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NOTES AND COMMENTS

NOTE: NEW YORK'S CIVIL RIGHTS LEGISLATION — A PATTERN OF PROGRESS

In the midst of widespread racial outbreaks and increasing racial tension throughout our nation, it is, indeed, timely to analyze New York State's civil rights record. Such a discussion necessitates analysis of the Negro's legal rights in the areas of employment, education, housing and public accommodations — the major targets of any possible desegregation movement. Is the present legal structure in New York sufficient to support the enforcement of constitutionally-protected rights in a peaceful manner or must the Negro continue to carry his fight into the streets? An attempt is made to provide some insight into this pivotal question.

At the outset, it is appropriate to allude to the fourteenth amendment of the United States Constitution which is generally referred to as the "civil rights amendment." It provides in part that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹ This

¹ U.S. CONST. amend. XIV, §1, reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

amendment was adopted to establish equal enjoyment of basic civil and political rights and to preserve these rights from discriminatory action by the states based on race or color.²

Legislation in New York has generally embodied the spirit and purpose of the fourteenth amendment. The New York Constitution states that no person shall be denied the equal protection of the laws of this state. It also provides that no person shall because of race, color, creed or religion be subjected to any discrimination in his civil rights.³

Further evidence of New York's progressive stand on civil rights may be found in Section 290 of the Executive Law, entitled "The Law Against Discrimination," wherein it is stated:

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

² Soon after the adoption of the fourteenth amendment, the United States Supreme Court declared that it is state action alone that is prohibited by the amendment. *Civil Rights Cases*, 109 U.S. 3 (1883).

³ N.Y. CONST. art. I, §11, provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

practices of discrimination against any of its inhabitants because of race, creed, color or national origin are a matter of state concern . . . such discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

To enforce such a policy, the same statute creates a state agency designated the State Commission for Human Rights (formerly known as the State Commission Against Discrimination).⁴ This agency has power to eliminate and prevent discrimination "in employment, in places of public accommodation, resort or amusement, in housing accommodations and in commercial space because of race, creed, color or national origin. . . ."⁵

In addition to the New York State Constitution and the Executive Law, a third major source of civil rights protection is found in the comprehensive Civil Rights Law. In passing this statute in 1874 New York became the second state to enact such legislation.⁶ Today after almost a century, it still provides relief to the aggrieved and, perhaps more important, has been the model for many subsequent civil rights enactments.⁷

⁴ The name of the Commission was changed in 1962. N.Y. EXECUTIVE LAW §293.

⁵ N.Y. EXECUTIVE LAW §290. The Executive Law, known as "The Law Against Discrimination" was originally intended to apply only to discrimination in employment. It has subsequently been amended to include places of public accommodation, resort or amusement and housing.

⁶ KONVITZ & LESKES, A CENTURY OF CIVIL RIGHTS 156 (1961).

⁷ The Executive Law, particularly in its Housing and Public Accommodation sections, has adopted similar substantive provisions. It differs significantly, however, in the more effective remedy provided.

PUBLIC ACCOMMODATIONS

The Civil Rights Law [hereinafter referred to as the CRL] gives to all persons within the jurisdiction of the state equal rights in places of public accommodation, resort or amusement.⁸ One section of the CRL defines each of these terms by listing the various types of establishments which fall into each category.⁹ Although the failure of the legislature to include a particular type of establishment in the statutory enumeration does not necessarily exclude it from the operation of the CRL, these classifications are given heavy weight by the courts. Traditionally, courts in common-law countries have strictly construed statutes which limit the use of private property. Therefore, they are hesitant to enlarge the establishments covered beyond those expressly set forth by the legislature. This reluctance of the courts is best demonstrated in the case of *Campbell v. Eichert*.¹⁰ Here an action was brought by a Negro woman who alleged that she was refused manicuring service in a beauty shop located in the defendant's department store. She claimed such refusal took place solely because of her race and color. The court, in holding for defendant department store, stated in a per curiam decision:

A beauty parlor is not specifically mentioned in the Civil Rights Law . . . and is not a place of public accommodation under the common law or under the general terms of the statute. Where it is not conducted as part of a barber shop a beauty parlor is not included in that term as used in the statute.¹¹

⁸ N.Y. CIV. RIGHTS LAW §40.

⁹ *Ibid.*

¹⁰ 155 Misc. 164, 278 N.Y. Supp. 946 (Sup. Ct. 1935).

¹¹ *Id.* at 165, 278 N.Y. Supp. at 947.

At that time only barber shops were included in the statutory enumeration. Thus, the unfortunate result is that the plaintiff was denied relief merely because the court desired to engage in the niceties of legal construction in distinguishing a barber shop from a beauty parlor.

Another case involving the same traditional approach of strict construction is *Delaney v. Central Valley Golf Club*,¹² wherein plaintiffs charged that they had been refused the use of defendant's golf course because they were Negroes. Here, as in the previous case, the CRL did not expressly include golf courses in its enumeration of places of public accommodation or amusement. In finding for the defendants, the court held that the plaintiffs had failed to sustain the burden of proving that the golf course was a place of public accommodation, resort or amusement and that, in any case, the statute did not specifically name golf courses among such public places. The court was of the view that since the CRL enumerated public places, the legislature intended to limit its application to the places set forth therein. They felt any extension of the list should be a product of the legislature rather than the courts. Although the court of appeals affirmed the decision,¹³ the dissent seemed to express an approach more consistent with the spirit of the CRL when Judge Finch stated therein:

The words of the Civil Rights Law, "a place of public accommodation, resort or amusement," . . . show by their mere statement that they are sufficiently broad to include

¹² 28 N.Y.S.2d 932 (Sup. Ct.), *aff'd*, 263 App. Div. 710 (1st Dep't 1941), *aff'd*, 289 N.Y. 577, 43 N.E. 2d 716 (1942).

¹³ *Delaney v. Central Valley Golf Club*, 289 N.Y. 577, 43 N.E.2d 716 (1942).

a public golf course. The fact that the Legislature immediately amended the statute so as specifically to include a public golf course when the earlier language was restricted by judicial decision, shows clearly that the amendment was intended for clarification. In addition there is no canon of construction which is authority for a strict construction of the statute here in question.¹⁴

In light of New York's staunch stand against discriminatory practices, it would appear that the liberal view is more in keeping with the legislative intent. Only by a broad approach can we be assured that all persons are receiving the equal protection of the laws provided for by both the state and federal constitutions.¹⁵ Civil rights is not an area calling for legalistic technicalities of statutory construction; rather, it is one necessitating an approach that embodies the true democratic tradition of equality for all.

A NEW APPROACH

In order to effectuate this policy, the legislature placed the enforcement of the CRL in the hands of the State Commission Against Discrimination.¹⁶ By so vesting the Commission with authority, the legislature endeavored to insure that those persons discriminated against would have a fair hearing of their grievances. The enabling statute of the Commission expressly orders it to apply the act liberally.¹⁷ From the stand-

¹⁴ *Id.* at 578, 43 N.E.2d at 717.

¹⁵ See notes 1 and 3 *supra*.

¹⁶ By virtue of an amendment to the Executive Law in 1952, the State Commission Against Discrimination was vested with authority to eliminate and prevent discrimination in places of public accommodation, resort or amusement. N.Y. EXECUTIVE LAW §290.

¹⁷ N.Y. EXECUTIVE LAW §300: "The provisions of this article shall be construed liberally for the accomplishment of the purposes thereof."

point of a prospective complainant, the existence of the Commission also removes the financial deterrent to obtaining civil rights relief. To institute a lawsuit under the old law and see it through to judgment would cost a person discriminated against a considerable sum. Consequently, many were without an adequate remedy and tolerated such discrimination as best they could. Today, an aggrieved party need only make a complaint to the Commission alleging the specific violation, and the matter will be investigated and prosecuted, if necessary, with no cost to the complainant.¹⁸ The end result of this practical approach is that many more infractions are being reported¹⁹ with a correspondingly better implementation of New York's strong anti-discrimination policy. In extending the jurisdiction and procedures of the Commission to discrimination in places of public accommodation, the legislature did not intend to abolish the old remedies provided by the CRL.²⁰ This result is clearly mandated by the Executive Law which provides that: "Nothing contained in this article shall be deemed to repeal any of the provisions of the Civil Rights Law . . . relating to discrimination because of race, creed, color or national origin."²¹

However, as to acts defined as unlawful by the Executive Law, the administrative

procedure provided therein is to be exclusive while an action is pending, and a final determination by the Commission acts as a bar to any other action.²²

The first case to come before the Commission under the public accommodation provisions was brought by a New York City resident.²³ He charged that the Castle Hill Beach Club was a public accommodation, and that it had denied him admission because of his color. The defendant beach club, in turn, challenged the jurisdiction of the Commission, maintaining that it was a private establishment not subject to the provisions of the Executive Law. To substantiate its claim, the beach club relied on the fact that it had become a membership corporation in 1950. Prior to this, the defendant had operated as a commercial enterprise and had a telephone listing under the heading "Bathing Beaches—Public." After its conversion, however, the telephone listing continued as a public one, notwithstanding the fact that the directory also contained a listing under the heading entitled "Clubs." Further proof of its public character was evidenced by the fact that taxes were paid without the exemptions given to bona fide private clubs and a public bathing license was issued to it by the City. In view of these facts, the Commission held that the incorporation was merely a sham designed to conceal the public nature of the enterprise. The Commission thereupon issued an order requiring the Castle Hill Beach Club to cease and desist from withholding or denying its accommodations, facilities or privileges from the complainant, and from all others

²² *Ibid.*

²³ *Brown v. Castle Hill Beach Club, Inc.*, 1954 State Commission Against Discrimination Report 41.

¹⁸ N.Y. EXECUTIVE LAW §297.

¹⁹ See 1958 N.Y. State Commission Against Discrimination Report.

²⁰ Under the CRL, a civil violation carries the possibility of fine up to \$500. N.Y. CIV. RIGHTS LAW §41. This monetary penalty is not found in the Executive Law, where the State Commission's main remedy is to issue cease and desist orders. N.Y. EXECUTIVE LAW §297. There exists, however, the possibility of a back-pay order which can become quite large, depending on how long complainant has been kept off the job. *Ibid.*

²¹ N.Y. EXECUTIVE LAW §300.

similarly discriminated against on the grounds of race or color.

The defendant then petitioned the state supreme court to review the Commission's order²⁴ since statutory provision is made for such review.²⁵ This statute provides, however, that the findings of the Commission as to the facts shall be conclusive if supported by sufficient evidence on the record considered as a whole.²⁶ Hence, a judicial review of the Commission's findings is limited to the question of whether the findings are, upon the entire record, supported by evidence so substantial that an inference of the existence of the facts found may be reasonably drawn.²⁷ Upon reviewing the action, the state supreme court held that the Commission's findings were so supported; therefore, the defendant beach club had to comply with the cease and desist order.

A violation of the anti-discrimination statutes may result in criminal as well as civil sanction. The penal provisions of the CRL²⁸ are similar to those of the Executive Law²⁹ with some worthwhile modification. Although a violation of the CRL remains per se a criminal offense,³⁰ the Ex-

ecutive Law requires a wilful disobedience of the Commission's order before criminal sanctions are invoked.³¹ While this added requirement might appear at first glance to reduce the deterrent effect of these criminal sanctions, it actually increases their overall effect. As previously illustrated, difficulties existed in obtaining a civil judgment under the CRL. This was also true with respect to criminal convictions since district attorneys were usually preoccupied with the more sensational crimes of violence.³² The Executive Law changes the pattern. As soon as the Commission's order is wilfully violated, criminal sanctions may be employed. If there is no wilful disobedience, this means that the complainant is no longer being discriminated against, hence, there is no need for any criminal penalty. The end result would appear to be a more effective course of action for all concerned.

EMPLOYMENT

New York has also evidenced its progressive attitude by being the first state to enact a fair employment practices statute³³ which comprises part of the Executive Law.³⁴ The statute provides that it shall be unlawful for an employer to refuse to hire, or to discharge or bar from employment, any person because of his race, creed, color or national origin, or to discriminate against such person in compensation or terms, conditions, or privileges of employment.³⁵ This statute also prohibits in-

²⁴ *Castle Hill Beach Club v. Arbury*, 208 Misc. 35, 142 N.Y.S.2d 432 (Sup. Ct. 1955), *aff'd*, 1 App. Div. 2d 943, 150 N.Y.S.2d 367 (1st Dep't 1956), *aff'd*, 2 N.Y.2d 596, 142 N.E.2d 186 162 N.Y.S.2d 1 (1957).

²⁵ N.Y. EXECUTIVE LAW §298: "Any complainant, respondent or other person aggrieved by such order of the commission may obtain judicial review thereof. . . ."

²⁶ N.Y. EXECUTIVE LAW §298.

²⁷ *Holland v. Edwards*, 307 N.Y. 38, 44, 119 N.E.2d 581, 584 (1954).

²⁸ N.Y. CIV. RIGHTS LAW §41.

²⁹ N.Y. EXECUTIVE LAW §299.

³⁰ N.Y. CIV. RIGHTS LAW §41: "Any person who . . . shall violate any of the provisions of section forty . . . shall, also, for every such offense be deemed guilty of a misdemeanor. . . ."

³¹ N.Y. EXECUTIVE LAW §299: "Any person . . . who . . . shall wilfully violate an order of the commission, shall be guilty of a misdemeanor. . . ."

³² KONVITZ & LESKES, *A CENTURY OF CIVIL RIGHTS* 179 (1961).

³³ *Id.* at 199.

³⁴ N.Y. EXECUTIVE LAW §290.

³⁵ N.Y. EXECUTIVE LAW §296 (1)(a).

quiries by any employer or employment agency concerning a job applicant's race, creed, color or national origin.³⁶ To be unlawful, this inquiry need not be direct but may be indirect as was illustrated in *Holland v. Edwards*.³⁷ The complainant went to the operator of an employment agency in response to the latter's newspaper advertisement. The application form contained a question as to whether the applicant's family name had ever been changed. The applicant was also questioned concerning the religion of one of her former employers, the maiden name of the latter's wife and the complainant's own national origin as reflected by her name and schooling. When she did not subsequently hear from the agency, the applicant filed a complaint with the State Commission Against Discrimination. The Commission investigated and found the employment agency guilty of making discriminatory inquiries.³⁸ The court of appeals, in reviewing the case, upheld the Commission and stated:

One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which subtleties of conduct play no small part.⁴⁰

Thus, it is clear that the inquiry need not be aimed directly at the individual's race or religion, for an employer or employment agency will be found to have violated the statute whenever the conduct, considered in

its entirety, evidences a discriminatory purpose.

While it is an unlawful practice for an employer to refuse to hire or employ any individual because of his race, creed, color or national origin, it is likewise unlawful for a racial group to try to coerce an employer into hiring and retaining a specific percentage of members of that race without regard to their individual qualifications, thereby displacing existing employees of different racial backgrounds.⁴¹ The Executive Law provides that:

It shall be unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.⁴²

In the case of *In re Young*⁴³ which involved an attempt by Negro pickets to force certain Harlem liquor stores to buy only from Negro salesmen, the court in referring to the Executive Law stated:

Acts to compel another to violate the law of the state and its public policy are against the law. The right to speak is not absolute. The First Amendment to the Constitution of the United States does not confer the right to persuade others to violate the law.⁴⁴

Labor Unions

Labor unions are also included within the scope of both the CRL and Executive Law. The CRL prohibits unions from denying membership to individuals on the ground of race, creed, color or national

³⁶ N.Y. EXECUTIVE LAW §296 (1)(c).

³⁷ 116 N.Y.S.2d 264 (Sup. Ct. 1952).

³⁸ N.Y. EXECUTIVE LAW §296 (1)(c).

³⁹ *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581 (1954).

⁴⁰ *Id.* at 45, 119 N.E.2d at 584.

⁴¹ See N.Y. EXECUTIVE LAW §296 (1)(a), (b). For such a holding, see *In re Young*, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961).

⁴² N.Y. EXECUTIVE LAW §296(6).

⁴³ 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961).

⁴⁴ *Id.* at 820, 211 N.Y.S.2d at 624.

origin.⁴⁵ In *Railway Mail Ass'n v. Corsi*,⁴⁶ membership in the association was limited to Caucasian and American Indian railway postal clerks. The New York Court of Appeals held that the CRL was applicable since the association was excluding individuals from membership on grounds of race and color. In answer to the association's argument that the CRL impinged upon the powers of the federal government, the court stated:

A statute in general terms which prohibits all labor organizations within this State, including organizations of workers in government service, from discriminating on the ground of race, creed or color violates no public policy of the United States, does not interfere with or impede any government service and invades no field from which the State is excluded by the Constitution.⁴⁷

Relating to unions the Executive Law contains provisions essentially similar to those in the CRL.⁴⁸ It goes a step further in one respect, however, by making it an unlawful discriminatory practice for a labor organization to deny or to withhold from any qualified person because of his race, creed, color or national origin the right to be admitted to, or participate in, an

⁴⁵ N.Y. CIV. RIGHTS LAW §43: "No labor organization shall hereafter, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, deny a person or persons membership in its organization by reason of his race, creed, color or national origin, or by regulations, practice or otherwise, deny to any of its members, by reason of race, creed, color or national origin, equal treatment with all other members in any designation of members to any employer for employment, promotion or dismissal by such employer."

⁴⁶ 293 N.Y. 315, 56 N.E.2d 721 (1944).

⁴⁷ *Id.* at 324, 56 N.E.2d at 725.

⁴⁸ N.Y. EXECUTIVE LAW §296(1)(b).

apprenticeship training program.⁴⁹ Furthermore, Section 815 of the Labor Law, which contains suggested standards for apprenticeship agreements, provides in subdivision 5 that apprentices should be hired "without any direct or indirect limitation, specification or discrimination as to race, creed, color or national origin."

Fair Employment and the Aged

Any discussion of civil rights in employment would be incomplete without some mention of the protection afforded the aged worker. While not a racial problem, it further demonstrates the thoroughness of New York's anti-discrimination program. One provision of the Executive Law makes it unlawful for an employer, licensing agency or employment agency to discriminate on the basis of age against an individual between the ages of forty and sixty-five in regard to hiring, dismissing, promoting, and licensing as well as to terms and conditions of employment.⁵⁰ It also prohibits the questioning of a prospective employee about his age if such questioning, either directly or indirectly, evinces any limitation, specification or discrimination against individuals between the ages of forty and sixty-five.⁵¹ Legislation such as this was necessary since many qualified individuals were being refused employment solely because they were deemed "too old." This, in turn, created a serious social and economic problem since many persons were unemployed, yet too young for social security or pensions.

Enforcement of Fair Employment Practices

As was seen in the area of public ac-

⁴⁹ N.Y. EXECUTIVE LAW §296(1-a).

⁵⁰ N.Y. EXECUTIVE LAW §296(3-a)(a).

⁵¹ N.Y. EXECUTIVE LAW §296(3-a)(b).

commodations, a person claiming to be aggrieved by an unlawful employment practice may file a complaint with the State Commission for Human Rights.⁵² The matter is then investigated and if probable cause for the complaint exists an attempt is made to eliminate it through persuasion.⁵³ If this informal talk fails, a formal hearing is held at which time the Commission determines the guilt or innocence of the accused.⁵⁴ If the Commission finds that the accused violated the law, it issues a cease and desist order⁵⁵ which may be enforced by court decree.⁵⁶ Any wilful violation of an order of the Commission results in the perpetration of a misdemeanor.⁵⁷ The statute also provides for judicial review of the Commission's order,⁵⁸ the demand for such not being deemed a wilful violation of the order.⁵⁹

In order to better enforce the Executive Law, the legislature empowered the Commission to adopt suitable rules and regulations.⁶⁰ Pursuant to this authorization, the Commission promulgated a regulation which requires every employer, employment agency and labor organization to post

and maintain at their establishments notices furnished by the Commission. These notices indicate the substantive provisions of the Executive Law, locations of places for filing complaints, and other pertinent information. The right of the Commission to enact such regulations was subsequently challenged by the owner of a licensed employment agency.⁶¹ The plaintiff argued that because the legislature had not acted on a Commission-sponsored bill which specifically authorized such posting, it had voiced its disapproval of such action. The supreme court rejected this contention by stating:

The rules of statutory construction on implications from legislative inaction must be applied cautiously Frequently, legislative bodies prefer to leave acts which they deem administrative to administrative agencies in the exercise of their rule-making power. In this case, such a conclusion appears as reasonable as the one the plaintiff draws.⁶²

An important factor in the court's decision was its belief that the power to make such a regulation was essential if the Commission was to succeed in carrying out its assigned task. The court reasoned that:

The Commission would be unable to carry out the purposes of this entirely new legislation unless it could familiarize persons whom the law is intended to protect with its provisions. . . . The object of the notice is not merely to catch violators. It is to make it manifest that there is a State policy against discrimination in employment. . . . Thirteen million people cannot be educated as to the terms of a law of

⁵² N.Y. EXECUTIVE LAW §297. See text accompanying note 17 *supra*.

⁵³ N.Y. EXECUTIVE LAW §297: "After the filing of any complaint . . . if such commissioner shall determine . . . that probable cause exists . . . he shall immediately endeavor to eliminate the unlawful discriminatory practice . . . by conference, conciliation and persuasion."

⁵⁴ N.Y. EXECUTIVE LAW §297.

⁵⁵ *Ibid.*

⁵⁶ N.Y. EXECUTIVE LAW §298.

⁵⁷ N.Y. EXECUTIVE LAW §299.

⁵⁸ N.Y. EXECUTIVE LAW §298.

⁵⁹ N.Y. EXECUTIVE LAW §299.

⁶⁰ N.Y. EXECUTIVE LAW §295(5): "The commission shall have the following functions, powers and duties to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article. . . ."

⁶¹ *Ross v. Arbury*, 206 Misc. 74, 133 N.Y.S.2d 62 (Sup. Ct. 1954), *aff'd mem.*, 285 App. Div. 886, 139 N.Y.S.2d 245 (1st Dep't 1955).

⁶² *Id.* at 77, 133 N.Y.S.2d at 64-65.

sweeping social significance unless it is advertised.⁶³

HOUSING

One of the areas in which discrimination causes the greatest social harm is that of housing. It has been asserted that discrimination in housing promotes family instability and juvenile delinquency on the theory that these conditions will persist as long as families are forced to dwell in whatever limited housing is available.⁶⁴ Until the legislature acts, however, discrimination against race or color in selling or leasing real estate is not unlawful as violative of a civil right.⁶⁵ Fortunately, the New York Legislature sensed the need for remedial legislation and enacted a number of statutes that prohibit discriminatory housing practices.

One of the first statutes enacted, the Public Housing Law, provides that for all of its purposes no person shall, because of race, creed, color or national origin, be subjected to any discrimination.⁶⁶ It regulates housing financed and administered either wholly or partially by federal, state or local authorities.⁶⁷ The next area designated for control was publicly-assisted housing.⁶⁸ Included in this category is

⁶³ *Id.* at 78, 133 N.Y.S.2d at 66.

⁶⁴ *Hearings on Housing in Washington before the United States Comm'n on Civil Rights* 7 (1962).

⁶⁵ *Globerman v. Grand Cent. Parkway Gardens*, 115 N.Y.S.2d 757, 761 (Sup. Ct. 1952), *aff'd mem.*, 281 App. Div. 820, 118 N.Y.S.2d 917 (1st Dep't 1953).

⁶⁶ N.Y. PUB. HOUSING LAW §223. Protection in public housing can also be had under the Executive Law since it includes public housing as a form of publicly-assisted housing. N.Y. EXECUTIVE LAW §292(11)(a).

⁶⁷ See N.Y. PUB. HOUSING LAW §3(2), (11), (15), (16), (17).

⁶⁸ Publicly-assisted housing was first defined and regulated by the CRL in 1950. N.Y. CIV. RIGHTS LAW §§18-b, 18-c. Subsequently the Executive

housing financed in whole or in part by a loan, the repayment of which is guaranteed by an agency of the federal, state or local government.⁶⁹ The main impact of this legislation in the area of publicly-assisted housing is that certain types of *privately* owned housing,⁷⁰ largely urban renewal projects and Federal Housing Association developments, are now brought within the scope of the anti-discrimination statutes.⁷¹

The constitutionality of this legislation was challenged⁷² when a Negro filed a complaint with the State Commission Against Discrimination charging the Pelham Hall Apartments in New Rochelle, New York, with refusing to lease him an apartment because of his race. Pelham Hall argued that legislation banning discrimination in housing violated the constitutionally protected right of property owners to choose the person to whom their property should be sold or leased. Justice Eager rejected this argument by reasoning:

Law was amended to include similar provisions. N.Y. EXECUTIVE LAW §§292(11), 296(3).

⁶⁹ N.Y. CIV. RIGHTS LAW §18-b (3)(e); N.Y. EXECUTIVE LAW §292(11)(d). Public assistance may also take the form of a tax exemption or the use of the governmental power of condemnation to assemble a parcel of land which is then sold to a private developer. N.Y. CIVIL RIGHTS LAW §18-b(3)(a), (c); N.Y. EXECUTIVE LAW §292(11)(c)(1), (3).

⁷⁰ The types of privately owned housing regulated are multiple dwellings containing three or more apartments and housing projects controlled by one person and containing ten or more contiguous units. N.Y. CIV. RIGHTS LAW §§18-b(3)(e), (f), (6); N.Y. EXECUTIVE LAW §2(11)(d)(e), (12).

⁷¹ See KONVITZ & LESKES, A CENTURY OF CIVIL RIGHTS 237 (1961); 9 CATHOLIC LAWYER 72 (1963).

⁷² *New York State Comm'n Against Discrimination v. Pelham Hall Apts., Inc.*, 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958).

The private ownership of private property, free of unreasonable restriction upon the control thereof, is truly a part of our way of life, but, on the other hand, we, as a People do hold firmly to the philosophy that all men are created equal. Indeed, discrimination against any individual here on account of race, color or religion is antagonistic to fundamental tenets of our form of government and of the God in whom we place our trust.⁷³

In this connection, he stated that private property rights are subject to the exercise of the State's police power in the interest of the public welfare and that legislation such as is involved here constitutes a valid exercise of this power.

Another argument advanced by Pelham Hall was that the Executive Law violated the "equal protection clause" of the fourteenth amendment because it was limited only to publicly-assisted housing and did not extend to private housing.⁷⁴ The court countered this contention by stating:

A proceeding step-by-step by legislative bodies to eliminate the practice of racial discrimination in affairs closely connected with the lives of our citizens is not only a reasonable, but in view of changing times and circumstances, a required method of procedure in the interest of public welfare.⁷⁵

Thus, even though certain areas of housing remained unaffected by this statute, Pelham Hall had not been denied equal protection under the law.

⁷³ *Id.* at 341, 170 N.Y.S.2d at 757.

⁷⁴ For the basis of this argument, see N.Y. EXECUTIVE LAW §§292(11), 296(3), (5). These subdivisions regulate privately owned housing to some extent, but not to the degree that they cover publicly-assisted, thus the charge of lack of "equal protection" by Pelham Hall.

⁷⁵ New York State Comm'n Against Discrimination v. Pelham Hall Apt., Inc., *supra* note 72, at 343, 170 N.Y.S.2d at 760.

One of the least regulated areas both in New York and in other jurisdictions is that of private housing. Protection, as was seen previously, is limited to provisions requiring that there shall be no discrimination in connection with the sale or rental of multiple dwellings or of contiguously located housing.⁷⁶ It is here that the arguments advanced as to the "right of freedom to contract" and the "inalienable right to possess property" carry the strongest weight, since the individual private homeowner relies entirely on his own resources to build and his own initiative to sell. These considerations, however, must be contrasted with New York's avowed public policy against discrimination. If the cost of protecting such rights of the private homeowner is too great,⁷⁷ then legislation should be planned to lessen its harmful effect and, if necessary, to eliminate it entirely. This is an area, however, where any change must of necessity be slow since private property rights are among our most cherished traditions. When this is combined with one's right to choose neighbors and friends, then the need for careful consideration can readily be seen.

Enforcement of the statutes in the housing area is difficult. While there is a State Commission for Human Rights whose purpose it is to enforce these laws, it is questionable if it can provide the remedy that the complainant seeks. This situation arises since it usually takes at least three months for the Commission to come to

⁷⁶ See note 74 *supra*. Provisions essentially similar to those in Executive Law regarding private housing are found in the Administrative Code of the City of New York, Section X 41-1.0.

⁷⁷ See N.Y.C. ADMIN. CODE §X 41-1.0 for an excellent outline of the evils and corresponding costs of discrimination in housing. See also text accompanying note 58 *supra*.

a final decision. During this period the defendant can defeat the complainant's remedy by renting or selling to another before the Commission has reached any conclusion. Injunctive relief to prevent this from happening is not available to a complainant since the Executive Law provides that the Commission's jurisdiction is exclusive until a final determination is reached.⁷⁸ If the statute is to have any effect in preventing discrimination, this exclusive jurisdiction provision must be changed. An infringed right without an effective remedy does not aid the cause of civil rights.

EDUCATION

Justifiable pride can be taken in New York's record in enacting legislation to prevent discrimination in education. As part of this record New York had the honor of being the first state to create a specialized agency to deal with discrimination in this area.⁷⁹ This agency was created in order to carry out the declared policy of the legislature which is to provide all students with the equal opportunity to attend state educational institutions without discrimination because of race, color, religion, creed or national origin.⁸⁰ Any

⁷⁸ N.Y. EXECUTIVE LAW §300: "[A]s to acts declared unlawful by section two hundred ninety-six of this article, the procedure herein provided shall, while pending, be exclusive. . . ."

⁷⁹ KONVITZ & LESKES, *A CENTURY OF CIVIL RIGHTS* 225 (1961).

⁸⁰ N.Y. EDUC. LAW §313(1): "Declaration of policy. It is hereby declared to be the policy of the state that the American ideal of equality of opportunity requires that students, otherwise qualified, be admitted to educational institutions without regard to race, color, religion, creed or national origin. . . ." An exception is made with regard to religious or denominational educational institutions. They are only forbidden to discriminate because of race, color, or national origin. Discrimina-

applicant for admission to an educational institution of post-secondary grade,⁸¹ who believes himself aggrieved by an unfair educational practice, can file a complaint setting forth the particulars thereof with the Commissioner of Education.⁸² The Commissioner then conducts an investigation and follows procedures similar to those of the State Commission for Human Rights.⁸³ One notable exception to this similarity is that the Commissioner of Education may initiate an investigation on his own motion whenever he has reason to believe that discrimination has been exercised against a school applicant.⁸⁴ This is desirable since his thorough knowledge of enrollment procedures makes him best equipped to determine when discrimination is in fact being practiced.

tion as to religion and creed is permissible in these institutions in recognition of the fundamental American right of members of various religious faiths to establish and maintain educational institutions exclusively or primarily for students of their own religious faith.

⁸¹ N.Y. EDUC. LAW §313(2). The term educational institution was limited to post-secondary schools since there was no evidence that racial or religious discrimination was practiced at public elementary or secondary schools. Also the Education Law in another section contained a section prohibiting discrimination on the grounds of race, creed, color, or national origin in all public schools. N.Y. EDUC. LAW §3201. Similar protection is found in N.Y. CIV. RIGHTS LAW §40 which defines public schools as places of public accommodation and in the N.Y. EXECUTIVE LAW §296(4) which makes it an unlawful discriminatory practice for a non-sectarian education corporation or association to deny the use of its facilities to any person, otherwise qualified, by reason of his race, color or religion.

⁸² N.Y. EDUC. LAW §313(5)(a).

⁸³ *Ibid.* See N.Y. EXECUTIVE LAW §297.

⁸⁴ N.Y. EDUC. LAW §313(5)(b). "Where the commissioner has reason to believe that an applicant or applicants have been discriminated against . . . he may initiate an investigation on his own motion."

The state's policy of equal educational opportunity for all was vividly demonstrated in the now historic message dispatched by Education Commissioner James E. Allen on June 18, 1963.⁸⁵ Dr. Allen's message ordered all school districts throughout the state to submit plans aimed at the eventual elimination of racial imbalance. This, according to the Commissioner, is a situation that arises in schools having Negro enrollments of 50 per cent or more.⁸⁶ It is Dr. Allen's belief that such racial imbalance constitutes a deprivation of the equality of educational opportunity envisioned under the Education Law of New York. This belief was bolstered in part by a report from the Commissioner's Advisory Committee on Human Relations and Community Tensions which stated:

When a "neighborhood school" becomes improperly exclusive in fact or in spirit, when it is viewed as being reserved for certain community groups, or when its effect is to create or continue a ghetto-type situation, it does not serve the purposes of democratic education.⁸⁷

One possible result of the Commissioner's directive that is certain to meet with opposition, is the transportation of students from their own neighborhoods to schools of other locales.⁸⁸ This is aggravated even more so when the other neighborhood is a

so-called "slum area." Parents are sure to object strenuously for they will lose, at the very least, the opportunity to participate in the support and guidance of their neighborhood schools.⁸⁹ They will also object to their children being subject to conditions of an area not of their own choosing. These are valid objections that merit serious consideration. How well the Commissioner's plan works in practice can only be determined through compliance and use. As it stands now, however, it is a dramatic step forward toward achieving the greatest possible measure of complete integration in our school system.

CONCLUSION

Against a backdrop of nationwide concern over civil rights, New York stands out as a leader in eliminating discrimination on the basis of race, creed, color or national origin. It has promoted the passage from ancient habits of prejudice to the development of opportunities based on merit, in which human worth is the sole measure of a man's right to work, to live and to enjoy the public facilities.

However, the questions raised by the recent civil rights demonstrations have become critical. The Negro has despaired of the gradualism of court desegregation. Does this mean that the extensive civil rights legislation in New York is inadequate? It is submitted that New York's legislation, although imperfect in several respects, is far-reaching enough so that the Negro can obtain more than just a gradual desegregation and, yet, not one which would be revolutionary.

disfavor upon such a plan unless it can be proved to be educationally effective. N.Y. Herald Tribune, July 2, 1963, p. 2 col. 5.

⁸⁹ N.Y. Times, June 19, 1963, p. 21, col. 5.

⁸⁵ N.Y. Times, June 19, 1963, p. 21, col. 2.

⁸⁶ Dr. Allen has announced that he has no plans to insist that school districts in the state achieve a fifty-fifty racial balance. He admitted that perhaps nothing can be done about integrating some schools in a borough like Manhattan, where overall registration is only twenty-five per cent white. N.Y. Herald Tribune, July 2, 1963, p. 2, col. 3.

⁸⁷ N.Y. Times, June 19, 1963, p. 21, col. 1.

⁸⁸ Dr. Allen is as yet undecided about the possibility of transporting white students into Negro areas to promote integration. He would look with

This analysis of New York's civil rights legislation does not decisively answer the question of whether the courts are more effective than the streets. One thing is certain: the legislative and judicial processes

move more slowly than the picketing and sit-in demonstrations. But another aspect is also evident: they are peaceful and, perhaps, more certain.

