the administrative procedures should, like injunctive relief, encourage possible complainants to seek commission aid.[192] Most states allow such redress.[193] The act also suggests a $500 exemplary award "to compensate complainants who suffer

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Rosen, The Law and Racial Discrimination in Employment, 53 Calif. L. Rev. 729, 746 (1965).

[189] But cf. Colo. FEPC Rules of Practice 3(D)(1), 6 BNA Lab. Policy & Prac. 451:186a (Nov. 25, 1965) (disclosure permitted when "deemed necessary for evidence at a hearing"); Minn. Stat. § 363.07(3) (1961) (admitting "any evidence pertaining to the efforts" at conciliation).

[190] The latest revisions to Chapter Seven of the Model Act (Nov. 1965) extend the provision for injunctive relief to make it available "any time after a complaint is filed." However, enjoining the respondent before probable cause has been established may work an unreasonable hardship, especially in the case of an employer who needs a job filled. It may also create bitterness and resentment among employers, lessening chances for a successful conciliation conference. Cf. Carter, supra note 149, at 48. In addition, it seems highly unlikely that a court of equity would grant the petition for injunction without a showing of probable cause.

[191] Mass. Ann. Laws ch. 151B, § 5 (1965). See also N.Y. Executive Law § 297(4).

[192] See BNA, The Civil Rights Act of 1964, at 67 (1964).

[193] E.g., Mich. Comp. Laws § 423.307(h) (Supp. 1961), Ross v. School Board, 5 Race Rel. L. Rep. 1247 (Mich. 1960); Pa. Stat. Ann. tit. 43, § 959 (1964), Foster v. Warwick Hotel, 5 Race Rel. L. Rep. 1245 (Pa. 1960).

none or a speculative financial loss."[194] If merely to make complainants' victories worth something when they have not suffered damages, this award may violate the respondents' rights of trial by jury in a civil suit, a remedy the complainant could have elected under most statutes.[195] If merely to punish the respondents, this provision may be ultra vires the commission.[196] In any event, it seems superfluous since the adverse publicity of the public hearing, and the other commission orders, will probably be damage enough.

There seems to be some question as to whether the commission can rightfully insist that the respondent hire or promote the complainant: when the Connecticut commission ordered an employer to "cease and desist from refusing to employ" the Negro complainant, the court of review modified the order by adding the words ". . . because of his race."[197] In other words, the court wanted it made clear that the commission's powers ceased once the employer agreed to consider the complainant's application without prejudice.[198] The modification ordered by the Connecticut court may be merely a matter of semantics; if the respondent had refused to employ the complainant for reasons other than race, there should have been no finding of probable cause, or, at least, no adverse decision at the hearing. Certainly a finding of probable cause should never be made unless the complainant is reasonably qualified for the job in question. In the situation where the employer, because of prejudice, has refused even to consider the complainant's application, it would still be advisable for the commission to dismiss the complaint if the applicant is unqualified: he deserves no remedy since he would not have gotten the job anyway. Of course the commission itself could, and should, file its *own* complaint against the employer, and order him to correct his practices.[199] If the commission followed this suggested procedure, only a qualified complainant would get past the "probable cause" stage, and an ultimate decision in his favor should lead to immediate employment; objections on the grounds of unfairness would not be heard.

F. *Enforcement of Commission Orders*

The strength and effectiveness of the commission's processes lie in their enforceability, particularly through the courts. Embodying conciliation agreements in consent decrees, and commission demands in court orders,[200] induces

194 Model Act § 705, Comment. Damage to the complainant would be negligible if he immediately secured other work after the discriminatory rejection.

195 E.g., Mass. Ann. Laws ch. 151B, § 9 (1965); N.Y. Executive Law § 300; Ore. Rev. Stat. § 659.150 (1959).

196 Motorola, Inc. v. Illinois FEPC, 58 L.R.R.M. 2573 (Cook County Cir. Ct. 1965) (FEPC had no power to levy $1000 fine). For a detailed account of the case and its political ramifications, see Kovarsky, The Harlequinesque Motorola Decision and its Implications, supra p. 535; Minsky, supra note 182, at 161-74.

197 Draper v. Clark Dairy, Inc., 17 Conn. Supp. 93, 99-101 (Super. Ct. 1950).

198 Contra, Arnett v. Seattle Gen. Hosp., 395 P.2d 503 (Wash. 1964) (unless arbitrary, commission could require hiring of complainant); Jimmerson v. Savoy Theater, 5 Race Rel. L. Rep. 914 (Mich. 1960).

199 E.g., De Matas v. Local 32-B, Bldg. Serv. Employees Union, 6 Race Rel. L. Rep. 1208 (N.Y. 1961); Bell v. American Smelting and Ref. Co., 7 Race Rel. L. Rep. 158 (Wash. 1962).

200 As provided in § 703(d) and § 706(a) of the Model Act.

compliance and gives the decisions of the commission the added authority of possible contempt sanctions.[201] The Model Act also encourages follow-up investigations of settlement agreements, and, under section 705(b)(6), the respondent company may be required to file periodic reports showing its elimination of discriminatory practices and policies.

Additional sanctions have been suggested for second offenders. For example, when a complaint is received against an employer who is already a party to a conciliation agreement resulting from another complaint, the commission, upon finding probable cause, would proceed immediately to a public hearing, unless a satisfactory adjustment occurs at once.[202] If the second-time offender operates under a state license, several states, and Section 705(c) of the Model Act, recommend suspension or revocation of the license,[203] either by the issuing agency or a court proceeding instituted by the commission. Other sanctions might include heavy fines, immediate publicity or stricter settlement terms.

Since the state has a special obligation in eliminating discrimination, section 705(d) of the act suggests that special action be taken against public contractors, regardless of the number of employees. The contracts could be terminated and the state refrain from entering into new ones until the commission is satisfied that the contractor will comply with the provisions of the act; although such a penalty is quite harsh, contractors will have fair warning if their contracts embody terms stating the nature of the sanction.[204]

G. *Judicial Review*

According to Section 706(a) of the Model Act, judicial review of a commission order may be had by any "complainant, respondent, or other party aggrieved." It is not specified, but presumably this section is limited to orders which finally dispose of the case.[205] There is also some question about whether a complainant may appeal a conciliation agreement with which he is not satisfied, and to whom he may appeal. The draft of the Model Act under consideration offers no recourse to a complainant not content with the terms of the agreement; the latest revisions of the draft,[206] however, provide for an appeal to the courts. As an alternative to review by the commission, judicial review of the conciliation terms is a far less desirable remedy. If the court

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[201] E.g., Local 35, IBEW v. Connecticut Comm'n on Civil Rights, 18 Conn. Supp. 426 (Super. Ct. 1954); N.Y. Comm'n Against Discrimination v. Ackley-Maynes Co., 4 Race Rel. L. Rep. 358 (Sup. Ct. 1959).

[202] Rabkin, supra note 164, at 110. See Ariz. Rev. Stat. Ann. § 41-1482(B) (Supp. 1965).

[203] See, e.g., Cal. Governor's Code of Fair Practices art. IX, 6 BNA Lab. Policy & Prac. 451:162 (Nov. 11, 1965); Utah Governor's Code of Fair Practices art. VII, id. at 451:1162 (Dec. 9, 1965). See also Routh, Supplementary Activities For State Governments Seeking To Eliminate Discrimination, 14 Buff. L. Rev. 148, 149 (1964).

[204] Several states already require such provisions in public works contracts. E.g., Ind. Ann. Stat. § 40-2316 (1965); Mich. Comp. Laws § 423.304 (Supp. 1961); Ohio Rev. Code Ann. § 153.60 (Baldwin 1964).

[205] Application of Local 373, United Ass'n of Journeymen, 40 Misc. 2d 440, 243 N.Y.S.2d 61 (Sup. Ct. 1963).

[206] November 1965.

finds that the complainant's rights have been poorly protected, it will probably remand the case to the commission, with suggestions. It seems unlikely that a court could rewrite a contractual consent decree between commission and respondent, although it could invalidate it. The commission, then, must ultimately reconsider the conciliation agreement anyway, so that much delay would be avoided if, as in many states,[207] the complainant had the right of immediate appeal to the commission.

Although only a minority of state statutes permit judicial appeal by parties to the action other than the principals,[208] the Model Act's viewpoint seems better suited to provide justice for all parties concerned. Another suggestion concerning the appeal is made by the Illinois Civil Rights Act. This statute permits an appeal, after the hearing, to be made to the commission itself, which, if it deems reasonable, will grant a hearing de novo.[209] Such a provision seems useful, however, only in cases where new evidence or testimony is offered.

Section 706(b) of the act specifies that, upon review, "the findings of the Commission shall be conclusive unless clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." This provision seems to be an unworkable conglomerate of standard state and federal review criteria, and certainly must be clarified before a final draft of the act is published. A court could find that the commission's order is not based on "substantial evidence," yet still affirm because it is not "clearly erroneous." The standard review criterion among the states is the "substantial evidence" test,[210] although some courts sustain any orders not "arbitrary or capricious."[211] A better rule for the Model Act would be that "the findings of the

[207] E.g., Cal. FEPC Rules of Practice § 19003(e), 6 BNA Lab. Policy & Prac. 451:138 (Aug. 5, 1965); Conn. Ad. Code § 371-16 (1947); Mich. FEPC Rules of Practice 7, 6 BNA Lab. Policy & Prac. 451:603 (1965); Wash. Ad. Code § 162-08-006(1) (1962).

[208] E.g., N.Y. Executive Law § 298; R.I. Gen. Laws Ann. § 28-5-28 (1956). Contra, Colo. Rev. Stat. Ann. § 80-21-8(1) (1963) (complainant or respondent only); Ohio Rev. Code § 4112.06(A) (Baldwin 1964) (same); Utah Code Ann. § 34-17-8(1) (Supp. 1965) (same). The Administrative Procedure Act, 60 Stat. 243 (1946), as amended, 5 U.S.C. § 1009(a) (1964), allows judicial review by "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action. . . ." But see Davis, Administrative Law Text § 22.02 (1959) (federal confusion as to meaning of "adversely affected").

[209] Ill. Ann. Stat. ch. 48, § 858(g) (Smith-Hurd Supp. 1965).

[210] E.g., Conn. Gen. Stat. Ann. § 31-128 (1960), Draper v. Clark Dairy, Inc., supra note 197; N.Y. Executive Laws § 298 ("sufficient evidence"), Comm'n For Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (1964). The NLRB is also subject to the "substantial evidence" criterion upon judicial review. NLRA, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(e) (1964). California is apparently the only state which does not limit the review court to a determination of whether the commission's decision was based on "substantial evidence" or was "arbitrary or capricious." Instead, the judge is allowed to decide for himself whether the result of the hearing is in accord with the weight of the evidence. As a result, the only three cases ever to reach a hearing, where discrimination was established, were reversed on appeal. Note, The California FEPC: Stepchild of the State Agencies, 18 Stan. L. Rev. 187, 193 (1965).

[211] E.g., Jeanpierre v. Arbury, 4 N.Y.2d 238, 149 N.E.2d 882 (1958); Arnett v. Seattle Gen. Hosp., 395 P.2d 503 (Wash. 1964).

Commission as to the facts shall be conclusive where based on substantial and competent[212] evidence."

The Model Act and most states permit the court of review to enforce the commission's order, modify and enforce, or set aside all or part.[213] Section 706(b) exceeds state statutes by also suggesting that the court could remand the case to the commission for further proceedings. This seems superfluous in view of two facts: First, the case has already been through several stages of investigation and consideration; and, second, the court has the power to modify the order as it sees fit. Utah,[214] Minnesota[215] and New Mexico[216] go even further by providing for a trial de novo upon appeal. Such tactics must cause considerable delay, and can only be discouraging to possible complainants.[217] It is sufficient protection, as the NLRB has found, to allow the courts to modify any administrative orders which they find unreasonable.

III. Conclusions

With the continuing increase in Negro voting registration, and the importance of the reapportionment decision of the Supreme Court in 1962,[218] FEP legislation has now become feasible in the Southern States for the first time.[219] The Civil Rights Act of 1964, with its threat of federal intervention, gives southern legislatures another good reason to enact suitable protection for minorities. For those legislatures that have the foresight to recognize the inevitable, now is the time to create a workable, efficient program for the elimination of discrimination in employment. A Model Civil Rights Act, correcting the errors shown by twenty years of state FEPCs, has an excellent chance to become a legislative prototype, both for the Southern States that wish to adjust to the times and the Northern States that wish to improve.

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212 Although the Model Act makes no mention of the competency of the evidence, many courts, even while allowing the commission complete discretion as to admissibility, require that the ultimate findings and decisions have a foundation in legally competent evidence. E.g., Local 35, IBEW v. Connecticut Comm'n on Civil Rights, 140 Conn. 537, 102 A.2d 366 (1953). The Washington statute stipulates a lengthy list of admissible, material facts. Wash. Ad. Code § 162-08-380 (1962). Colorado suggests that, in the hearing, "the rules and requirements of proof . . . conform . . . with those in civil non-jury cases . . . ." Colo. FEPC Rules of Practice 7(D)(2), 6 BNA Lab. Policy & Prac. 451:188 (Jan. 20, 1966).

213 The NLRB is subject to the same scope of review. NLRA, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(e) (1964).

214 Utah Code Ann. § 34-17-8 (Supp. 1965).

215 Minn. Stat. § 363.08(7) (1961).

216 N.M. Stat. Ann. § 59-4-11(a) (1953).

217 "This transfer of administrative fact finding responsibility to a court results in an unnecessary duplication of litigation." Sutin, The Experience of State Fair Employment Commissions: A Comparative Study, 18 Vand. L. Rev. 965, 1043 (1965). But cf. Ragland v. Detroit, 6 Race Rel. L. Rep. 208 (Wayne County Cir. Ct. 1960) (at trial de novo, the trier is "limited to the record as made before the Commission, with the right to refer it back to the Commission should further testimony be deemed to be necessary or advisable").

218 Baker v. Carr, 369 U.S. 186 (1962). Pursuant to this decision, legislative districts will have to be revised to give fairer representation to urban areas; and it is the urban areas of the South which are most heavily populated by Negroes.

219 See Norgren & S. Hill, Toward Fair Employment 235-39 (1964).

There are doubtless many improvements still to be made in the Model Act itself, as the draftsman, Professor Norman Dorsen, has made quite clear.[220] Several areas, notably those involving the "bona fide occupational qualification," determination of probable cause, and the standards for judicial review, require more clarity and definition. In a few sections, despite the Conference's noted desire to avoid controversial discussion, there is room for experienced, considered recommendations. For example, the Special Committee could suggest programs for the gradual adjustment of the present racial imbalance in employment; and they could propose methods to eliminate, in the industry and the union, patterns of discrimination through systematic, controlled programs of investigation. They could also recommend techniques for a more advantageous use of municipal FEPCs. The principle flaw in the Model Act, then, and one which hopefully will disappear by the final draft, is a failure to take a definite stand in an area of political and social relations where a stand is needed. The time has come for the leaders of men to accept their clear responsibility and make the national policy of equal employment opportunity more than a mere slogan of the "Great Society."

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220 Very shortly, according to Professor Dorsen, there should be "a third and much revised draft." Letter from Norman Dorsen, December 3, 1965.