

CIVIL RIGHTS: A NEW PUBLIC ACCOMMODATIONS LAW FOR OHIO

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For the first time in the twentieth century, the Ohio Legislature has moved forcefully to protect the right of access to places of public accommodation from racial discrimination.¹ In one sense new legislation would seem to be wholly unnecessary, for denial of access to places of public accommodation has constituted a civil and criminal offense in Ohio ever since the legislature acted in 1884² to fill the gap created by the *Civil Rights Cases*.³ But a survey by the Ohio Civil Rights Commission of seventeen cities in 1960 indicated that access to thirty-six kinds of public facilities—from inns through theaters—was commonly denied to many Ohio residents.⁴ A review of the old public accommodations act disclosed a number of basic defects in the law itself⁵ and a most conspicuous sign of the law's disrepair was evident in the skepticism of minority groups. They had turned from legalistic appeals to the courts based on codified law to extralegal self-help, *i.e.*, direct nonviolent persuasion such as sit-ins and picketing.⁶

Whether the current legislative effort will recapture the confidence of those it is principally designed to protect and whether it will encourage the voluntary abatement of sit-ins in Ohio are political questions beyond anyone's capacity to predict. The purpose of this comment is merely to review what the law provides, and to anticipate certain unresolved problems which the Civil Rights Commission must soon confront. Essentially, the 104th General Assembly has integrated the public accommodations law with the remedial provisions of the Fair Employment Practices Act of 1959. Without discarding criminal and civil remedies already available under Section 2901.35 of the Ohio Revised Code, the new law provides for relief in the alternative, com-

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¹ Ohio Rev. Code §§ 4112.01-.08 (Supp. 1959), as amended by H.B. 918 (1961).

² 81 Ohio Laws 15 (1884).

³ 109 U.S. 3 (1883).

⁴ Ohio Civil Rights Comm'n, *Discrimination in Public Accommodations in Ohio*, (multil. Dec. 1960).

⁵ Van Alstyne, "A Critique of the Ohio Public Accommodations Law," 22 Ohio St. L.J. 201 (1961).

⁶ *E.g.*, the several stand-ins held at the Coney Island Amusement Park near Cincinnati; demonstrations at a Columbus skating rink from which three law suits resulted.

mencing with the filing of a verified charge by a complainant.⁷ Upon receipt of a complaint describing an unlawful instance of discrimination in a place of public accommodation, the Commission is obliged to conduct a preliminary investigation⁸ which is to determine the sufficiency of the charge. Where probable cause is established, the Commission must attempt through informal conciliation to persuade the respondent proprietor to alter his policy to conform with the law. No publicity is to accompany any part of these proceedings, and thus both parties may initially be insulated from unwanted public attention. Should conciliation attempts fail, the case must proceed to a formal hearing in which the Attorney General shall present the State's evidence,⁹ all indispensable parties shall be joined, and all interested parties may be heard at the discretion of the Commission. If the

⁷ The requirement of a complainant represents a departure from the self-initiatory power entrusted to the Commission for the purpose of investigating employment discrimination. Ohio Rev. Code § 4112.05(B), as amended by H.B. 918 (1961). The legislature evidently felt that the risk of reprisal by employers which might discourage employees from filing complaints had no parallel in the field of public accommodations. That the "complainant" need not himself be the victim of discrimination, however, may be inferred from the provisions that the complaint may be directed against discriminatory practices in general (§ 4112.05[B]), that relief is to be granted when discrimination "whether against the complainant or others" has been proved (§ 4112.05[G]), that the complainant shall be a party to the proceeding apart from others who may be "indispensable part(ies)" (§ 4112.05[I]), and that "complainant" is not otherwise limited in the section setting forth definitions with greater particularity (§ 4112.01).

⁸ The Commission's investigative power has not been specifically defined, and some question exists as to whether it extends to a right to inspect premises pursuant to a court order but without the employer's or entrepreneur's consent, and whether it includes the power to subpoena records. Because the Commission is required to make investigations and cannot proceed to a hearing unless it finds that discrimination probably exists, the right to inspect premises at reasonable hours and under judicial supervision, and to subpoena records, may necessarily be implied, especially since the Commission's enforcement power is not penal. In the only instance of a challenge to the Commission's power to inspect premises, the employer relented when the Commission announced its intention to secure a court order. A fully analogous general power to investigate was held sufficient to imply specific authority to subpoena payroll, membership, bank, tax and membership meeting records to determine whether respondent was in fact operating a bona fide private club, in *Sun and Splash Club v. DAD*, 3 Race Rel. L. Rep. 726 (Super. Ct. N.J. 1957) (1958).

⁹ Ohio Rev. Code § 4112.05(B), codifies a rule previously adopted by the Commission pursuant to Ohio Rev. Code § 4112.04(A)(4). Committee debate, of which there is no official record, indicated that the provision for the Attorney General to present the case was adopted in an effort to separate the judicial function of the Commission from its executive function. The effort is unavailing, however, for the Commission still is charged with receiving and investigating complaints, and with determining whether probable cause exists to proceed to a formal hearing; whatever danger previously existed that the Commission acting in its executive capacity will prejudice its neutrality during the formal hearing lingers on.

Commission determines that the respondent has unlawfully discriminated, it shall issue a cease and desist order enforceable through contempt proceedings in a court of common pleas sitting without a jury. Either principal party affected by a Commission order is entitled to appeal to a court of common pleas for judicial determination that the Commission's findings of fact are or are not supported by substantial evidence on the record considered as a whole; "legal conclusions" presumably are to be reviewed independently by the court. In comparison with the older remedies of section 2901.35, the advantages of these provisions become self-evident,¹⁰ although some may regret that a proprietor is allowed a "free first bite," and others may mourn the substitution of administrative relief for more traditional judicial techniques. Nevertheless, the use of administrative agencies in the field of civil rights is increasingly common.¹¹ Generally, they have discharged their duties in a satisfactory manner even from a reasonably conservative perspective.¹²

The 1961 amendments increased the law's coverage in several other respects: The class of protected persons has been enlarged by substituting "any person" for "citizen," and defining "person" so as to include international students, formal and informal associations, and tourists—thus removing the ambiguity of the older law which may have been limited to the protection of individual Ohio residents; discrimination now includes discriminatory acts based on religious and ancestral animus, as well as those based on race or color; and finally, the legislature has defined discrimination to include segregation, removing the doubt which prevailed under section 2901.35.¹³ None of these changes represent any radical departure from recent legislative policy, because all are fully analogous to provisions already adopted in the F.E.P. legislation of 1959.¹⁴

Certain questions have not been clearly settled by the new law, however, and something may be added to an otherwise prosaic summary of the law by examining them here. The most important of

¹⁰ Van Alstyne, *supra* note 5, at 209-12.

¹¹ For reference to the laws of twenty-six states affecting discrimination in places of public accommodation, see Greenberg, *Race Relations and American Law* 375-79 (1959). See also Emerson and Habor, *Political and Civil Rights in the United States* 1408-09, 1413 at n.1; Governor's Comm'n on Human Rights, *Report on State Laws and Agencies for Civil Rights* (multil. Wis. 1960). For recent developments in Idaho, Nevada, West Virginia, Washington, Indiana, North Dakota, and Oregon, see 6 *Race Rel. L. Rep.* 630-650 (1961).

¹² Note, 74 *Harv. L. Rev.* 526 (1961).

¹³ See Van Alstyne, *supra* note 5, at 206-07 (1961), and Ohio Rev. Code § 4112.01 (G), defining discrimination so as to include segregation.

¹⁴ Ohio Rev. Code §§ 4112.01-.08 (Supp. 1959).

these relates to the class of public accommodations which is subject to the law's proscriptions. In this respect, the legislature seemingly did no more than to carry over bodily the same description as appeared in the earlier law:

"Place of public accommodation" means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, or other place for the sale of merchandise, or any other place of public accommodation or amusement, where the accommodation, advantages, facilities or privileges thereof are available to the public.

In declining to follow the precedent of New York¹⁵ and the suggestion of the Ohio Civil Rights Commission¹⁶ to list comprehensively all the types of business establishments to which the law shall apply, the legislature has repeated its earlier formula of using a merely illustrative list of establishments followed by an undefined omnibus clause. It is clear even from judicial construction of the omnibus clause as it appeared in section 2901.35 that the list is not to be considered exclusive.¹⁷ However, the courts otherwise took a

¹⁵ *N.Y. Civ. Rights Law* § 40; *N.Y. Exec. L. Art. 12*, §§ 290-301 (1959).

¹⁶ Ohio Civil Rights Comm'n, *supra* note 4, at 49-50:

(c) "Places of public accommodation" shall include but shall not be limited to:

(1) inns, hotels, motels, hostels, trailer courts, camps, parks, lodges, resorts, and other establishments conducted for the recreation, rest, health, or entertainment of transient persons;

(2) restaurants, drive-ins, cafes, dining rooms, lunch counters, soda fountains, buffets, taverns, road houses, barrooms, saloons, and other establishments where prepared foods, beverages, ice cream, or spiritous or malt liquors are sold for consumption whether on or off the premises;

(3) theatres, motion picture houses and drive-ins, auditoriums, stadiums, arenas, music halls, dance halls, roof gardens, golf courses, race tracks, bowling alleys, skating rinks, billiard and pool parlors, swimming pools, shooting galleries, fairs, carnivals, circuses, rodeos, amusement parks, and other establishments conducted for amusement, recreation, or entertainment;

(4) buses, taxis, limousines, rail cars, airplanes, ships, and other commercial carriers, terminals, stations, waiting rooms, rest rooms, ticket offices, travel agencies and all facilities appurtenant to transportation establishment for land, sea, or air travel;

(5) retail stores and other retail outlets, wholesale and discount houses, warehouses, auctions, service establishments, parking lots, garages, service stations, and other enterprises engaged in the sale, rental, repair or servicing of merchandise, clothes, equipment, food, or other goods, whether on business premises or not;

(6) barber shops, beauty parlors, bathhouses, reducing salons, and other establishments conducted for the health, appearance, and physical improvement of persons;

(7) dispensaries, clinics, hospitals, convalescent homes, and other institutions for the physically infirm, cemeteries, crematories, and similar establishments.

¹⁷ Places of public accommodation within the omnibus clause of Ohio Rev. Code § 2901.35 include: a private amusement park, *Fletcher v. Coney Island*, 54 Ohio Op. 112, *rev'd on other grounds*, 165 Ohio St. 150, 134 N.E.2d 371 (1956); a golf course, *Gillespie v. Lake Short Golf Club, Inc.*, 56 Ohio L. Abs. 222, 91 N.E.2d 290 (Ct. App.

narrow view of "other place of public accommodation,"¹⁸ but it does not follow that the Commission should feel bound by this history.

Unlike section 2901.35, the new law is simply an amendment to the F.E.P. law and thus becomes subject to the legislative admonition of section 4112.06 that it "shall be construed liberally for the accomplishment of the purposes thereof and any law inconsistent with any provision hereof shall not apply." With this expression of legislative purpose, the Commission has greater license to depart from the presumption that statutes in derogation of the common law are to be narrowly interpreted.¹⁹ Similarly, because relief by the Commission extends only to a cease and desist order rather than to fine and imprisonment as under section 2901.35, there is no occasion to confine construction by characterizing the statute as penal²⁰ rather than remedial.²¹ Thus, the stronger argument is that the legislature employed the omnibus phrase liberally so as virtually to absorb the whole list of establishments noted in the Commission's Report. The list may not have been incorporated literally as a matter of political strategy, in order to keep adversely affected, special interest groups from noting their specific inclusion early enough to lobby against the bill.

Nevertheless, it is equally clear that the public accommodations law cannot be used as a *carte blanche* by the Commission to trench upon every form of discrimination, as by a homeowner or a garden club. Some specific guide should surely be observed. In an article reviewing the scope of California's old public accommodations law, Professor Harold Horowitz has provided the Ohio Commission with just such a guide.²² In defining a "place of public accommodation," Professor Horowitz strikes a reasonable balance between the competing interests of those seeking access and service, and those in the position of entrepreneur, by drawing a line to include establishments in a place open to a substantial public where the relationship is ordinarily

1950); a bowling alley, *Johnson v. Humphrey Pop Corn Co.*, 4 Ohio C.C.R. (n.s.) 49, 14 Ohio C.C. Dec. 135 (1902); a dance hall, *Anderson v. Ohio*, 29 Ohio Ct. App. 61, 40 Ohio C.C.R. (n.s.) (1918); a motion picture theater, *Guy v. Tri-State Amusement Co.*, 28 Ohio Ct. App. 231 (1917).

¹⁸ See, e.g., *Harvey v. Sissle*, 53 Ohio App. 405, 5 N.E.2d 410 (1936); *Deuwell v. Foerster*, 12 Ohio N.P. (n.s.) 329, 30 Ohio Dec. 510 (C.P. Franklin Co. 1912).

¹⁹ See *Fletcher v. Coney Island*, 165 Ohio St. 150, 134 N.E.2d 371 (1956).

²⁰ *Ibid.* See cases cited *supra*, note 18; *Rice v. Rinaldo*, 44 Ohio Op. 28, 95 N.E.2d 30 (C.P. 1950), *aff'd*, 67 Ohio L. Abs. 183, 119 N.E.2d 657 (Ct. App. 1951); *Uhlman v. Sherman*, 22 Ohio N.P. (n.s.) 225, 31 Ohio Dec. 54 (C.P. 1919); *Tate v. Eidelman*, 32 Ohio N.P. (n.s.) 478 (C.P. 1934).

²¹ For a similar view of Ohio Rev. Code § 2901.35, see the lower courts opinion in the *Coney Island* case, *supra* note 17, at 117.

²² Horowitz, "The California Equal Rights Statute," 33 So. Cal. L. Rev. 360 (1960).

temporary, sporadic, nonsocial, impersonal, and nongratuitous. Soda fountains, bowling alleys, swimming pools, travel agencies, business schools, beauty parlors, clinics, and transient housing are easily included. By the same gesture, it is arguable that the more enduring, less public, and more confidential relationship between doctor and patient, or attorney and client, is not contemplated, even though such services may be available to the general public on a nongratuitous basis, and even though the interest in obtaining such service may be high.

Similarly, it would take an utter stranger to the Ohio legislature to construe their purpose as reaching permanent housing. Thus, while hotels, motels, daily rental units, camps, and trailer courts are reasonably included, it is doubtful whether lessors and homeowners are. Consequently, though real estate agents might otherwise appear to operate establishments of public accommodation,²³ it would probably constitute an unwarranted extension of the law to apply it to them as an indirect assault on discrimination in the field of permanent housing. It is significant that the Commission's Report which was distributed to all the legislators and which occasioned the new legislation did not include a survey of permanent housing or real estate agency practices although it did include a survey of trailer court practices.²⁴

Although the legislature has not expressly provided that distinctly private facilities are exempt from the law, such an exemption may be inferred in that the law is limited to "place(s) of *public* accommodation." The problem is, however, to acknowledge the legitimacy of certain interests in exclusive association which renders a place distinctly private, without at the same time swallowing up the rule that there shall be no discrimination in places of public accommodation. In certain respects, the same tests which Professor Horowitz has applied to determine which kinds of business establishments fall outside the law also apply to this private club problem, but with this clarification: the facility may be one which ordinarily constitutes a place of public accommodation, *e.g.*, a golf course, but it may still operate in such a fashion that it should nonetheless be classified as "private" so as to vindicate the associational interests of its "members." Manifestly, it is impossible to determine the scope of the private club exemption by listing *types* of facilities, for the legitimate exclusiveness of such clubs is more a function of their internal order than of the activity which they sponsor. An inn is most conspicuously

²³ Cf. Cal. Att'y Gen. Ops., 5 Race Rel. L. Rep. 255 (1960), 6 Race Rel. L. Rep. 354-55 (1961); Mass. Att'y Gen. Op., Nov. 24, 1959, 5 Race Rel. L. Rep. 253 (1960).

²⁴ See *supra* note 4. See also *Teverbaugh v. El Key Trailer Parks*, 3 Race Rel. L. Rep. 222 (Cal. Super. Ct. 1958).

a place of public accommodation, and yet an inn operated exclusively by and for dues-paying members of the Upper Peninsula Bridge Club ought not necessarily have to cater to the world at large. And if the Bridge Club should employ religion or racial qualifications in the selections of its members, we may respect the desire of the members to assert these associational preferences in a relatively harmless way, even though we may take personal exception to the values reflected by those preferences. At the same time, clearly not every establishment using the "club" label merits a special exemption.²⁵ Particular cases might best be resolved with the Commission taking evidence on the following questions:

1. Do the "club members" participate in the organizations' policy decisions, or do they merely accede to membership qualifications established by an independent manager, owner or nucleus of members?²⁶
2. Is the organization a nonprofit association supported by regular dues and initiation fees, or is it essentially a commercial establishment operated for profit, with short-term membership cards functionally resembling tickets?²⁷
3. Is it clear that the organization is sustained principally by the associational interests of its members in one another, or does it exist principally from the coincidence of interest in the activity of its sponsors?²⁸

²⁵ Mich. Att'y Gen. Op., 2 Race Rel. L. Rep. 1046, 1049 (1957).

²⁶ See the only Ohio case to examine the private club device, *Gillespie v. Lake Shore Golf Club, Inc.*, 56 Ohio L. Abs. 222, 91 N.E.2d 290 (Ct. App. 1950), *infra* note 26.

²⁷ *Id.* See *Crawford v. Kent*, 167 N.E.2d 620, 5 Race Rel. L. Rep. 830 (Mass. S. Ct. 1960), holding a dancing school to be a place of public accommodation partly because it was a "commercial enterprise," a "business operated for profit"; *Peoples v. Club Primadonna*, 5 Race Rel. L. Rep. 1164 (Cal. Super. Ct. 1960), awarding \$500 exemplary and \$100 actual damages to a Negro and against a subsidiary of a Nevada "Club" in business in California to sell "reservations to the general public" for tours to the Nevada club; *SCAD v. Trowbridge*, 5 Race Rel. L. Rep. 552 (1960), holding that Trowbridge Farm, advertising in N.Y. papers for "Christian clientele," with facilities for dining and recreation, operated for profit by a family proprietorship, was a place of public accommodation. And see *Evans v. Ross*, 150 A.2d 512 (Camden Cty. Ct. N.J.), 4 Race Rel. L. Rep. 355 (1959), *aff'd* 154 A.2d 441 (N.J. Super. Ct.), 4 Race Rel. L. Rep. 1012 (1959), *cert. denied*, 157 A.2d 362 (N.J. Super. Ct. 1959), 5 Race Rel. L. Rep. 206 (1960).

²⁸ See *supra* notes 25-27, and see *Castle Hill Beach Club v. Arbury*, 208 Misc. 35, 142 N.Y.S.2d 432 (1955), denying a private club exemption where the club had 7,500 adult members, admitted 10,000 annually as guests of members, operated on 16 acres with 3,780 bathhouses, 2 swimming pools, 32 handball courts, and 10 tennis courts, where voting rights were confined to six permanent members and regular members had no authority to influence the club's policy. See also *Norman v. City Island Beach Co.*, 126 Misc. 335, 213 N.Y. Supp. 379 (1926), exemption denied to swimming club with lockers for 1,500 and members used only 60 at a time, and the club generally solicited

- a) How many members are there?
- b) How frequent is the turnover in membership?
- c) How frequently do the members use the facilities?
- d) How many and how regular are the meetings?
- e) Is the activity one involving fairly intimate association, or one with but casual relations between groups?
- f) To what extent are those who use the facilities actually acquainted with one another?

Because of the untested discretionary powers reposed in the Civil Rights Commission, it is premature to pass judgement on the success of Ohio's newest effort in the field of civil rights. Nevertheless, the legislature's act is relatively bold in comparison with developments in other jurisdictions.²⁹ It comes as a vigorous reminder that "a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt."³⁰

members from the public at large; *McCarter v. Beckwith*, 247 App. Div. 289, 285 N.Y. Supp. 151 (1936), *aff'd* 272 N.Y. 488, 3 N.E.2d 882, *cert. denied*, 299 U.S. 601 (1936); *Everett v. Harron*, 380 Pa. 123, 110 A.2d 383 (1955).

²⁹ See *supra* note 11.

³⁰ *Railway Mail Ass'n v. Coral*, 326 U.S. 88, 98 (1945) (Frankfurter, J. concurring).