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Extra-Legislative Tort Liability for Discrimination

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Extra-Legislative Tort Liability for Discrimination

THE QUEST for adequate remedies to overcome discrimination on the basis of race, color, religion, ancestry, or national origin has induced several state legislatures in recent years to enact laws creating state antidiscrimination commissions.[1] Experience had demonstrated that existing federal and state antidiscrimination laws could not adequately protect the rights of an aggrieved party. Federal laws were restrictive as to jurisdiction,[2] and the state courts tended to construe statutory remedies as exclusive, frequently failing to deter discriminatory practices or afford victims adequate relief.[3] Furthermore, under the older civil rights statutes, discrimination was generally unlawful only in cases involving public accommodations.[4] Depending upon the purpose and type of the particular statute, the more recent administrative remedies are designed to give more adequate relief against discrimination and, in addition, to extend this re-

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[1] The following state statutes provide for some form of administrative enforcement of antidiscrimination laws: ALASKA STAT. §§ 23.10.190-.235 (1962); ARIZ. REV. STAT. ANN. §§ 41-1401 to -1485 (Supp. 1966); CAL. LABOR CODE §§ 1420-32; COLO. REV. STAT. ANN. §§ 80-21-1 to -8 (employment), §§ 25-3-1 to -6 (1963) (public accommodations); CONN. GEN. STAT. ANN. §§ 31-122 to -128 (1960); DEL. CODE ANN. tit. 19, §§ 710-13 (Supp. 1964); ILL. ANN. STAT. ch. 14, § 9 (Smith-Hurd 1963); IND. ANN. STAT. §§ 40-2307 to -2328 (repl. vol. 1965); IOWA CODE ANN. §§ 105A.1-.12 (Supp. 1965); KAN. STAT. ANN. §§ 44-1001 to -1013 (Supp. 1965); MD. ANN. CODE art. 49B, §§ 11-12, 14, 16-20 (Supp. 1965); MASS. GEN. LAWS ANN. ch. 151B, §§ 1-10 (1958); MICH. STAT. ANN. §§ 17.458(1)-(11) (1960); MINN. STAT. ANN. §§ 363.01-.13 (Supp. 1965); MO. ANN. STAT. §§ 314.101-.080 (Supp. 1965); N.H. REV. STAT. ANN. §§ 354-A:1 to :14 (1966); N.J. STAT. ANN. §§ 18:25-1 to -28 (Supp. 1964); N.M. STAT. ANN. §§ 59-4-1 to -14 (1953); N.Y. EXECUTIVE LAW §§ 290-301; OHIO REV. CODE §§ 4112.01-.99; OKLA. STAT. ANN. tit. 74, §§ 951-54 (1961); ORE. REV. STAT. §§ 659.010-.115 (1955); PA. STAT. ANN. tit. 43, §§ 951-63 (1964); R.I. GEN. LAWS ANN. §§ 28-5-1 to -39 (employment), §§ 11-24-1 to -8 (1956) (public accommodations); UTAH CODE ANN. §§ 34-17-1 to -8 (1966); WASH. REV. CODE ANN. §§ 49.60.010-.320 (1962); WIS. STAT. ANN. §§ 111.31-.36 (1957).

[2] See 28 U.S.C. § 1343 (1964).

[3] See, *e.g.*, Bachrach v. 1001 Tenants Corp., 21 App. Div. 2d 662, 249 N.Y.S.2d 855 (1964), *aff'd*, 15 N.Y.2d 718, 205 N.E.2d 196, 256 N.Y.S.2d 929 (1965); Fletcher v. Coney Island, Inc., 165 Ohio St. 150, 134 N.E.2d 371 (1956). See generally Goostree, *The Iowa Civil Rights Statute: A Problem of Enforcement*, 37 IOWA L. REV. 242 (1952); Van Alstyne, *A Critique of the Ohio Public Accommodations Law*, 22 OHIO ST. L.J. 201 (1961); Comment, *Public Accommodations: Remedies for Denials of Equal Treatment*, 7 ST. LOUIS U.L.J. 88 (1962).

[4] The first state statutes prohibiting discrimination in places of public accommodations were enacted shortly after the Supreme Court invalidated the Civil Rights Act of 1875, 18 Stat. 335, in the Civil Rights Cases, 109 U.S. 3 (1883). For a history of early civil rights legislation, see Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 547 (1909).

lief to employment and housing as well as public accommodations.[5] The commissions are able to provide more adequate relief because they are generally given the authority to issue an order requiring the business establishment to cease and desist from any unlawful discriminatory practice and to take such further affirmative measures as will effectuate the purpose of the legislation.[6]

Noticeably, the administrative remedies are not designed to compensate the aggrieved party in money damages except where there is a provision which authorizes the commission to direct the payment of back pay in cases of employment discrimination.[7] In such cases, the commission orders the employer to pay the complainant the amount he would have earned in the absence of the unlawful discriminatory practice, with an allowance for interim earnings he may have acquired elsewhere. Perhaps in creating administrative remedies the legislatures thought that adequate legal remedies were already available to the individual under the public accommodations statutes or at common law. It is unfortunate to find, however, that although these statutes often provide for some sort of civil remedy to the aggrieved party, by and large they have been unsuccessful in their result.[8] Moreover, the courts have failed to find a means for redressing the aggrieved party since they have allowed tort law to lie dormant in discrimination cases.[9]

There are several reasons for finding only a small number of cases in which compensatory damages were awarded for discrimina-

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[5] The commissions originally dealt only with employment, but state legislatures later extended their jurisdiction to include housing and public accommodations. The New York fair employment law of 1945 created the first state antidiscrimination commission. N.Y. EXECUTIVE LAW §§ 293-95. Modeled in large part after the National Labor Relations Act, 49 Stat. 451 (1935), as amended, 29 U.S.C. § 153 (1964), the statute established an agency with procedures much like those of the National Labor Relations Board by assigning to it the function of enforcing the state's policy against discrimination in employment. For a complete discussion of state antidiscrimination commissions, see Dyson & Dyson, *Commission Enforcement of State Laws Against Discrimination: A Comparative Analysis of the Kansas Act*, 14 KAN. L. REV. 29 (1965); Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526 (1961).

[6] See, *e.g.*, OHIO REV. CODE § 4112.05(G).

[7] *Ibid.* The back pay award is copied from the language in the National Labor Relations Act (NLRA) which provides back pay as a remedy for persons unlawfully fired for union activity. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(C) (1964). Although the NLRA permitted back pay relief only in situations involving reinstatement of employees previously hired, most states have enabled their commissions to award back pay for a discriminatory refusal to hire. Only Kansas and Missouri limit back pay awards to situations involving reinstatement of employees fired because of discrimination. Kan. Sess. Laws 1965, ch. 323, § 5; MO. REV. STAT. § 296.040(G) (Supp. 1961).

[8] See note 3 *supra* and accompanying text.

[9] See Green, *The Thrust of Tort Law*, 64 W. VA. L. REV. 1, 23 (1961).

tion. First, individuals are often hesitant to utilize civil remedies provided by statutes because of the expense and effort of a lawsuit and because Negroes are aware that their claims will probably be decided by a white judge and jury. Second, the difficulty inherent in calculating damages makes it likely that any recovery would be minimal. Finally, the inadequacy of the remedy for one whose primary interest is in finding a better home or job has discouraged litigation.

The antidiscrimination commissions have been successful in deterring discriminatory practices in that they have been more effective than any of the previous statutory remedies in compelling violators to comply with the law.[10] However, administrative relief does not necessarily make the aggrieved party whole, because there are no means available to compensate him for his injuries or financial losses. The violator is, in effect, permitted his "first bite free."

This Note will explore the possible justification for utilizing the recently enacted state antidiscrimination statutes creating administrative relief as a basis for a tort action by the aggrieved party to recover compensatory damages. The term compensatory damages is used in a broad context to include actual "out-of-pocket" expenses, loss of human dignity, humiliation, and mental anguish. This remedy would be in addition to the relief provided by the commissions. Because such statutes have clearly made discrimination a wrong, the injured party should have a remedy to compensate him for his economic loss as well as to punish the violator. The fact that other remedies are available under existing antidiscrimination laws need not mean that such forms of relief are exclusive.

I. THE PROBLEM OF PROVING DAMAGES

Before a tort action can be brought for compensatory damages, there must be some injury on which the plaintiff can base his plea for relief.[11] It is not surprising that in discrimination cases most people think that an aggrieved party does not suffer any injuries which should be compensated in damages because such unlawful conduct usually does not result in any physical harm or direct financial loss.[12] However, this should not prevent the courts from recog-

[10] See Dyson & Dyson, *supra* note 5, at 57; Van Alstyne, *Civil Rights: A New Public Accommodations Law for Ohio*, 22 OHIO ST. L.J. 683 (1961); Note, 74 HARV. L. REV. 526 (1959).

[11] PROSSER, TORTS §§ 1-2 (3d ed. 1964).

[12] Certainly there should be a sound basis for a tort remedy by an aggrieved party where discriminatory conduct causes physical harm.

nizing that there should be recovery for the humiliation, loss of human dignity, and mental anguish caused by the discriminating party. The courts might also award additional relief in the form of exemplary or punitive damages to reimburse the aggrieved party for elements of damages which are not legally compensable, such as wounded feelings or the expenses of suit.

A. Damages for Mental Distress

Although most courts have thus far failed to acknowledge mental distress as a compensable injury,[13] there is sound reason for allowing damages for this type of injury when it is caused by the intentional conduct of one who unlawfully discriminates against another on the basis of race or religion.[14] An examination of existing tort law reveals that damages for mental distress generally are not recoverable unless the mental injury is accompanied by some physical injury or by some already recognized tort.[15] However, there are exceptions to this rule, and mental distress may be a cause of action in itself where it results from conduct which is so outrageous that it causes severe emotional distress.[16] In addition, the intentional infliction of mental suffering has been recognized as a separate cause of action in cases involving wrongful eviction,[17] insult by public carriers[18] and innkeepers,[19] and abuse of dead bodies.[20]

An act of discrimination is seldom hostile and usually does not cause severe emotional distress. For this reason, it is unlikely that discrimination cases would be included in the first exception which permits recovery for mental suffering in the absence of physical injuries. But the inclusion of cases involving unlawful discriminatory conduct in the class of cases recognizing the intentional infliction of mental suffering as a separate cause of action would seem to be a

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[13] In Browning v. Slenderella Systems, 54 Wash. 2d 440, 341 P.2d 859 (1959), the court found that the defendant's discriminatory conduct warranted only one hundred dollars in damages because it did not cause severe emotional distress. *But see* Anderson v. Pantages Theatre Co., 114 Wash. 24, 194 Pac. 813 (1921), where the court held that the defendant's refusal to admit a Negro to his theatre constituted a tort for which the plaintiff's consequential mental suffering was an element of actual damages.

[14] For a complete discussion of the problem of proving damages for mental suffering in discrimination cases, see Duda, *Damages for Mental Suffering in Discrimination Cases*, 15 CLEV.-MAR. L. REV. 1 (1966).

[15] See PROSSER, *op. cit. supra* note 11, § 11.

[16] *Ibid.* See also Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956).

[17] Hargrove v. Leigh, 73 Utah 178, 273 Pac. 298 (1928).

[18] Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899).

[19] Emmke v. De Silva, 293 Fed. 17 (8th Cir. 1923).

[20] England v. Central Pocahontas Coal Co., 86 W. Va. 575, 104 S.E. 46 (1920).

logical extension of existing tort law. The cases in the second exception involving wrongful eviction, insult by public carriers and innkeepers, and abuse of dead bodies are similar to discrimination cases in that the injuries arise from intentional conduct or malice which disregards the legal rights of another.

Arguments that damages for discriminatory conduct cannot be measured seem to have no more validity in discrimination cases than in the class of cases presently recognizing that mental distress is compensable. For example, the mental suffering experienced by an evicted tenant seems no less difficult to prove than that experienced by a Negro who is refused admission to a place of public accommodation. The degree to which the jury is outraged by such unlawful conduct should be reflected in the amount of their damage awards.[21]

B. Punitive Damages

Where a defendant's wrongdoing is intentional and has the character of outrage frequently associated with crime, most courts have permitted the jury to award the plaintiff punitive or exemplary damages.[22] Such damages are given to the plaintiff over and above the compensatory damages for his injuries in order to punish the defendant and deter others from committing such acts.[23] Punitive damages might also serve the additional purpose of reimbursing the plaintiff for injuries which are not otherwise compensable, such as his wounded feelings or expenses of litigation.

Since discrimination is caused by an intentional act in disregard of the legal rights of another, the courts would seem to be justified in allowing an award of punitive damages to the aggrieved party. Thus, where antidiscrimination laws fail to provide adequate remedies to punish the discriminating party, an award of punitive damages would serve the dual purpose of discouraging future discriminatory conduct as well as compensating the plaintiff for the expenses of bringing the tort action where his actual damages are not sizeable. The fact that existing legislation recognizes discrimination as unlawful indicates the outrageous character of such conduct to the community.

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21 For a thorough analysis of the legal basis for awarding a victim of discrimination damages for mental suffering, see Duda, *supra* note 14.

22 PROSSER, *op. cit. supra* note 11, § 2.

23 *Ibid.*

II. Legislative Enactments as a Basis for a Civil Action for Damages

A. Public Accommodations Statutes as a Basis for a Separate Tort Action

The idea of allowing antidiscrimination legislation to act as a basis for supporting a separate tort action on behalf of the protected party is not new. A few courts have permitted a civil action for damages to be based on the older public accommodations laws. In *Browning v. Slenderella Systems*,[24] the court classified discrimination as an outrageous act in order to allow compensatory damages for mental distress.[25] Although the trial court awarded 750 dollars in compensatory damages to the plaintiff, the amount was reduced to one hundred dollars on appeal. The appellate court stated that substantial damages were not justified because the defendant's conduct did not cause *severe* emotional distress and merely warranted a nominal recovery for mental suffering.[26]

Some courts have adopted a more realistic approach to the difficulty of proving compensatory damages by granting punitive or exemplary damages.[27] Interestingly, the issue of damages is sometimes never reached because the court may be concerned only with whether or not there is a cause of action.[28] Once a cause of action is established, these cases are likely to be disposed of by out-of-court settlements.

In *Amos v. Prom, Inc.*,[29] for example, the court never decided the merits of the case. The plaintiff brought an action in a federal district court seeking three thousand dollars compensatory and seven thousand dollars exemplary damages for the defendant's violation of the Iowa Civil Rights Statute.[30] Iowa law permits an award of exemplary damages where the defendant, without justification, intentionally commits an illegal act which results in an injury to the

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[24] 54 Wash. 2d 440, 341 P.2d 859 (1959).

[25] *Id.* at 446, 341 P.2d at 863.

[26] *Ibid.*

[27] See, *e.g.*, Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961); Amos v. Prom, Inc., 115 F. Supp. 127 (N.D. Iowa 1953).

[28] See, *e.g.*, Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956); Washington v. Blampin, 226 Cal. App. 2d 604, 38 Cal. Rptr. 235 (1964); Bachrach v. 1001 Tenants Corp., 41 Misc 2d 512, 245 N.Y.S.2d 912 (1963), *rev'd*, 21 App. Div. 2d 662, 249 N.Y.S.2d 855 (1964), *aff'd*, 15 N.Y.2d 718, 205 N.E.2d 196, 256 N.Y.S. 2d 929 (1965).

[29] 115 F. Supp. 127 (N.D. Iowa 1953).

[30] Iowa Code Ann. §§ 105A.1-.12 (Supp. 1965).

plaintiff.[31] The defendant moved to dismiss the action for lack of jurisdiction on the ground that under Iowa law it would be legally impossible for the plaintiff to recover damages in an amount exceeding the federal jurisdictional minimum.[32] The court found that compensatory damages might be recovered for the plaintiff's emotional distress and that the defendant's malicious conduct would also support an award for exemplary damages.[33] Since it did not appear to be a legal certainty that a recovery in excess of three thousand dollars would be impossible under Iowa law, the motion to dismiss was overruled.[34]

B. *Administrative Remedy as a Basis for a Separate Tort Action*

In *Bachrach v. 1001 Tenants Corp.*,[35] a cooperative apartment corporation refused to sell stock and a proprietary lease to the plaintiff because he was Jewish. The plaintiff brought an action for compensatory damages, alleging that the defendant's conduct was unlawful and in violation of the Administrative Code of New York City.[36] The trial court held that the complaint sounded in prima facie tort and accordingly denied the defendant's motion to dismiss. The court stated that the key to prima facie tort is the infliction, without excuse or justification, of intentional harm which results in damages.[37] Because the defendant's conduct was contrary to the law of the city and the state, the plaintiff should have been permitted to recover damages based upon the difference in value of other obtainable accommodations he may have found. Although the New York City Code did not expressly provide a civil remedy for damages, the court reasoned that such an omission was intentional so that a limitation could not be implied. However, on appeal[38] the case was reversed on the ground that the absence of private or individual remedies in the code indicated that the intention of the legislature was to exclude such remedies.[39] According to the

[31] 115 F. Supp. at 134.

[32] The jurisdictional amount at that time was three thousand dollars. 36 Stat. 1091 (1911).

[33] 115 F. Supp. at 137.

[34] *Ibid.*

[35] 41 Misc. 2d 512, 245 N.Y.S.2d 912 (1963), *rev'd*, 21 App. Div. 2d 662, 249 N.Y.S.2d 855 (1964), *aff'd*, 15 N.Y.2d 718, 205 N.E.2d 196, 256 N.Y.S.2d 929 (1965).

[36] NEW YORK, N.Y., ADMINISTRATIVE CODE, §§ D1-1 to -4.

[37] 41 Misc. 2d at 515, 245 N.Y.S.2d at 915.

[38] 21 App. Div. 2d 662, 249 N.Y.S.2d 855 (1964), *aff'd*, 15 N.Y.2d 718, 205 N.E.2d 196, 256 N.Y.S.2d 929 (1965).

[39] *Id.* at 662, 249 N.Y.S.2d at 856.

appellate court, the express intent of the legislature would have to be shown in order to establish an action for damages on such a basis.[40]

The opinion of the trial court in *Bachrach* illustrates a novel approach of establishing a basis for a recovery of damages in a private tort action. If discrimination is made unlawful by legislative enactment, anyone who violates that law acts illegally and inflicts an intentional harm which sounds in tort. It is true that an administrative agency will eventually issue a cease and desist order after a complaint is made and a violation established. However, this relief may be too late for the complainant who has already suffered financial losses in seeking comparable accommodations, not to mention the humiliation and mental anguish experienced. Such damages should not go unnoticed by the courts merely because the legislature made no express provisions for a civil action in damages.

In a separate tort action brought by the aggrieved party, the courts need not be concerned that the remedies provided by statutes which make discriminatory conduct unlawful are exclusive. By making discrimination unlawful, legislative enactments serve to create a standard of conduct. The extension of existing tort doctrines based upon the legislation make a violation of the statute a prima facie tort.[41] The court does not look to the statute for remedies; rather it looks to it to determine whether the prescribed standard of conduct has been met. Thus, the court does not usurp the function of the legislature by this act of interpretation.

C. *Authority of Antidiscrimination Commissions To Grant Compensatory Damages*

Most antidiscrimination commissions now have the authority to compensate a complainant by ordering back-pay awards, but it is questionable whether they can order the payment of other damages.[42] For example, in Ohio the statutory provisions appear to restrict the Ohio Civil Rights Commission to back-pay awards,[43] a power which has been invoked in at least six instances in awards ranging from two hundred dollars to over two thousand dollars.[44]

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[40] *Id.* at 663, 249 N.Y.S.2d at 857.

[41] See, *e.g.*, Anderson v. Pantages Theatre Co., 114 Wash. 24, 194 Pac. 813 (1921).

[42] See note 7 *supra* and accompanying text.

[43] OHIO REV. CODE § 4112.05(G).

[44] Interview with Ellis L. Ross, Executive Director, Ohio Civil Rights Commission, in Cleveland, Ohio, March 17, 1966.

There is only one known case, *Rose Hill Sec. Co.*,[45] in which the Ohio Commission ordered the payment of actual damages. In that case a Negro woman attempted to purchase for her deceased grandmother a burial plot in a local cemetery, but her offer was refused on the ground that the cemetery was reserved for white persons. When a complaint was filed with the Commission in accordance with the Ohio antidiscrimination statute,[46] the decedent's body was placed in a temporary vault so as to preclude mootness.[47] Upon completion of the administrative proceedings, the cemetery company was ordered to cease and desist from discriminatory practices in the public sectors of the cemetery and to grant burial rights for the complainant's grandmother. In addition, the Commission ordered Rose Hill to reimburse the granddaughter for the expenses incurred as a consequence of the discrimination.[48] Damages were restricted to tomb rental fees, and no compensation was awarded for mental suffering.[49] Such injuries might also have been compensable in view of existing tort law in cases dealing with dead bodies.[50] It is arguable that the Ohio courts would not agree that the Commission had the authority to order the payment of any damages, but this point cannot be authoritatively determined because the respondent complied with the order without resorting to judicial review.[51]

Granting antidiscrimination commissions the authority to order a payment of compensatory damages after the completion of the administrative proceedings would be an efficient method of giving complete relief to the aggrieved party. It is certainly more direct than a separate civil action in the courts. The commission could easily adjudicate the additional issue of damages while the case is before it, sparing the parties the time and expense of additional litigation. Moreover, the amount of damages would be determined by experts who are more familiar with discrimination problems than

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[45] 8 RACE REL. L. REP. 749 (1964).

[46] OHIO REV. CODE §§ 4112.01-.99.

[47] A barber's refusal to cut a Negro's hair was found to be discriminatory under Ohio law by an Ohio court. Gegner v. Graham, 1 Ohio App. 2d 442, 205 N.E.2d 69 (1964). But later the Ohio Supreme Court dismissed the case as moot. 1 Ohio St. 2d 108, 205 N.E.2d 72 (1965).

[48] 8 RACE REL. L. REP. at 760.

[49] *Ibid.*

[50] PROSSER, *op. cit. supra* note 11, § 11.

[51] Most antidiscrimination statutes provide that the commissions' orders are reviewable in a court proceeding. *E.g.*, OHIO REV. CODE § 4112.06; PA. STAT. ANN. tit. 43, § 960 (1964).

are judges and juries. State civil rights commissions are comprised of a select group of appointed officials, most commonly attorneys, who are prominent in the civil rights field. These officials have a better understanding of discrimination problems because they spend most of their time enforcing antidiscrimination laws.

While damage awards granted by antidiscrimination commissions would probably be subject to judicial review,[52] the overall effect would be to insure complete relief for every aggrieved party as part of the initial administrative proceedings. Subsequent review by the courts would operate to make the amount of damage awards conform to existing community standards. However, in the absence of express legislative authority to grant such relief, administrative agencies might soon be discouraged by the courts from awarding damages. For this reason, it is the duty of the courts to recognize a private civil action designed to compensate the complainant. Such an action could be brought as an intentional tort in order to prevent possible invalidation of the action by existing state statutes on the ground that the statutory remedies are exclusive.

III. Are Existing Statutory Remedies Exclusive?

Before the inception of antidiscrimination commissions, the aggrieved party's sole remedy was under the public accommodation statutes.[53] This proved to be highly unsatisfactory because the courts were reluctant to recognize an action for damages or equitable relief unless it had been authorized by the statute or ordinance.[54] These laws were basically penal, imposing minimum and maximum amounts payable as a criminal penalty or in a civil action to the aggrieved party.[55] Such remedies were insufficient to act as a deterrent to discrimination, because the violator could pay the fine, which was generally an insubstantial amount, and continue to thwart the true discrimination-preventative purpose of the public accommodations laws. Imposition of higher minimum penalties might help deter violations of the public accommodations laws, but

[52] *Ibid.*

[53] See note 4 *supra* and accompanying text.

[54] The view taken was that unless the specific cause of action is granted in the statute none is created, since this type of legislation is in derogation of the common law which provided no redress. Tynes v. Gogos, 144 A.2d 412, (D.C. Munic. Ct. App. 1958); White v. Pasfield, 212 Ill. App. 73 (1918); Bailey v. Washington Theatre Co., 218 Ind. 513, 34 N.E.2d 17 (1941); Brown v. J. H. Bell Co., 146 Iowa 89, 123 N.W. 231 (1909).

[55] *E.g.*, Ohio Rev. Code § 2901.35 provides for either a criminal or civil remedy for damages of fifty to five hundred dollars.

this would not prevent discrimination in housing and employment nor would it necessarily compensate the aggrieved party for all his injuries, including mental distress.

A better approach has been taken by a few courts which have liberally construed state statutes to provide more effective relief by recognizing remedies not specifically enumerated in the statute.[56] An examination of the common law cases will facilitate an understanding of the rationales supporting strict and liberal construction.

A. Strict Construction of Statutes

The difficulty in persuading today's courts to recognize a civil action for compensatory damages supported by antidiscrimination laws stems from the narrow interpretation given to public accommodation statutes.[57] Where the statute permitted a civil remedy for damages, the maximum recovery was limited to the statutory amount. The courts frequently refused equitable relief, basing their decisions both upon strict statutory construction and upon generalizations that equity will not enforce the criminal law or personal rights.[58]

An excellent example of the narrow construction a public accommodations law can be given is the decision in *Fletcher v. Coney Island, Inc.*[59] In that case, a Negro woman sought to enjoin the owner of an amusement park from refusing her admittance. Despite the plaintiff's plea that the remedy at law was inadequate, the Supreme Court of Ohio held that she was restricted to the statutory remedies provided for such a violation[60] and refused the injunction.[61] The court stated that the statute created new rights and prescribed remedies and penalties for their violation and that therefore an additional remedy by injunction was not contemplated by the legislature and could not be invoked by the court.[62]

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[56] Stone v. Pasadena, 47 Cal. App. 2d 749, 118 P.2d 866 (1941); Bolden v. Grand Rapids Operating Corp., 239 Mich. 318, 214 N.W. 241 (1927); Randall v. Cowlitz Amusements, Inc., 194 Wash. 82, 76 P.2d 1017 (1938); Anderson v. Pantages Theatre Co., 114 Wash. 24, 194 Pac. 813 (1921).

[57] See note 54 *supra*.

[58] See Comment, 7 ST. LOUIS U.L.J. 88, 94 (1962).

[59] 165 Ohio St. 150, 134 N.E.2d 371 (1956).

[60] OHIO REV. CODE § 2901.35, provides in part: "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 . . . ."

[61] 165 Ohio St. at 156, 134 N.E.2d at 375.

[62] *Id.* at 154, 134 N.E.2d at 374.

In *Tynes v. Gogos*,[63] a District of Columbia court was faced with the question of whether a civil cause of action for damages could be based upon the violation of a municipal ordinance. There, the plaintiff, a white woman, and her husband, a Negro, were ordered to stop dancing in a restaurant and dance hall owned by the defendant because mixed dancing was not permitted. The woman sought damages because of the alleged violation of local antidiscrimination laws, contending that the words and actions of the defendant caused her to suffer humiliation, embarrassment, anguish, and anxiety. The court held that the ordinance was penal in character and did not give rise to a civil action for damages.[64] In addition, the court stated that an ordinance cannot directly provide that one person owes a civil duty to another which will serve as the basis of an action in tort for the breach of that duty. It was asserted that such a cause of action must arise either at common law or by a statute in the jurisdiction.[65]

B. Liberal Construction of Statutes

The *Fletcher* and *Tynes* decisions support the conclusion that statutory remedies are the exclusive forms of relief available to an aggrieved party. However, the more liberal cases have found that, first, by enacting a public accommodations law, the legislature has expressed its intention to eliminate discrimination and, second, the best remedy to effectuate this legislative intent should be granted.[66] In order to insure that administrative enforcement by commissions will effectuate the purposes of antidiscrimination laws, some legislatures provide in express terms that the laws should be liberally construed.[67] Arguably, such language provides sufficient justification for allowing laws against discrimination to support a civil action for damages. An examination of some of the cases which have permitted this type of action to be based upon a state public accommodations statute[68] indicates that state statutory remedies do not necessarily preclude a separate tort action.

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[63] 144 A.2d 412 (D.C. Munic. Ct. App. 1958).

[64] *Id.* at 415.

[65] *Id.* at 417.

[66] See, *e.g.*, Orloff v. Los Angeles Turf Club, 30 Cal. 2d 110, 180 P.2d 321 (1947); *cf.* McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914).

[67] See, *e.g.*, OHIO REV. CODE § 4112.08.

[68] Amos v. Prom, Inc., 115 F. Supp. 127 (N.D. Iowa 1953); Powell v. Utz, 87 F. Supp. 811 (E.D. Wash. 1949); Browning v. Slenderella Systems, 54 Wash. 2d 440, 341 P.2d 859 (1959); Anderson v. Pantages Theatre Co., 114 Wash. 24, 194 Pac. 813 (1921).

In *Browning v. Slenderella Systems*,[69] a Negro woman went to the defendant's salon for a courtesy demonstration of Slenderella reducing treatments. Although she had made an appointment by telephone, the plaintiff was refused service because she was a Negro. The plaintiff brought an action for damages for the embarrassment, humiliation, mental anguish, and emotional shock of this act of discrimination. The court held that a civil cause of action would accrue in favor of a person who suffered discrimination in violation of the public accommodations statute.[70] The court, stating that although the statute was penal in form, it was remedial in its nature and effect, accorded the aggrieved party a civil remedy against the violator. Damages were said not to be precluded merely because criminal sanctions alone were provided by the statute.[71] This case illustrates the broad construction a court can give to a public accommodations statute.

In another Washington case, *Anderson v. Pantages Theatre Co.*,[72] the supreme court held that a mere refusal of service or of admittance to a public place based upon race or color is sufficient to constitute a cause of action which lies in tort. There, a Negro was refused admission to a theater after he had purchased tickets for a performance. An action was brought against the theater company for the humiliation, mental suffering, and injury to the plaintiff's feelings. The court included mental suffering as an element of actual damages[73] and awarded plaintiff three hundred dollars. In holding that the defendant's conduct constituted a tort, the court relied upon an early Michigan case which stated that

> where a statute imposes upon any person a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty, he is liable for any injury or detriment caused by such neglect or refusal, if such injury is of the kind which the statute was intended to prevent . . . .[74]

A rationale similar to that in *Anderson* might also be employed to allow a tort action for the violation of state antidiscrimination laws which provide only administrative relief. Thus, an aggrieved party would have a tort action against a person who discriminates in employment, housing, or public accommodations.

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[69] 54 Wash. 2d 440, 341 P.2d 859 (1959).

[70] WASH. REV. CODE ANN. § 9.91.010 (1962).

[71] 54 Wash. 2d at 445-46, 341 P.2d at 863.

[72] 114 Wash. 24, 194 Pac. 813 (1921).

[73] *Id.* at 31, 194 Pac. at 816.

[74] Ferguson v. Gies, 82 Mich. 358, 365, 46 N.W. 718, 720 (1890).

IV. Extension of Civil Remedies in Other Areas of Law

A cause of action can be implied so as to extend a civil remedy to one injured by another's breach of a statute or regulation which does not explicitly provide such relief. The doctrine of implied remedies appears to have gained significant application, particularly in federal regulatory statutes where the legislative remedy or administrative agency could not afford adequate relief.[75] The doctrine has also been applied to impose civil liability for the violation of criminal statutes.[76]

Two theories have been advanced for implying a civil cause of action from the violation of a statute. One view is that the statute sets forth the standard of conduct of a reasonable man, the violation of which is evidence of either prima facie negligence or negligence per se.[77] The other theory is that the statute declares certain behavior to be wrongful and that the court can create a new cause of action against the party guilty of such wrongful conduct.[78] Under the first theory, existing standards of conduct are changed by the statute; under the latter theory, a new cause of action is created. The effect under either theory is to impose liability where none existed before the statute was enacted.

In dealing with cases where antidiscrimination laws have been violated, the courts might adopt either one or both of these theories. By permitting a violation of antidiscrimination laws to be evidence of prima facie negligence, the courts could defeat any argument that the statutory remedy is exclusive. The legislation, in effect, allows an extension of existing tort law to provide a civil remedy to an aggrieved party. On the other hand, if the courts adopt the theory that a new cause of action is created from the statute itself, arguments might be made that the court is performing a legislative function.

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[75] Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761 (N.D. Ohio 1929); Roosevelt Field, Inc. v. North Hempstead, 84 F. Supp. 456 (E.D.N.Y. 1949). See Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

[76] Discussions relevant to this problem include Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM. L. REV. 456 (1948); Note, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933).

[77] RESTATEMENT (SECOND), TORTS §§ 285-88 (1965). See Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

[78] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961).

A. Tort Liability for Violation of Criminal and Regulatory Statutes

In *Wills v. Trans World Airlines, Inc.*,[79] a federal district court followed the doctrine which permits treatment of a criminal or regulatory statute as creating a cause of action in favor of members of a class for whose protection the statute was enacted. Under this theory, a tort action can be brought by anyone in the protected class who is injured by a violation of the statute. In this case, a lawyer holding a tourist reservation on a TWA flight was informed that the airline had oversold the flight and that his accommodations had been given to a first class passenger. The plaintiff lawyer brought an action based upon section 404(b) of the Civil Aeronautics Act[80] for compensatory and exemplary damages because of the defendant airline's unjust discrimination. Though the act provides only injunctive and criminal sanctions, the court awarded the plaintiff one dollar and fifty-four cents in compensatory damages and five thousand dollars in exemplary damages.[81] Actual damages being negligible, the court awarded substantial punitive damages to afford redress to the plaintiff because there was no administrative authority in the Civil Aeronautics Board (CAB) to award damages or other relief to a passenger for past wrongs.[82] The court reasoned that the deprivation of the passenger's contractual rights under the act amounted to tortious conduct on the part of the airline and that traditional judicial remedies generally available for tortious acts should therefore be available to the injured party.[83]

The doctrine of implying a civil remedy to permit a recovery of damages for violation of a criminal or regulatory statute has been adopted in a small number of cases involving unlawful discrimination on the basis of race or color. For example, in *Fitzgerald v. Pan Am. World Airways, Inc.*,[84] the court held that the Civil Aeronautics Act created a new federal right in favor of an aggrieved Negro passenger. The CAB could issue prospective orders prohibiting discrimination against airline passengers but could not award

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79 200 F. Supp. 360 (S.D. Cal. 1961).

80 72 Stat. 760 (1958), 49 U.S.C. § 1374(b) (1964). The act provides in part: "no air carrier . . . shall . . . subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

81 200 F. Supp. at 368.

82 *Id.* at 364.

83 *Id.* at 367.

84 229 F.2d 499 (2d Cir. 1956).

damages to the party discriminated against.[85] For this reason, the court found an implied private remedy for damages. A similar rationale has also been employed by a federal court to discover an implied remedy where there has been a violation of a state public accommodations statute.[86] However, the doctrine has not had as much success in discrimination cases litigated in state courts.

It has been shown that state statutory regulations do not provide an aggrieved party with a civil remedy to recover compensatory damages.[87] Yet, a person discriminated against is a member of a class for whose protection antidiscrimination laws were enacted. Where criminal and regulatory statutes have been enacted for the protection of a certain class, courts have implied a civil remedy in favor of members of the protected class. Therefore, it would seem to be a sound policy for state courts to adopt the principle that unlawful discriminatory conduct is wrongful and should be considered a tortious act. In *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*,[88] Mr. Justice Frankfurter stated that "if civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized."[89] Certainly a civil remedy in favor of a party who has been discriminated against would be appropriate to effectuate the purposes of antidiscrimination statutes.

B. Tort Liability in Relation to Labor Disputes

By virtue of the National Labor Relations Act (NLRA),[90] the National Labor Relations Board (NLRB) regulates activities and settles disputes between unions and employers. The sole remedy provided by the act for violations by either party is the relief afforded by the NLRB. But the fact that a union or an employer has a remedy to resolve certain labor disputes under the Taft-Hartley Act[91] does not necessarily "pre-empt" a tort action by the injured party in a state court.[92] In *San Diego Bldg. Trades Council v. Garmon*,[93] the United States Supreme Court laid down the criteria

85 *Id.* at 502.

86 Amos v. Prom, Inc., 115 F. Supp. 127 (N.D. Iowa 1953).

87 See text accompanying note 7 *supra.*

88 341 U.S. 246 (1951).

89 *Id.* at 261 (dissenting opinion).

90 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1964).

91 61 Stat. 136 (1947), 29 U.S.C. §§ 151-68 (1964).

92 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (dictum).

93 359 U.S. 236 (1959).

by which a state court could exercise jurisdiction over a suit brought by a union or employer. The Court held that a tort action in a state court would be permitted: (1) when the activity regulated was a merely peripheral concern of the NLRA, and (2) where the regulated conduct was of strong state interest.[94]

In 1959, subsequent to the *Garmon* decision, Congress amended the Taft-Hartley Act[95] to permit a state court to assert jurisdiction over labor disputes in which the NLRB declines to assert jurisdiction. This has served to broaden the number of cases in which a civil remedy could be recognized in the state courts. For example, in a recent case before the Supreme Court, the NLRA was held not to bar the maintenance of a civil action for libel in a state court.[96] The Court reasoned:

> The injury that the statement might cause to an individual's reputation . . . has no relevance to the Board's function. . . . The Board can award no damages, impose no penalty, or give any other relief to the defamed individual. . . .
>
> On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the "personal" injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.[97]

Although the state tort action for labor disputes does not have any direct relation to civil remedies for discrimination, it is somewhat analogous and may serve to reinforce the argument in favor of a tort action in state courts for the violation of antidiscrimination laws. The injuries which the aggrieved party suffers cannot be fully redressed by the regulatory agencies, because the statutes confer no power on the commissions to grant reparation in money damages for the past misconduct of the discriminating party. But in a tort action the state courts would be able to compensate the discriminated plaintiff, thus enabling him to recover his losses. The commissions' inability to provide redress should vitiate any argument that the statutory remedies are exclusive.

C. *Action for Treble Damages in Antitrust Cases*

The field of antitrust law has also focused attention on the civil remedy for damages. Any person who is injured in his busi-

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[94] *Id.* at 243-44.

[95] 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-68 (1964). See § 1(b)(2) of the NLRA, added by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, as amended, 29 U.S.C. § 164(c) (1964).

[96] Linn v. United Plant Guard Workers, 383 U.S. 53 (1966).

[97] *Id.* at 63. (Footnote omitted.)

ness or property by reason of a violation of the federal antitrust laws may sue to recover damages or for injunctive relief.[98] The private antitrust suit, in addition to redressing the injured party and preventing loss or damage to the plaintiff's business, serves as a deterrent to antitrust violations. This is especially true regarding the damage action in which treble damages are recoverable.[99] Furthermore, private suits contribute to the interpretation and understanding of the federal antitrust laws and serve as an enforcement vehicle supplementing the government antitrust action.[100]

Interestingly, the actual amount of damages need not be precisely established in all antitrust cases. In the absence of exact proof, a jury may make a just and reasonable estimate of the damages.[101] As long as the injuries can be attributed to the wrong committed in violation of the antitrust laws, damages are recoverable.[102]

A similar treble damage action is provided for a violation of the Michigan public accommodation statute,[103] but no other state has adopted an action resembling the private antitrust suit. If such an action were utilized to enforce antidiscrimination laws, its effect would parallel the success it has had in enforcing the federal antitrust law. However, since the legislatures have not provided a private suit for treble damages as a remedy for a violation of antidiscrimination laws, a stronger case can be made for the courts to recognize a civil remedy for damages. If the legislatures created the right to be free from discrimination, they must have intended that the statutory remedies should not preclude other effective remedies which could protect that right and redress the injured party.

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98 Private actions under the antitrust laws are authorized by sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737 (1914), 15 U.S.C. §§ 15, 26 (1964).

99 Section 4 of the Clayton Act provides in part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ." 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

100 The Sherman Anti-Trust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964), the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. §§ 14-27 (1964), and the Robinson-Patman Price Discrimination Act, 49 Stat. 1528 (1936), 15 U.S.C. § 13 (1964), contain both civil and criminal sanctions which are enforceable by the Antitrust Division of the United States Department of Justice.

101 Bigelow v. RKO Radio Pictures, Inc., 332 U.S. 817 (1946); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

102 Pennington v. UMW, 325 F.2d 804 (6th Cir. 1963).

103 MICH. STAT. ANN. § 28.344 (1962).

V. CONCLUSION

Recently enacted antidiscrimination laws have established a standard of conduct which makes discrimination on the basis of race, religion, ancestry, or national origin a statutory violation. Until now these laws have been enforced solely by administrative agencies which have authority to issue prospective orders, thus leaving the aggrieved party with no compensation for his injuries. Since such legislation creates in a protected class of individuals a legal right not to be discriminated against, anyone who violates an antidiscrimination statute or ordinance acts in deliberate disregard of the legal rights of another. It follows that a cause of action for the commission of an intentional tort should lie in favor of the aggrieved party. Recognition by the courts that unlawful discrimination is an actionable tort would provide a means of compensation for the economic loss, humiliation, and mental anguish incurred because of the violator's wrongful conduct.

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