

# COMMENT

## A CRITIQUE OF THE OHIO PUBLIC ACCOMMODATIONS LAW

WILLIAM W. VAN ALSTYNE\*

Many people are willing to fight discrimination but preferably that which exists across the street or across the world rather than that in their own backyards. We must build a better example here at home—in Ohio.

GOVERNOR MICHAEL V. DiSALLE<sup>1</sup>

Since 1884, Ohio has modestly identified itself with the philosophy that enterprises which solicit the general public for private profit necessarily assume some responsibility not to deny arbitrarily the public's right to rely on their services and facilities.<sup>2</sup> In adhering to this position, Ohio has not pursued a novel or maverick policy as twenty-six states presently maintain laws which forbid discrimination in places of public accommodation.<sup>3</sup> Indeed, the conservative char-

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\* Assistant Dean and Assistant Professor of Law, Ohio State University. Materials for this Comment were provided by third year seminar students at the College of Law; their assistance is gratefully acknowledged.

<sup>1</sup> Ohio Civil Rights Conference Proceedings 8 (multil. 1960).

<sup>2</sup> 81 Ohio Laws 15 (1884): "Whereas, it is essential to just government that we recognize and protect all men as equal before the law, and that a democratic form of government should mete out equal and exact justice to all, of whatever nativity, race, color, persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law therefore, SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, that all persons within the jurisdiction of said state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land and water, theaters and other places of public amusement subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color.

SECTION 2. That any person who shall violate any of the provisions of the foregoing section by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color and race, the full enjoyment of any of the accommodations, advantages, facilities, or privileges, in said section enumerated, or by aiding or inciting such denial, shall for every such offense, forfeit and pay a sum not to exceed \$100 to the person aggrieved thereby, to be recovered in any court of competent jurisdiction, in the county where said offense was committed; and shall also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not to exceed one hundred dollars (\$100), or shall be imprisoned not more than thirty days or both; and provided further, that a judgment in favor of the party aggrieved, or punishment upon an indictment, shall be a bar to either prosecution respectively."

<sup>3</sup> For full citation to laws of all twenty-six jurisdictions, see Greenberg, *Race Relations and American Law* 275-79 (1959). See also, "State Laws and Agencies for Civil Rights," Report of the Governor's Comm. on Human Rights, Wisconsin, 1960.

acter of the Ohio public accommodations law has been relatively unchanged since 1894.<sup>4</sup> Both the coverage and remedies provided by the law are extremely abbreviated in comparison with the general trend of legislation in other jurisdictions,<sup>5</sup> notwithstanding substantial evidence that discrimination in places of public accommodation exists throughout Ohio.<sup>6</sup>

The doubtful success of the law is attributable both to a number of deficiencies apparent on the face of the statute, and to the diffidence or reserved attitude of the courts. The purpose of this comment is to examine the more striking inadequacies of the law which inhibit it from eliminating racial and religious discrimination in places of public accommodation.<sup>7</sup> The following treatment briefly reviews the law with respect to: who is protected; who is forbidden from discriminating; what kind of discrimination is proscribed; what constitutes a place of public accommodation; what remedies are available; what significance has section 2901.36 of the Ohio Revised Code. As an immediate point of reference, it may be well to set out the relevant sections of the Ohio Revised Code:

*Section 2901.35 Denial of privileges at restaurants, stores and other places by reason of color or race.*

No proprietor or his employee, keeper, or manager of an inn, restaurant, eating house, barber shop, public conveyance by air, land, or water, theater, store or other place for the sale of mer-

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<sup>4</sup> See 91 Ohio Laws 17 (1894), increasing the provision for punitive damages to a minimum of \$50 and a maximum of \$500, or a fine from \$50 to \$500 or imprisonment from 30 to 90 days, or both. A previous amendment enacted one month after the statute's promulgation (81 Ohio Laws 90 [1884]), added "accommodations" to the omnibus phrase, and listed restaurants, eating-houses, and barber shops.

<sup>5</sup> In 1959 the Unruh Civil Rights Act of California, (Calif. Stats. 1959), ch. 1866, extended coverage of its public accommodations law (Cal. Civ. Code § 51), to forbid discrimination because of race, color, religion, ancestry, or national origin in any *business establishment*, a violation giving rise to an action for minimum damages of \$250. See 5 Race Rel. L. Rep. 249 (1960). A recent state attorney general's opinion construes this phrase very broadly, even to include the facilities and services supplied by real estate brokers and salesmen. 5 Race Rel. L. Rep. 255 (1960).

The current New York law (Civil Rts. Law § 40) lists more than fifty kinds of places of public accommodations in which discrimination is proscribed, enforceable through a civil suit with minimum damages of \$100 or an administrative procedure through a state commission which possesses power to subpoena witnesses and issue cease and desist orders. N.Y. Exec. L. Art. 12, §§ 290-301 (1959). The New Jersey statute is similar. For a comparison of these and other statutes, see "State Laws and Agencies for Civil Rights," Report of the Governor's Comm. on Human Rights, Wisconsin, 1960; Greenberg, *Race Relations and American Law* 101-114 (1959).

<sup>6</sup> See "Discrimination in Public Accommodations in Ohio" section I of the Report of the Ohio Civil Rights Commission (multil. Dec. 1960).

<sup>7</sup> For an earlier review of the Ohio public accommodations law, see Note, 12 U. Cinc. L. Rev. 60 (1938).

chandise, or any other place of public accommodation or amusement, shall deny to a citizen, except for reasons applicable alike to all citizens and regardless of color or race, the full enjoyment of the accommodations, advantages, facilities, or privileges thereof, and no person shall aid or incite the denial thereof.

Whoever violates this section shall be fined not less than fifty nor more than five hundred dollars or imprisoned not less than thirty nor more than ninety days, or both and shall pay not less than fifty nor more than five hundred dollars to the person aggrieved thereby to be recovered in any court in the county where the violation was committed.

*Section 2901.36 Bar to prosecution.*

Either a judgment in favor of the person aggrieved, or the punishment of the offender upon an indictment under section 2901.35 of the Revised Code, is a bar to further prosecution for a violation of such section.

I. WHO IS PROTECTED BY THE STATUTE

The statute provides only that discrimination against "a citizen" is unlawful. It is not to be supposed that the phrase would be liberally construed, since the judicial tendency has been to restrict the statute.<sup>8</sup> It is therefore quite clear that visiting aliens, foreign travelers in Ohio, and the more that 1,000 foreign students attending Ohio colleges, do not come within the protection of the law. Their omission possibly is attributable to legislative oversight in earlier years when fewer students and visitors came to Ohio from Asia, Africa, and the Middle East; there would otherwise appear to be little reason to sanction racial discrimination against these visitors, while forbidding it with respect to local residents. Since these international visitors to Ohio probably contribute substantially to the image of America projected in their own countries, there is every reason to make the law uniform to protect them equally with our own citizens.

In the absence of any reported decision disposing of the issue, it is doubtful whether an organization, club, or association would be defined as "a citizen" under a conservative interpretation of the phrase. The statute may therefore produce the incongruous consequence of sanctioning a racially inspired refusal to accommodate a conference, meeting, luncheon, or convention when the request for accommodations is made by an organization, even while forbidding discrimination against each of the club members if they were to enter a request, or to present themselves, individually.

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<sup>8</sup> See, e.g., *Fletcher v. Coney Island*, 54 Ohio Op. 112 (C.P. 1954), *rev'd*, 165 Ohio St. 150, 134 N.E.2d 371 (1956); *Harvey v. Sissle*, 53 Ohio App. 405, 5 N.E.2d 410 (1936); *Hargo v. Meyers*, 4 Ohio C.C.R. 275, 2 Ohio C.C. Dec. 543 (1889). And see discussion which follows.

Finally, the language of the statute leaves the question unsettled as to whether *all* American citizens are protected against discrimination in places of public accommodation in Ohio, or whether only citizens (roughly equivalent to permanent residents) of Ohio itself are protected. Since Ohio state citizenship is not characteristic of transient visitors, tourists, or travelers through Ohio, and since these persons doubtlessly comprise a substantial portion of hotel, motel, restaurant, and theater trade, the statute may in fact tolerate discrimination in some of the very establishments it otherwise explicitly lists as places of public accommodation which are ostensibly forbidden from discriminating.

## II. WHO IS FORBIDDEN FROM DISCRIMINATING

The face of the statute limits the class of potential defendants to proprietors and their employees, keepers, and managers. The reference in the second paragraph which makes it an offense to discriminate, "whoever" that person may be, should probably be construed in terms of the particular parties expressly designated, and therefore adds nothing to the scope of the statute. In the absence of cases to the contrary, it is arguable that lessors, trustees, and others in whom ownership of places of public accommodation may inhere and who profit from the operation of such establishments, but who have assigned or otherwise delegated proprietary and managerial interests to others, cannot be held responsible. Yet the intimate connection of such persons with their enterprises and their ultimate power to influence the policies of such establishments, suggest they should be included.

The statute is also patently ambiguous with respect to impersonal legal entities which may operate places of public accommodation under business or firm names. Although one Ohio court held that a corporation was a "person"<sup>9</sup> under an earlier version of the statute,<sup>10</sup> another court held that a partnership was not a "person" and thus could not be sued in its firm name for acts committed by its employees.<sup>11</sup> The phrase "whoever" recently has been substituted for "person"; since the referent of "whoever," *viz.* "a proprietor," might include a corporation or partnership, it is presently arguable that business entities may

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<sup>9</sup> *Johnson v. Humphrey Pop Corn Co.*, 4 Ohio C.C.R. (n.s.) 49, 14 Ohio C.C. Dec. 135 (1902).

<sup>10</sup> In 1902, at the time of the *Johnson* case, the statute forbade any "person" from violating the terms of the statute. The word has since been dropped, raising some possible question as to the vitality of the *Johnson* decision.

<sup>11</sup> *Hargo v. Meyers*, *supra* note 8.

be held liable.<sup>12</sup> The lack of judicial precedent under the current statute, however, and the checkered treatment of the law in prior cases, suggest that legislative clarification is desirable.

Finally, there is the knotty problem of proving an agency relationship between an employee or other representative of a proprietor, and the proprietor himself. Without alleging and proving that such a relationship exists, an aggrieved party cannot secure even the slight relief presently afforded by the statute against proprietors, managers, or keepers who determine the policy for their business establishments. While such proof may be easy where the manager is present and actually participates in the discriminatory acts,<sup>13</sup> such a case is obviously atypical. The courts have generally taken a parochial view of a proprietor's responsibility, confronting the plaintiff with an extremely difficult burden of proof.<sup>14</sup> Since the actual scope of employment is best known to the proprietor, and since the facts which determine the legal relationship between management and subordinate representatives of an establishment may be peculiarly within the knowledge and control of these parties, it may be reasonable to entertain a rebuttable presumption that an agency relationship does exist when discrimination is manifested by one apparently acting in a representative capacity for a place of public accommodation. Moreover, it may be desirable to give statutory effect to the dictum of one Ohio court that where an employee is otherwise acting within the scope of his employment, the employer cannot escape his own liability under the law even if the employee discriminates contrary to the employer's instructions.<sup>15</sup>

### III. WHAT KIND OF DISCRIMINATION IS PROSCRIBED

The statute is apparently limited to discrimination based on "color or race," and thus ignores discrimination in places of public accommodation with respect to religion, ancestry, and national origin.<sup>16</sup> The omission is especially puzzling since there would seem

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<sup>12</sup> The argument has been advanced at 12 U. Cinc. L. Rev. 62-63 (1938), but never acted upon by the courts.

<sup>13</sup> See, e.g., *Puritan Lunch v. Forman*, 29 Ohio Ct. App. 289 (1918).

<sup>14</sup> See, e.g., *Lyons v. Akron Skating Rink Co.*, 18 Ohio C.C.R. (n.s.) 202, 32 Ohio C.C. Dec. 690 (1908); *Anderson v. Rawlings*, 18 Ohio C.C.R. 381, 10 Ohio C.C. Dec. 112 (1899). Note, also, that in any criminal proceeding brought under the law, the state must prove the material facts beyond a reasonable doubt, and not merely by a preponderance of the evidence. For other cases evidencing the courts' conservative construction of the law, see *supra* note 8 and *infra* note 26.

<sup>15</sup> *Davis v. Euclid Theatre Co.*, 17 Ohio C.C.R. (n.s.) 495, 32 Ohio C.C. Dec. 690 (1911).

<sup>16</sup> *But see Anderson v. Ohio*, 29 Ohio Ct. App. 61, 40 Ohio C.C.R. 510 (1918),

to be no sound argument to support the law forbidding the indulgence of prejudice based on the adventitious difference of race or color, and tolerating the indulgence of prejudice based on equivalently irrelevant differences of religion, ancestry, or national origin. The explanation is not to be found in the fact that the original law of 1884 responded principally to the state's concern for fair treatment of Negroes, because the preamble to the original public accommodations law expressed the state's determination to eliminate discrimination based upon "nativity" and "religion or political persuasion,"<sup>17</sup> as well as discrimination based on race or color. Since the state has regarded discrimination on account of religious, ancestral, or ethnological differences just as repugnant to its policy on fair employment practices as discrimination on account of race or color,<sup>18</sup> consistency would require that the public accommodations law be expanded commensurately.

Startling as the thought may be, the public accommodations law apparently does not prohibit total segregation even in the specific establishments listed in the law! What section 2901.35 proscribes is the denial of the "full enjoyment" of accommodations, advantages, facilities, or privileges of a place of public accommodation. The substantive content of "full enjoyment" is not to be construed according to federal constitutional definitions of 1954 or 1960,<sup>19</sup> however, but according to an assessment of the legislature's purpose at the time of

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where the conviction of a dance hall owner who excluded a Jewish person was upheld. The opinion contains no discussion of the basis for including this type of protection within the statute.

<sup>17</sup> See *supra* note 1.

<sup>18</sup> Ohio Rev. Code § 4112.02 (Supp. 1959).

<sup>19</sup> That is, the shift in the Supreme Court's definition of "equal protection" under the fourteenth amendment, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), would presumably not operate to change the content of "full enjoyment" in the state law, especially if a contrary interpretation accords with the ascertainable intent of the Ohio legislature when it last modified the state law. The effect of *Brown* is merely to bar segregation in state owned, leased, operated, or substantially assisted enterprises. There is no reason why it should operate so as to require that the states impose on private persons the same standard of equal protection to which the state itself is subject, especially since judicial modification of statutes is less likely than judicial modification of constitutional provisions which otherwise cannot be easily updated by amendment. That fourteenth amendment standards do not affect "private" activity, see *Civil Rights Cases*, 109 U.S. 3 (1883), although state sanction of private discrimination has since been held to offend the fourteenth amendment, *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Black v. Cutter Laboratory*, 351 U.S. 292 (1956) (dissenting opinion), and state inaction has occasionally been equated with state action where responsibility could be easily attached to a particular state officer; *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3rd Cir. 1945), *cert. denied*, 332 U.S. 776 (1947); *United States v. Catlette*, 132 F.2d 902 (4th Cir. 1943).

the law's enactment.<sup>20</sup> In this setting, the phrase "full enjoyment" would clearly include the right to have access to facilities which are *physically* equal to those available to all other persons,<sup>21</sup> but it might not forbid "mere" segregation because of the reluctance of the early courts to regard even compulsory separation as essentially odious standing alone.<sup>22</sup> Thus a description of the law in Ohio Jurisprudence 2d states:

The mere separation of the races by a common carrier involves no discrimination in the invidious sense contemplated by the Civil Rights Statute if each race is afforded substantially equal comforts, conveniences, and accommodations.<sup>23</sup>

Since the compulsory isolation of minority citizens has, for some time, been determined to have the same reprehensible effects as other, less subtle, forms of discrimination, and since more recent Ohio legislation in the employment fields includes segregation within the definition of proscribed discrimination,<sup>24</sup> the anachronism of section 2901.35 should be corrected.

#### IV. WHAT CONSTITUTES A PLACE OF PUBLIC ACCOMMODATION

A glance at the statute discloses that the *specific* enumeration of places of public accommodation is extremely brief, obviously limited far short of all establishments which generally solicit public patronage for private profit. Transportation terminals, sports arenas, hospitals, soda fountains, and bars would appear to be indistinguishable from public conveyances, theaters, and stores with respect to the policy of the law, yet they are omitted from the list of designated places of public accommodation.

It is possible that some of these enterprises might come under the general omnibus phrase "or any other place of public accommodation or amusement,"<sup>25</sup> but such a construction is not entirely likely.

<sup>20</sup> See *Wachendorf v. Shaver*, 149 Ohio St. 231 (5th syllabus), and see generally, 82 C.J.S. "Statutes" § 321, n.25 at 568 (1953).

<sup>21</sup> See, e.g., *Guy v. Tri-State Amusement Co.*, 28 Ohio Ct. App. 231 (1917); *Puritan Lunch v. Forman*, *supra* note 13.

<sup>22</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896), and see discussion in Civil Rights Cases, *supra* note 19. The effort of the Ohio courts in the cases cited in note 25, *infra*, to explain in what fashion the facilities extended to Negroes were not merely separate but *physically* unequal, also implies that "mere" segregation would not have constituted a denial of "full enjoyment."

<sup>23</sup> 9 Ohio Jur. 2d 203, "Civil Rights" § 18 (1954); the current supplement suggests no modification of the 1954 view.

<sup>24</sup> See *supra* note 18.

<sup>25</sup> Places of public accommodation not named explicitly in § 2901.35, but which have been held to fall within the omnibus clause, include: a private amusement park, *Fletcher v. Coney Island*, 54 Ohio Op. 112, *rev'd on other grounds*, 165 Ohio St. 150,

Because the statute is partly in derogation of common law, because it is partly penal in character, and because of the doctrine of *ejusdem generis*, the courts have generally tended to restrict the scope of the omnibus phrase.<sup>26</sup> Thus, retail stores were held not to be places of public accommodation,<sup>27</sup> necessitating a statutory amendment<sup>28</sup> to bring them within the statute. Similarly, even though the statute explicitly included inns, restaurants, and eating houses at the time, an Ohio court held that a soda fountain within a candy store was not included within the omnibus phrase.<sup>29</sup>

Even if a change were suddenly to be signalled in the judicial treatment of the omnibus phrase,<sup>30</sup> the policy of providing those subject to the law with clear notice of their responsibility, as an essential element of fundamental fairness, would suggest that a more explicit, symmetrical list of places of public accommodation ought to be provided.

Since the statute is limited to places of "public" accommodation, presumably it does not include distinctly private establishments organized and managed by a regular, dues-paying membership. In recognition of the distinctions that such establishments do not solicit general patronage for profit, and that they are formed for non-commercial reasons which may involve close, social associations, these groups may legitimately not lie within the purpose of the statute. The division between "public" and "private" is sufficiently indistinct, however, that the exemption of private organizations tends to encourage evasive schemes of entrepreneurs through the organization of spurious clubs.<sup>31</sup> Because knowledge and evidence of the actual character of a particular

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134 N.E.2d 371 (1956); a golf course, *Gillespie v. Lake Shore Golf Club, Inc.*, 56 Ohio L. Abs. 222, 91 N.E.2d 290 (Ct. App. 1950); a bowling alley, *Johnson v. Humphrey Pop Corn Co.*, *supra* note 9; a dance hall, *Anderson v. Ohio*, *supra* note 16; a motion picture theater, *Guy v. Tri-State Amusement Co.*, *supra* note 21.

<sup>26</sup> See, e.g., *Fletcher v. Coney Island*, 165 Ohio St. 150, 134 N.E.2d 371 (1956); *Rice v. Rinaldo*, 44 Ohio Op. 286, 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); *Harvey v. Sissle*, *supra* note 8; *Tate v. Eidelman*, 32 Ohio N.P. (n.s.) 478 (C.P. 1934); *Hargo v. Meyers*, *supra* note 8.

<sup>27</sup> *Harvey v. Sissle*, *supra* note 8.

<sup>28</sup> Gen. Code § 12940, 117 Ohio Laws 271 (1937).

<sup>29</sup> *Deuwell v. Foerster*, 12 Ohio N.P. (n.s.) 329, 30 Ohio Dec. 510 (C.P. Franklin Co. 1912).

<sup>30</sup> See, e.g., *Gillespie v. Lake Shore Golf Club, Inc.*, *supra* note 25 where the court included a golf club as a place of public accommodation, and where it granted injunctive relief, notwithstanding the claim that the club was a private association for members only. *But see Fletcher v. Coney Island*, *supra* note 26.

<sup>31</sup> Compare *Gardner v. Vic Tanny Compton, Inc.*, 6 Cal. Rptr. 490, 5 Race Rel. L. Rep. 331 (Cal. D.C.A. 1960), with the *Gillespie* case, *supra* note 25.



establishment is frequently within the exclusive control of its owners, a reasonable precaution against evasive arrangements might require that respondents should assume the burden of proving the distinctly private nature of an establishment which otherwise has been proved to cater for profit to large segments of the general public.

## V. WHAT REMEDIES ARE AVAILABLE

### A. *The Criminal Sanction*

Section 2901.35 provides that a violation is punishable by a fine from \$50 to \$500 and/or incarceration from thirty to ninety days. Notwithstanding the obvious inference one might draw initially that the threat of imprisonment should certainly operate as an effective deterrent, these penal sanctions have proved to be virtually worthless.<sup>32</sup> Since 1884, there has been but one reported case where the criminal sanction was employed, and that case arose in 1918.<sup>33</sup> It would appear extremely doubtful that proprietors of places of public accommodation would be much deterred by knowledge of this record. Although the matter is necessarily speculative,<sup>34</sup> failure of the criminal law may involve the following considerations:

1. Actions can be brought only by local prosecutors who may be reluctant to implement the statute because:
  - (a) the complaining witnesses are usually persons of little influence.
  - (b) the accused may have considerable property and influence.
  - (c) the case has little political value due to the unpopularity of the law.
  - (d) convictions may be difficult to obtain, because:
    - (1) a jury trial is mandatory on defendant's request; the jury may be hostile to the complaining witness's cause, or understandably reluctant to find a verdict that may result in imprisonment.
    - (2) the burden of proof in a criminal proceeding is one of proof beyond a reasonable doubt, rather than proof by a mere preponderance of the evidence.
2. The public character of a criminal proceeding is likely to attract unwanted publicity to the complaining witness's grievance, discouraging the filing of complaints.

### B. *The Civil Sanction*

It is most difficult to assess the efficacy of the civil remedy which provides for damages from \$50 to \$500 because: (a) not all actions

<sup>32</sup> See Ohio Civil Rights Conference Proceedings at p. 46 (multil. 1960).

<sup>33</sup> *Anderson v. Ohio*, *supra* note 16. There may be, of course, other instances among courts of original jurisdiction whose decisions are not published, although one might expect that these would be correspondingly few.

<sup>34</sup> On the lack of success of criminal and civil remedies generally, see Note, 74 *Harv. L. Rev.* 526 (1961); Note, 39 *Colum. L. Rev.* 986 (1939).

in the lower state courts are reported; (b) the extent of discrimination in places of public accommodation had not been quantified or even surveyed until recently; (c) presumably, cases of this character may frequently be settled out of court to save costs and avoid publicity.

It is, however, difficult to imagine how the civil remedy could be fully effective in view of the following considerations:

- (a) the minimum recovery of \$50 has been unchanged since 1894, even though the dollar has diminished in value by more than two-thirds.
- (b) suits must be brought wholly at the private expense of the plaintiff who will probably be required to employ the services of an attorney. The cost of financing litigation which is unlikely even to cover expenses must deter aggrieved parties from pursuing their *exclusive* remedies.<sup>35</sup>
- (c) attorneys may be reluctant to handle cases as financially unattractive as these, especially with respect to a clientele less able than others to retain them except on a contingency fee basis of small appeal.
- (d) it is questionable whether proprietors find the hazard of an occasional, trifling judgment any significant deterrent to their discriminatory practices; a modest out-of-court settlement may be viewed simply as part of the cost of doing "business."

## VI. WHAT SIGNIFICANCE HAS SECTION 2901.36

Section 2901.36 provides that either a successful private suit for damages or a successful criminal proceeding will bar an aggrieved party from pursuing his alternative remedy. This obligatory election of remedies is highly exceptional, since the general rule proceeds on the theory that wholly different interests are vindicated in the two proceedings. Punishment by the state for an infraction of its policy ordinarily is no obstacle to a civil proceeding which seeks to redress a private loss. Since even the successful prosecution of a discriminatory proprietor does little to compensate his victim for the emotional distress, humiliation, and inconvenience caused by the act of discrimination, a separate suit for damages ought to be allowed.

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<sup>35</sup> The emphasis is properly on the fact that a suit for damages is the *exclusive* remedy, since *Fletcher v. Coney Island*, *supra* note 8 (overruling *sub silentio* the *Gillespie* case), held that equitable relief is not available under § 2901.35, notwithstanding that the trend in other jurisdictions was to the contrary, (see the dissent), and notwithstanding the persuasion of the lower court that: "It is evident that neither a recovery at law of the damages permitted by the statute, regardless of how many times the plaintiff recovers, nor convictions and punishments of the defendant, regardless of how often obtained and imposed, will restore to the plaintiff in this case the thing which the legislature clearly intended to give her and of which the wrongful acts of the defendant have and will continue to deprive her, namely, the right to enter the park and the opportunity fully to enjoy its facilities." 54 Ohio Op. at 117.

Even in regard to election of remedies, however, the statute lacks symmetry. Thus, it is not at all clear that an unsuccessful criminal prosecution would bar a subsequent civil suit, especially since the state's failure to satisfy the high standard of proof required in criminal cases may be no indication that the plaintiff would not prevail in a separate proceeding involving a lower standard. Equally, it is unclear whether an unsuccessful civil action would bar a subsequent criminal prosecution, although there may be slightly more reason to suggest that it might.

With respect to the possibility of multiple prosecutions for "one" offense, at least one court has suggested that a proprietor may be liable once for the acts of an employee who was acting within the scope of his authority, and again for inciting the employee to discriminate, even though the Negro customer had encountered but one instance of exclusion.<sup>36</sup> The effect of section 2901.36 on other notions of double jeopardy, through barring "further prosecution for a violation," is typically obscure. For instance, the statute provides no clue as to where the line must be drawn in the following sequence of events to insulate a proprietor from several causes of action:

- (a) Plaintiff is denied admission to a single motion picture theater twice, the second act of discrimination occurring two weeks after the first;
- (b) Plaintiff is denied admission to a single motion picture theater twice, on consecutive days, with different films playing.
- (c) Plaintiff is denied admission to a single motion picture theater twice, on consecutive days, while the same film is playing.
- (d) Plaintiff is denied admission to a single motion picture theater twice on the same day.
- (e) Two plaintiffs are denied admission at the same instant at a motion picture theater . . . (etc.).

The point, of course, is not to suggest that courts will be unable to draw the line, but to make clear that the choice of remedies presently available is not responsive to the policy which accounts for the law. That policy would not be well served even by a construction of the statute which would encourage individuals to turn their badges of minority identification to profit, by allowing them to collect from a proprietor for every act of discrimination in an interminable series.<sup>37</sup> Rather, what is required is the availability of administrative relief to insure that access to places of public accommodation shall not be denied for arbitrary reasons.<sup>38</sup> Provision for such relief

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<sup>36</sup> See *Davis v. Euclid Theater Co.*, *supra* note 15.

<sup>37</sup> Such a possibility exists under the current law, according to a dictum in *Young v. Pratt*, 11 Ohio App. 346, 30 Ohio Ct. App. 589 (1919).

<sup>38</sup> For an assessment of the success of administrative agencies in this area, see Note, 74 Harv. L. Rev. 526 (1961).

from discriminatory employment practices is available under the New Fair Employment Practices Law of Ohio,<sup>39</sup> and could easily be made a part of an expanded public accommodations law. In that event, some of the problems arising from sections 2901.35 and 2901.36 would disappear; continued refusal to admit either the original complainant or any other person in defiance of a cease and desist order issued on behalf of all persons similarly situated and on behalf of the state's own interest would be subject to contempt proceedings. Whether the legislature will provide such a remedy, or whether it will otherwise repair Ohio's dilapidated law, however, depends on how seriously it heeds the Governor's admonition with which this comment began.

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<sup>39</sup> See Ohio Rev. Code §§ 4112.03—4112.06 (1959 Supp.).