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Enforcement Procedure of Oberlin, Ohio, Fair Housing Ordinance Held Unconstitutional--*Porter v. City of Oberlin*

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RECENT DEVELOPMENTS

Enforcement Procedure of Oberlin, Ohio, Fair Housing Ordinance Held Unconstitutional— *Porter v. City of Oberlin**

Plaintiff, a citizen of Oberlin, Ohio, brought an action for declaratory and injunctive relief to review the constitutionality of the city's fair housing ordinance, which makes it a misdemeanor to discriminate because of race, creed, or color in the sale or rental of housing. Under the procedure established by the ordinance,[1] the Housing Renewal Commission is directed to make investigations of complaints filed with it. If violations are discovered, the commission must attempt to eliminate the discriminatory practices by conciliation and persuasion. If these efforts fail, the entire record of the matter must be forwarded to the city council, accompanied by the commission's recommendations. The city council may either dismiss the complaint or refer it to the city solicitor for criminal proceedings. The Common Pleas Court upheld the constitutionality of the entire ordinance.[2] On appeal to the Supreme Court of Ohio, *held*, reversed as to the section on enforcement, three judges dissenting; otherwise affirmed. The enforcement procedure outlined by the ordinance is an attempt by a municipality to establish adjudicative remedies in contravention of the Ohio Constitution,[3] and

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* 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965) (hereinafter cited as principal case).

1. OBERLIN, OHIO, ORDINANCE 235 AC CMS (1961):

"Section 3. ENFORCEMENT PROCEDURE

(a) A complaint charging a violation of any provision of the prohibitive sections of this ordinance may be made by an aggrieved individual or his legal counsel. Such complaint shall be made in writing to the Housing Renewal Commission and shall give full details of the complaint and be sworn to under oath.

(b) The Commission shall make a prompt and full investigation of each complaint of the unlawful housing practice.

(c) If after such investigation the Commission by an affirmative concurrence of three-fifths of the members thereto determines that a violation of this ordinance has occurred, it shall attempt to eliminate the unlawful housing practice by conciliation and persuasion.

(d) In the event the Commission fails in the conciliation proceedings, it shall forward all papers including the complaint, investigation, record of conciliation proceedings, factual findings and recommendation to the City Council.

(e) The complaint, investigation and conciliation proceedings shall be confidential; records and proceedings of the Commission shall not be made public until same are forwarded to the City Council.

(f) The City Council shall review the proceedings and shall either dismiss the complaint or refer same to the City Solicitor for appropriate legal action under this ordinance."

2. See principal case at 143, 205 N.E.2d at 363.

3. OHIO CONST. art. IV, § 1: "The judicial power of the state is vested in [certain named courts] . . . , and such other courts inferior to the courts of appeals as may from time to time be established by law."

is also invalid as lacking sufficient definiteness and certainty to be enforceable.

Municipal, state, and federal statutes providing relief through administrative machinery based on a process of conference, conciliation, and persuasion have proved most effective in implementing public policy against discrimination by private persons on the basis of race, color or religion.[4] Administrative agencies with enforcement power have dealt with discrimination in public accommodations, housing, employment, and education.[5] Under typical conciliation-oriented enforcement procedures,[6] the agency, upon receiving a complaint, makes an investigation, and, if there is probable cause to believe that the allegations of the complaint are true, attempts to eliminate the discriminatory practice by conference, conciliation, and persuasion. If conciliation is unsuccessful, some more direct type of enforcement procedure is provided. At the state level, there are a number of human relation commissions *without* jurisdiction over housing. Although they are usually empowered to issue cease-and-desist orders enforceable by the courts, all lack powers of criminal enforcement of antidiscrimination laws. Of those states with a human relations commission having jurisdiction over housing, only Alaska provides for a criminal prosecution to enforce its anti-discrimination law.[7] On the other hand, criminal enforcement tech-

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OHIO CONST. art. IV, § 19: "The general assembly may establish courts of conciliation and prescribe their powers and duties."

Jurisdiction of criminal proceedings is vested in the Municipal Courts of Ohio. OHIO REV. CODE ANN. § 2931.041 (Baldwin 1964) reads in part: "Municipal Courts have jurisdiction in criminal cases to finally try and determine prosecutions for the violation of municipal ordinances within the corporate limits of municipal corporations and misdemeanor cases within their territories as provided in ch. 1901 of the Revised Code."

4. The desirability of this process is twofold: the alleged violator is given an opportunity to comply voluntarily with the law without the stigma of prosecution, and the general welfare of the community is promoted by ensuring equality of opportunity to all segments of the population. See Bamberger & Lewin, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526 (1961); Carter, *Policies and Practices of Discrimination Commissions*, 304 Annals 62, 67-68 (1956).

5. See Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1171, 1180 (1965). For a list of state and local human relation commissions and their jurisdictions, see *id.* at 1239-44.

6. For discussions of typical enforcement procedures, see *id.* at 1180-87; Bamberger & Lewin, *supra* note 4, at 526-55; Note, 107 U. PA. L. REV. 515, 524-25 (1959).

7. ALASKA STAT. §§ 11.61.230, .240 (1962), §§ 18.80.010-.160 (Supp. 1963). Sixteen states have laws governing private housing: Alaska, California, Colorado, Connecticut, Indiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Rhode Island. Of these, only Maine and New Hampshire lack official enforcement agencies. There is a wide variety of enforcement practices. Center for Fair Housing, Nat'l Comm. Against Discrimination in Housing, The Fair Housing Statutes and Ordinances as of June 1, 1965 (June 25, 1965) (a report on state and local legislative and administrative action related to achieving equality of opportunity in housing).

niques have been prevalent at the municipal level.[8] If conciliation fails, several city commissions lacking housing jurisdiction,[9] as well as the majority of those commissions specifically established by fair housing ordinances,[10] forward their findings directly to the city attorney, who can then institute a criminal action.

In contrast to this general statutory scheme of agency-enforced conciliation backed by criminal enforcement, the enforcement procedure of the Oberlin Fair Housing Ordinance provides for screening and review of the Housing Renewal Commission's findings by the city council.[11] In effect, both the commission and the city council are afforded an opportunity to dismiss the complaint before the city attorney acquires the power to invoke criminal enforcement. In invalidating the enforcement section of the Oberlin Ordinance, the majority of the court in the principal case empha-

8. One of the major reasons that cities entering the field of antidiscrimination generally established the criminal enforcement technique rather than the administrative technique (cease-and-desist orders) employed by the states was that cities viewed their regulatory power as limited to that expressly granted by the state through home-rule laws. Municipal ordinances are passed under the constitutional authority giving municipalities the power to adopt such local police requirements as are not in conflict with the general law. For a discussion of the power of a municipal corporation to enact civil rights legislation, see Annot., 93 A.L.R.2d 1028 (1964).

9. For examples of ordinances establishing municipal commissions with jurisdiction over employment, see, *e.g.*, 28 L.R.R.M. 3087 (1952) (Minneapolis, Minn., Mayor's Commission on Human Relations); 27 L.R.R.M. 3039 (1951) (Youngstown, Ohio, Fair Employment Practices Commission). See also Note, 42 MINN. L. REV. 1163 (1958).

For examples of ordinances establishing municipal commissions with jurisdiction over public accommodations, see 9 RACE REL. L. REP. 1897 (1964) (Corpus Christi, Texas, Human Relations Committee); 8 RACE REL. L. REP. 1684 (1963) (Kansas City, Mo., Commission on Human Relations; ordinance upheld, Marshall v. Kansas City, 355 S.W.2d 877 (Mo. 1962)); 5 RACE REL. L. REP. 248 (1960) (same). Examples of the kinds of fair employment practice statutes are presented in *Fair Employment Practice Legislation in the U.S.: Federal, State and Municipal*, Public Affairs Bulletin, No. 93, Library of Congress Legislative Reference Service (1951). For analyses of pre-1951 ordinances, see Rice & Greenberg, *Municipal Protection of Human Rights*, 1952 WIS. L. REV. 679. See also 2 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1451-58 (2d ed. 1958); Note, 56 YALE L.J. 431 (1947).

10. EAST ST. LOUIS, ILL., ORDINANCE 3913 (1964); WICHITA, KAN., ORDINANCE 27-550 (1964); ANN ARBOR, MICH., ORDINANCE CODE ch. 112, §§ 9.151-.160 (1963); DETROIT, MICH., ORDINANCE 753-F (1962); GRAND RAPIDS, MICH., ORDINANCE 1628 (1963); DULUTH, MINN., ORDINANCE 7260 (1963); ST. LOUIS, MO., REVISED CODE ch. 395 (1960); ALBUQUERQUE, N.M., ORDINANCE 2358 (1963); OBERLIN, OHIO, ORDINANCE 235 AC CMS (1961); TOLEDO, OHIO, MUNICIPAL CODE §§ 3-41-15 to -18 (1961); ERIE, PA., ORDINANCE 19-1963 (1963); PHILADELPHIA, PA., CODE tit. 9, §§ 9-1101 to -1109 (1963); PITTSBURGH, PA., ORDINANCE 523 (1958); MADISON, WIS., GENERAL ORDINANCES § 3.23 (1963).

11. See note 1 *supra*. Only one other city fair housing ordinance employing criminal sanctions for violation of the act involves council review of a commission's proceedings before prosecution is commenced. See YELLOW SPRINGS, OHIO, CODIFIED ORDINANCES ch. 72, pt. 5 (1963). The Yellow Springs ordinance does not *require* the commission to communicate its findings to the council before prosecution is commenced. The New London, Connecticut, ordinance provides that the Fair Housing Practices Board must communicate its findings of probable cause to the State Civil Rights Commission and the City Council. No other sanctions are provided. New London, Conn., Ordinance Establishing a Fair Housing Practices Board (July 15, 1963).

sized that no criteria were established to determine when conciliation by the commission had been successful, or to prescribe the grounds for dismissal of a complaint by the council, that the section was too indefinite to be enforceable, and that the city council had both improperly assumed judicial power itself and improperly delegated such power to the commission.[12]

Given a restrictive interpretation, the court's opinion would not seem to have great impact upon the validity of agency-enforced civil rights legislation. Although the ordinance allows for the dismissal of a complaint by either the commission or the city council, the court's language is ambiguous as to whether the fatal lack of definite standards pertains to the screening by the commission, the council, or both. If the court's reference was to the lack of standards set for the council, the impact of the *Porter* decision would be limited to the Oberlin ordinance, which is unique in allowing the city council complete discretion to decide whether a criminal prosecution is to be brought.[13]

However, if the decision were construed to require definite statutory standards for the process of conciliation and persuasion by the commission, it would cast doubt upon the validity of most fair housing laws, as well as other agency-enforced civil rights legislation which uses this process. Although no state or local act prohibiting discrimination in employment has been found which establishes definite standards to govern the conciliation process,[14] such laws authorizing the establishment of commissions with far greater enforcement powers than those conferred on the Oberlin Housing Renewal Commission have been upheld.[15] Public accommodation

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12. "No procedure . . . is set forth nor are any criteria established to determine the success of conciliation by the commission or to prescribe the grounds for the dismissal of a complaint by council. . . . [T]he only reasonable conclusion which may be derived from the provisions of section 3 of the ordinance is that if conciliation by the commission is successful, or if the council dismisses the complaint, then prosecution of the complaint shall thereby terminate. . . . [S]uch termination of an alleged violation would appear to be, in legal effect, the acquittal of a crime and would constitute the exercise of judicial power which council had no authority to bestow upon the commission or to enact unto itself. . . . Moreover . . . it lacks sufficient definiteness and certainty to be enforceable." Principal case at 155.

13. "Discretion must be made subject to a standard or rule to operate uniformly. . . . An ordinance can not commit to the municipal legislative body itself, any more than to administrative officials, uncontrolled discretion." 9 McQUILLIN, MUNICIPAL CORPORATIONS 531-32 (3d rev. ed. 1964).

14. See 2 EMERSON & HABER, *op. cit. supra* note 9, at 1451-83. Witherspoon, *supra* note 5, at 1239-44, lists the state and local human relations commissions and the relevant fair employment practice statutes. See generally Morgan, *An Analysis of State FEPC Legislation*, 8 LAB L.J. 469 (1957); Rice & Greenberg, *Municipal Protection of Human Rights*, 1952 WIS. L. REV. 679, 692.

15. *E.g.*, Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581 (1954); Castle Hill Beach Club v. Arbury, 208 Misc. 622, 144 N.Y.S.2d 747 (Sup. Ct. 1955), *aff'd*, 1 App. Div. 2d 950, 150 N.Y.S.2d 367, *motion for reargument denied*, 2 App. Div. 2d 664, 153 N.Y.S.2d

laws with similar enforcement procedures providing for informal conference, conciliation, and persuasion have also been adopted without specific standards in several states.[16] Also, city public accommodation acts with the same enforcement procedure found in "conventional"[17] fair housing laws have been declared constitutional.[18] The requirement of specific statutory standards for the conciliation process inherent in a broad reading of the decision in the principal case would even invalidate section 706(a) of the Civil Rights Act of 1964, which authorizes "informal methods of conference, conciliation and persuasion."[19] Moreover, an examination of state and city fair housing laws fails to reveal a single instance in which the legislature considered it necessary to define the criteria for successful conciliation.[20]

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544 (1st Dep't 1956); Ross v. Arbury, 206 Misc. 74, 133 N.Y.S.2d 62 (Sup. Ct.), *aff'd*, 285 App. Div. 886, 139 N.Y.S.2d 245 (1st Dep't 1954).

16. In none of these laws has the process by which conciliation is to be achieved been rigidly defined. *E.g.*, MASS. GEN. LAWS ANN. ch. 151B, § 5 (1965). Public accommodation statutes are compiled in *1 Hearings Before the Senate Committee on Commerce*, 88th Cong., 1st Sess. 1316-80 (1963). See generally 2 EMERSON & HABER, *op. cit. supra* note 9, at 1405-22.

17. The "conventional" ordinance, unlike the Oberlin law, establishes a two-tiered enforcement procedure. It creates an administrative agency which may receive complaints, investigate, attempt conciliation, and hold hearings; it may then forward its recommendations or findings of fact to the city prosecutor or municipal court. See notes 6-10 *supra* and accompanying text.

18. *E.g.*, Marshall v. Kansas City, 355 S.W.2d 877 (Mo. 1962).

19. 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(a) (1964): "If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice, by informal methods of conference, conciliation and persuasion."

20. See, *e.g.*, ALASKA STAT. §§ 18.80.010-.160 (Supp. 1965); CAL. HEALTH & SAFETY CODE §§ 35700-38; COLO. REV. STAT. ANN. §§ 69-7-1 to -7 (1963), as amended, Colo. Sess. Laws 1965, ch. 185, §§ 69-7-3 to -7; CONN. GEN. STAT. REV. §§ 53-34 to -36 (1958), as amended, §§ 53-35 to -36 (Supp. 1965), §§ 31-122 to -128 (1958), as amended, § 31-128 (Supp. 1964); IND. ANN. STAT. § 48-8543(b) (1963), §§ 40-2307 to -2317 (1964), as amended, §§ 40-2308, 40-2312 (Supp. 1965); MASS. GEN. LAWS ANN. ch. 151B, §§ 1-10 (1965), ch. 6, § 56 (Supp. 1964); MICH. CONST. art. I, § 2, art. V, § 29; MICH. STAT. ANN. § 3.548 (Supp. 1963); MINN. STAT. ANN. § 462.481 (1963) (urban renewal housing); §§ 363.01-.13 (1963), as amended, §§ 363.01-.09, .12-.13 (Supp. 1964), § 507.18 (Supp. 1964); N.H. REV. STAT. ANN. §§ 354-A:1-:14 (1965); N.J. STAT. ANN. §§ 18:25-1 to -28 (1964) (attorney general empowered to investigate and conciliate); N.Y. EXECUTIVE LAW §§ 290-301; OHIO REV. CODE ANN. §§ 4112.01-.07 (Baldwin Supp. 1965); ORE. REV. STAT. §§ 183.310-.510, 659.010-.115, 659.990, 696.300 (1963); PA. STAT. ANN. tit. 43, §§ 951-62 (1964); R.I. GEN. LAWS ANN. §§ 11-24-1 to -4 (1956), §§ 28-5-8 to -36 (1956), as amended, § 28-5-11 (Supp. 1965); WASH. REV. CODE § 35.81.170 (Supp. 1963) (publicly assisted housing—held unconstitutional in O'Meara v. Washington State Bd. Against Discrimination, 58 Wash. 2d 793, 365 P.2d 1 (1961), *cert. denied*, 369 U.S. 839 (1962); New Haven, Conn., Equal Opportunities Ordinance (May 14, 1964); New London, Conn., Ordinance Establishing a Fair Housing Practices Board (July 15, 1963); WASHINGTON, D.C., POLICE REGULATIONS art. 45, §§ 1-13; Chicago, Ill., Fair Housing Ordinance (Sept. 11, 1963); EAST ST. LOUIS, ILL., ORDINANCE 3913 (1964); PEORIA, ILL., MUNICIPAL CODE app. D (1963); WICHITA, KAN., ORDINANCE 27-550 (1964); ANN ARBOR, MICH., ORDINANCE CODE ch. 112, §§ 9.151-.160 (In City of Ann Arbor v. Hubble (Washtenaw County Circuit Court, June 8, 1965, unreported) the court, relying on the principal case, held that the sections

The various state and local legislative bodies seem to have recognized that without flexibility and freedom to mold conciliatory patterns to fit local conditions, there can be little hope of providing effective responses to the many problems of discrimination. The great value of antidiscrimination agencies is that they make respondents more amenable to persuasion. For example, in the fair housing area the conciliation process is used (1) to educate the respondent and persuade him to pay at least lip service to the law; (2) to try to persuade the respondent to offer the aggrieved party the housing unit sought or the next available one; and (3) to try to persuade the respondent to change his pattern of doing business to one more favorable to Negro applicants. Destruction of the vast number of civil rights laws by a holding such as that in the principal case would promote no social good because the broad educative effect of the conciliation process would be lost. Therefore, it is hoped that *Porter* will be limited to the special statutory formula of the Oberlin ordinance—commission review combined with council review, requiring definite standards for determining both successful conciliation and grounds for the dismissal of a complaint.

The second basis on which the court in the principal case invalidated the ordinance was that the procedure amounted to an improper delegation of judicial power in violation of the Ohio constitution,[21] which vests judicial power in courts established by the General Assembly.[22] It is clear that an administrative agency has no power to determine the guilt or innocence of an individual in

granting investigative and conciliatory power to the commission were unconstitutionally ambiguous); DETROIT, MICH., ORDINANCE 753-F (1962); GRAND RAPIDS, MICH., ORDINANCE 1628 (1963); DULUTH, MINN., ORDINANCE 7260 (1963); KANSAS CITY, MO., REV. ORDINANCES § 39.585 (1962); ST. LOUIS, MO., REVISED CODE ch. 395 (1960); ALBUQUERQUE, N.M., ORDINANCE 2358 (1963); BUFFALO, N.Y., ORDINANCES, ch. VII, art. XVIII, §§ 350-53 (1964); NEW YORK, N.Y., ADMIN. CODE ch. 41, tit. X (1957), as amended, (1962); SCHENECTADY, N.Y., ORDINANCES 14353 (1963); OBERLIN, OHIO, ORDINANCE 235 AC CMS (1961); SHAKER HEIGHTS, OHIO, CODIFIED ORDINANCES §§ 704.01-02 (1961); TOLEDO, OHIO, MUNICIPAL CODE § 3-41-15 to -18 (1961); YELLOW SPRINGS, OHIO, CODIFIED ORDINANCES ch. 72, pt. 5 (1963); ERIE, PA., ORDINANCE 19-1963 (1963); PHILADELPHIA, PA., CODE tit. 9, §§ 9-1101 to -1109 (1963); PITTSBURGH, PA., ORDINANCE 523 (1958); BELOIT, WIS., GENERAL ORDINANCES CODE § 8.119 (1964); MADISON, WIS., GENERAL ORDINANCES § 3.23 (1963). See generally 9 TRENDS IN HOUSING 1 (July-Aug. 1965).

Other cities with fair housing ordinances for which citations were unavailable include: San Francisco, Cal.; Gary, Ind. (effective June 4, 1965); Indianapolis, Ind. (enacted July 1964); Des Moines, Iowa (effective June 4, 1964); Iowa City, Iowa; St. Paul, Minn. (enacted August 13, 1964); South Euclid, Ohio; Warrensville Heights, Ohio; Oak Ridge, Tenn.; King County, Wash. (effective March 3, 1964). *The Fair Housing Statutes and Ordinances, supra* note 7, at 6-7; Enclosure in a letter from A. H. Zwerner, Associate General Counsel, Housing and Home Finance Agency, Sept. 9, 1965 (copy on file in the offices of the *Michigan Law Review*). A compilation of many state and city fair housing provisions may be found in HOUSING AND HOME FINANCE AGENCY, FAIR HOUSING LAWS (1964).

21. See note 12 *supra*.
22. See note 3 *supra*.

criminal cases.[23] According to *Porter*, if conciliation by the commission is successful, or if the council dismisses the complaint, prosecution of the violation must terminate. Such termination, in legal effect, would amount to an acquittal of a crime and thus would be an improper delegation of judicial power from the council to the commission or an improper assumption of judicial power by the council.[24]

A strict interpretation of the precise language of the Oberlin ordinance would seem to support the decision of the court in the principal case. It is significant that the ordinance provides that complaints "shall" be made to the commission and, if conciliation fails, "shall" be forwarded to the city council.[25] In view of this mandatory language, it would appear that the city council considered its review function an essential part of the operation of the enforcement procedure.[26] While it might be argued that the aggrieved individual could avoid the commission investigation and council review by complaining directly to the city solicitor, who would then institute a criminal action, it seems doubtful that the city council, in enacting an ordinance providing for council review of citizens' complaints, intended to create any means by which its function could be curtailed by direct complaint to the city solicitor. Under this view there is only one available procedure for redress of grievances, and a dismissal of a complaint by either the commission or the council would appear to be tantamount to a final adjudicative dismissal of the case.

On the other hand, it may be argued that the mere establishment of a commission to handle complaints does not *necessarily* indicate an abrogation of the right of an aggrieved individual to seek relief through direct complaint to the city solicitor.[27] Indeed, it would

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23. "One kind of adjudication which clearly can not be conferred upon an administrative agency is the power to determine guilt or innocence in criminal cases . . . [be cause] the criminal defendant is entitled to special procedural protection of the kind that is given neither in civil proceedings in court nor in administrative proceedings." DAVIS, ADMINISTRATIVE LAW 47 (1959).

24. See note 12 *supra*.

25. See note 1 *supra*.

26. OBERLIN, OHIO, ORDINANCE 235 AC CMS, § 3(a) (1961). The meanings of "shall" and "may" are naturally of great importance in the proper interpretation of any statute. The use of the word "shall" indicates a mandatory intent unless the context indicates otherwise. CRAWFORD, STATUTORY CONSTRUCTION § 262 (1940); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 2803 (Supp. 1964).

27. This argument was rejected in City of Ann Arbor v. Hubble (Washtenaw County Circuit Court, July 30, 1965, unreported). The city contended that, while the provision of the city ordinance creating jurisdiction in the municipal court may "confer an absolute right in all aggrieved persons due to alleged violation of a city ordinance to go directly to a municipal judge and upon proper showing have a warrant issued, that right does not seem to be abrogated by the Ann Arbor ordinance just because it fails to explicitly state that right." Brief for City, p. 6. It is submitted that the court was wrong in its reliance upon the principal case, see note 31 *infra*, since it failed to recog-

appear that section 3 of the Oberlin ordinance does not *necessarily* provide for only one avenue of redress. While state law provides that jurisdiction in criminal cases rests solely with the municipal court,[28] it is apparent that the administrative screening process established by the ordinance pertains only to the handling of complaints that *may* be brought to the court by the city.[29] There is no express or implied indication that redress is to be obtained *only* by complaint to the commission, although the language does suggest that at least *one copy* of every complaint must be filed with the commission. If the city council had intended that complaints be filed *only* with the commission, it would seem that express language would have so indicated.

If the Oberlin ordinance is read, as it was in the principal case, to preclude direct access by aggrieved individuals to the city attorney, it is important that the ordinance be distinguished from the more conventional statute, which is framed in more permissive terms and is subject to broader interpretation. The more conventional type of antidiscrimination law provides for criminal prosecution as a misdemeanor in case of violation, unrestricted by any type of council review.[30] The language of such ordinances pertaining to the initial filing of a complaint is crucial. A common provision states that "any person claiming to be aggrieved by an alleged unlawful discriminatory practice *may* by himself or his attorney file with the commission a complaint in writing under oath."[31] Such permissive language would seem to suggest that the commission is intended to be merely one of several possible avenues of redress.[32] Interpreting these conventional ordinances as requiring use of the

nize the clear distinction between the "mandatory" ordinance involved in *Porter* and the "permissive" Ann Arbor ordinance.

28. See note 3 *supra*.

29. See note 1 *supra*, § 3(a).

30. See note 10 *supra*.

31. (Emphasis added.) *E.g.*, WASH. REV. CODE § 49.60.230(1) (1961) (public accommodations); ERIE, PA., ORDINANCE 19-1963 (1963) (housing).

32. *But see* City of Ann Arbor v. Hubble (Washtenaw County Circuit Court, July 30, 1965, unreported), which involved a "conventional" fair housing ordinance (ANN ARBOR, MICH., ORDINANCE CODE ch. 112, §§ 9.151-.160 (1963)), and in which the issue of improper delegation of judicial authority was considered. Breakey, J., followed *Porter* and declared § 9.157, ¶¶ 3-5, unconstitutional insofar as those paragraphs purport "to invade either the jurisdiction of the duly-constituted law enforcement officers or the functioning of the judiciary." Order remanding case to Ann Arbor Municipal Court, p. 2 (July 30, 1965). The Ann Arbor City Charter vests sole jurisdiction in criminal cases with the Municipal Court. ANN ARBOR, MICH., CITY CHARTER § 6.8(a) (1963). See MICH. STAT. ANN. §§ 28.1192-.1195 (Supp. 1963).

One interpretation which would definitely seem to be precluded is that an individual may seek enforcement only through the city attorney, despite the fact that city charters often vest sole jurisdiction in criminal cases with the Municipal Court. *E.g.*, ANN ARBOR, MICH., CITY CHARTER § 6.8(a) (1963). Such a construction would defeat the very purpose of creating the commission, since enforcement by an administrative agency is based on obtaining compliance through conciliation rather than prosecution.

commission as the *only* avenue of redress[33] would frustrate the intention of legislatures to give an aggrieved individual an added remedy rather than replace his existing remedies with a single new one. Furthermore, if this interpretation were adopted, the language in *Porter*, construed broadly, would suggest that other courts might invalidate similar enforcement procedures in other antidiscrimination legislation which has been in successful, unquestioned operation. Abrogation of this established practice of conciliation by local commissions familiar with local problems[34] would shift the task of alleviating discriminatory practices in many areas to state civil rights commissions. This would be advantageous in the sense that it would consolidate statewide enforcement powers and policies without duplicating administrative effort, but such a bar on legislative and administrative screening could logically extend to *state* antidiscrimination commissions, which have even greater powers of enforcement than local commissions.[35]

The fact that the "conventional" ordinance provides that an individual *may* file a complaint with the commission does not preclude a simultaneous filing of a complaint with the city attorney. Construing the language in this manner would theoretically enable the city attorney to proceed with prosecution at the same time conciliation was being attempted. While this result is perhaps neither desirable nor likely,[36] the power of bringing complaints to the city

33. See, *e.g.*, Castle Hill Beach Club v. Arbury, 208 Misc. 622, 144 N.Y.S.2d 747 (Sup. Ct. 1955). But see Vaught v. Village Creek Homeowners Ass'n, 7 RACE REL. L. REP. 849 (Super. Ct. Fairfield County, Conn. 1962), in which the court said that failure to invoke the aid of the Civil Rights Commission was not a bar to the maintenance of the action simply because the statute (CONN. GEN. STAT. REV. § 53-36 (Supp. 1963)) gave the commission the power to entertain a complaint. The court emphasized that "an administrative remedy which does not give to the complainant a right to have a judicial review of an administrative order dismissing his complaint, does not afford to him a full and adequate remedy at law." *Id.* at 851. See also People v. Carr, 231 Mich. 246, 203 N.W. 948 (1925) (a public utilities commission held not to be the exclusive remedial process provided for by a statute, despite language so indicating); Backrack v. 1001 Tenants Corp., 41 Misc. 2d 512, 245 N.Y.S.2d 912 (Sup. Ct. 1963) (procedures before the Commission on Human Rights not necessarily exclusive).

34. See McGee & Ginser, *The House I Live In: A Study of Housing for Minority*, 46 CORNELL L.Q. 194, 227 (1961); Witherspoon, *supra* note 5.

35. This argument must be viewed in light of the fact that provisions for court-enforceable cease-and-desist orders are rare in city fair housing ordinances. State commissions, on the other hand, exercise greater powers because of the generally greater powers enjoyed by a state. See note 8 *supra*.

36. See Bamberger & Lewin, *supra* note 4, at 573: "In many states where both civil and administrative procedures are available, a complainant is required to elect his remedy. Such a requirement is supported by the fact that the pendency of a suit during conciliation may exert considerable pressure on the respondent and make it difficult for him to agree in good faith. Moreover, if the commission is unable to assure the respondent that conciliation will bar later court action, its persuasiveness may be substantially undermined . . . ." See WASH. REV. CODE § 49.60.020 (Supp. 1965), which requires that an antidiscrimination commission refuse a complaint on which a civil action has already been commenced.

attorney, in practical terms, adds the threat of court enforcement to the commission's investigations.[37] Under the usual housing ordinance,[38] it is apparent that the city attorney has the power to determine whether a misdemeanor proceeding shall be instituted. If access to the courts is available to both the commission and the city attorney, termination of the alleged violation by successful conciliation or a finding of lack of probable cause does not constitute the acquittal of a crime, any more than does a finding of no probable cause in a preliminary examination before a commissioner in other kinds of criminal cases. No formal exercise of judicial power has taken place, for no legal prosecution has been instituted. Thus, whatever transpires before the city attorney's decision to prosecute has been purely administrative and is not binding upon him. This would seem to have been recognized in cases upholding the constitutionality of state[39] and local[40] fair housing laws with "conventional" enforcement procedures.

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37. Bamberger & Lewin, *supra* note 4, at 530.

38. See note 10 *supra*.

39. The substantive validity of state fair housing laws seems well-established in a number of states. *E.g.*, Colorado Anti-Discrimination Comm'n v. Case, 151 Colo. 235, 380 P.2d 34 (1963) (holding invalid, however, the part of the enforcement procedure which delegated "carte blanche" authority to the commission to impose penalties or sanctions for the substantive portion of the statute in question); Vaught v. Village Creek Homeowner's Ass'n, 7 RACE REL. L. REP. 849 (Super. Ct. Fairfield County, Conn. 1962); Swanson v. Comm'n on Civil Rights, 6 RACE REL. L. REP. 841 (Super. Ct. New Haven County, Conn. 1961); Massachusetts Comm'n Against Discrimination v. Colangelo, 344 Mass. 387, 182 N.E.2d 595 (1962); David v. Vesta Co., 35 N.J. 301, 212 A.2d 345 (1965); Levitt & Sons, Inc. v. Division Against Discrimination, 31 N.J. 514, 158 A.2d 177, *appeal dismissed*, 363 U.S. 418 (1959); Cooney v. Katzen, 41 Misc. 2d 236, 245 N.Y.S.2d 548 (Sup. Ct. 1963); New York State Comm'n Against Discrimination v. Pelham Hall Apartments, Inc., 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958). It is interesting to note that some of the above cases were cited with approval in the principal case. In O'Meara v. Washington State Bd. Against Discrimination, 58 Wash. 2d 793, 365 P.2d 1 (1961), *cert. denied*, 369 U.S. 839 (1962), the court held invalid the prohibition against discrimination in publicly assisted housing. See Pearl & Terner, *Survey: Fair Housing Laws—Design for Equal Opportunity*, 16 STAN. L. REV. 849, 852-79 (1964).

A collection of cases upholding the constitutionality of state public accommodation statutes appears in *Hearings*, *supra* note 16, at 1381-83. For examples of state fair employment practices acts which have been upheld, see note 15 *supra*. For a complete examination of state and local fair employment practices laws, see 2 EMERSON & HABER, *op. cit. supra* note 9, at 1451-83.

40. The substantive validity of local laws is rapidly becoming accepted. See Martin v. City of New York, 22 Misc. 2d 389, 201 N.Y.S.2d 111 (Sup. Ct. 1960); Stanton Land Co. v. City of Pittsburgh, 111 P.L.J. 469 (Munic. Ct. Pittsburgh, Allegheny County, 1963). In District of Columbia v. Ruark, 10 RACE REL. L. REP. 321 (D.C. Ct. Gen. Sess., March 19, 1965), the court emphasized that there was no unconstitutional delegation of power to the commission. The enforcement procedure created by the ordinance (D.C. POLICE REGULATIONS art. 45, § 8) was of the "conventional" type. *Contra*, Terry v. City of Toledo, 270 Ohio 2d 251, 194 N.E.2d 877 (Lucas County Ct. App. 1963) (fair housing ordinance held invalid because it did not grant the Fair Housing Board *enough* power to make enforcement of the ordinance certain); see Pearl & Terner, *supra* note 39, at 892-93. See also Marshall v. Kansas City, 355 S.W.2d 877 (Mo. 1962), upholding the constitutionality of a public accommodation ordinance with enforcement procedures

Another possible interpretation of the "conventional" ordinance would suggest that an aggrieved person's right of access to the city attorney is contingent upon the exhaustion of the administrative remedies established by the ordinance.[41] However, few city attorneys would be inclined to proceed with a prosecution against the alleged violator in the face of a commission's dismissal of a complaint for lack of probable cause. Indeed, to do so might be disastrous politically. Thus, in practical application the result would echo that in *Porter,* since the commission's determination would be in effect adjudicatory.

Under several other possible interpretations of "conventional" ordinances, it is possible to avoid the question whether criminal enforcement can be attached to administrative conciliation in a fashion that prevents a citizen from filing a criminal complaint unless such conciliation has failed. The possible interpretations are (1) that the aggrieved individual may file his complaint either with the city attorney or with the commission, the former choice not requiring an exhaustion of the latter remedy; (2) that the individual's choice of procedure, as between the city attorney and the commission, is an irrevocable election; and (3) that an election to proceed through either the city attorney or the commission, but not the other, is an irrevocable choice. Under all these constructions, the result is that the aggrieved individual is not precluded from taking full advantage of the commission's powers. If the election to file a complaint with the commission is irrevocable, the persuasiveness of the conciliation process is augmented by the removal of any pressure on a respondent that might prevent his agreeing in good faith to the terms of conciliation.[42] If, on the other hand, the aggrieved party chooses to file a complaint with the city attorney, such an election still leaves open the way to informal investigation and conciliation at the discretion of the solicitor, who may forward the

(providing for criminal enforcement) almost identical to those in the "conventional" ordinance.

In Stanton Land Co. v. City of Pittsburgh, *supra,* the court rejected the argument that the Pittsburgh ordinance gave the Commission on Human Relations broad, undefined, and nondelegable power to issue such orders as the facts warranted. The Court stated: "This argument is not too impressive. It seems to assume a finality to the orders of the commission which they do not have." *Id.* at 477. It is noteworthy that the Pennsylvania Commission on Human Relations is empowered to issue enforceable orders, instead of merely recommending prosecution, as in conventional ordinances. The fact that the ordinance in *Stanton* was upheld in its entirety would suggest that the *Porter* holding should be narrowly limited. *Compare* PITTSBURGH, PA., ORDINANCE 523 (1958), *with* OBERLIN, OHIO, ORDINANCE 235 AC CMS (1961).

41. *But cf.* Levitt & Sons, Inc. v. Division Against Discrimination, 31 N.J. 514, 158 A.2d 177, *appeal dismissed,* 363 U.S. 418 (1959). For an analogous right arising under the National Labor Relations Act, see, *e.g.,* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1948).

42. See note 36 *supra.*

matter to the commission. Therefore, in light of the language of the "conventional" antidiscrimination law, it is apparent that even if judicial power has been improperly delegated to the commission in *Porter*, the court's holding should not be broadly applied to invalidate other ordinances which treat the use of the commission as *permissive* rather than *mandatory*.[43]

It seems clear that the framers of antidiscrimination legislation have been of the opinion that conciliation is the best means of bringing about voluntary compliance with the law, and that criminal sanctions should be employed only when the threat of their use fails to encourage good-faith conciliation. Interpreting these statutes as requiring that complaints be brought only to the city attorney or the municipal court, as the court in the principal case implied, would be self-defeating. While it would have the apparent effect of reposing judicial power in the proper place, it would destroy the intent of a municipality to vest discretionary powers in the commission so that the adjudicatory process would often be unnecessary.

Thus, in order to implement the groundwork that has been fashioned for the resolution of civil rights problems by administrative agencies, the *Porter* decision should be narrowly interpreted.[44] It is regrettable that the court's vague language permits a broad reading which poses problems that it is hoped the court did not intend and implications that it surely could not have justified.

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43. It is true that the judicial remedy which leaves the prosecutor free to prosecute and also leaves the commission in existence would still not limit the prosecutor's freedom to delegate informally to the commission the investigation and conciliation functions it formerly performed. However, it is suggested that the existence of the commission as an available means of redress is vital to effective treatment of civil rights problems simply in terms of the feelings of minority groups who respect the commission and its objectives and fear having to initiate the filing of a complaint with the prosecutor.

44. See notes 13, 21-26 *supra* and accompanying text.