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SOME GENERAL OBSERVATIONS ON ADMINISTRATION OF STATE FAIR EMPLOYMENT PRACTICE LAWS

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WE think it is time for major changes in the administration of commission enforced fair employment laws. These laws were born in an atmosphere charged with uncertainty, fear and hostility. Many thought they were doomed to ineffectuality, that they were likely to aggravate racial problems, indeed that their constitutionality was doubtful. Therefore, it was natural for the commissions established to enforce the laws to proceed cautiously and discreetly, and, for the most part, to take the position that their principal role, apart from general educational efforts, was to resolve specific complaints formally presented to them by persuasion and conciliation, causing as little antagonism on the part of respondents as possible. In large measure these attitudes continue to dominate the commissions.

Now, however, we think there is a substantial consensus in jurisdictions which have adopted fair employment laws that discrimination in employment because of race or religion is wrong, and that it is proper for government to condemn such discrimination and to take moderately strong measures towards its elimination. The fair employment laws in these jurisdictions seem well-established; the opposition, the concern, the scepticism that surrounded them has substantially dissolved. For this, we owe much to the restrained, responsible performance of the commissions. At the same time, by their educational programs, their enforcement activities, their existence generally, they have produced important gains in economic opportunities for minorities. These substantial commission accomplishments should neither be overlooked nor belittled. Nevertheless, it seems clear that much employment discrimination remains and that in many areas the commissions and the law have hardly scratched the surface. This, at a time when it is important that we progress rapidly in improving the economic situation of Negroes and other minority groups.

We believe that the commissions should assume a much more active and significant part in this effort—that they should diligently seek out important discrimination and make well-planned, imaginative, forceful efforts to eliminate or ameliorate it on a plant-wide, organization-wide, even industry-wide basis. It is no longer adequate for them to proceed wholly, or even principally, on the basis of complaints filed by private parties. Within the framework of flexible, general plans designed to make most effective use of their resources, the commissions should systematically initiate their own inquiries, negotiations and complaints where they have reason to believe significant discrimination

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is being practiced. In jurisdictions where commissions lack power to initiate these various proceedings, legislatures should not only give them authority, but, in view of past experience, direct them to exercise it. We realize, of course, that there are dangers and disadvantages in these proposals but are convinced they would be greatly outweighed by the benefits which would result.

From the beginning the number and quality of complaints received by the commissions has been disappointingly low. Failures by commissions, as well as by civil rights organizations, are responsible in substantial measure. For the most part, however, this dearth seems inherent in the plight of minority groups, the law's inevitable delays and burdens, and the inability of the commissions fully to protect complainants. True, the number of complaints has increased recently. Nevertheless, the impression remains that the number is small compared with unlawful discrimination and, more important, that the complaints continue to come before the commissions in haphazard and fragmentary patterns. The number of complaints undoubtedly could be increased (*e.g.*, by faster, more adequate relief for aggrieved parties, by more extensive and forceful publicity about commission action, by dispersal and relocation of commission offices), but even if the number could be multiplied several fold, this does not seem the best approach. Complaints would still not present any systematic, comprehensive pattern, let alone fit a thoughtful, well-integrated, prearranged program for commission action, which we regard as a vital reform. They would still frequently involve dissipation of commission resources on unrelated, relatively insignificant, less tractable aspects of discrimination.

Even under an approach based on private complaints, of course, commissions frequently should attempt to eliminate all discriminatory practices of respondents, although the discrimination charged has no relation to the discrimination found. Existing statutes apparently confer this power despite its seeming inconsistency with lack of power to initiate complaints. Some commissions appear to do little more, however, than adjust the well-founded grievances of particular complainants, and then only if they persist to the end in their demand for relief. Action on this basis seems plainly inadequate—an indefensible frittering away of the commissions' resources and potentialities, like trying to drain a swamp with a teaspoon.

In undertaking a much more spontaneous and affirmative role against discriminatory practices it appears that commissions can rely, to a large degree, on informal, noncomplaint inquiries and persuasion, taking advantage of the greater flexibility this involves. The pressures and influence which the commissions can exert in this fashion frequently will secure substantial compliance with the law. (Here we have in mind unfavorable publicity, difficulties with other government agencies, problems with civil rights groups, possible commission resort to complaint and enforcement procedure, as well as appeals to the conscience, the sense of social responsibility, the publicly proclaimed principles of those who control economic opportunities.) Today, much of the vital dis-

crimination in connection with *employment opportunities* seems not to be rooted deeply in powerful psychological or emotional needs or in vital economic self-interests, but rather is primarily a matter of ignorance, of habit, of vague concern about the reaction of employees or customers, which can be overcome with a skillful blend of education, persuasion and subtle pressure. Even the mere presentation of relevant facts about minority persons can have potent effect. Of course there may be some resistance by lower echelon management people, by employees and others, particularly as discrimination shrinks toward the hard core, which can only be countered by more severe means.

In handling investigations and complaints which disclose unlawful discriminatory practices, commissions generally should seek comprehensive and definite commitments from violators, including formulation of detailed personnel programs which are effectively communicated to responsible officials throughout their organizations. Furthermore, perceptive compliance reviews should be made until the commission is fully satisfied that the respondent observes and will continue to observe both the letter and spirit of its requirements. To this end violators should be directed generally to submit compliance reports and to keep adequate records available to commission inspection. Apparently a number of commissions, at present, do not make any substantial effort to check on compliance with conciliation agreements. This is thoroughly unsatisfactory and undoubtedly deprives the commission's efforts of much of their possible effect.

In addition to these basic measures, we believe commissions now can properly be expected to go beyond discrimination in attempting to make economic opportunities available to minorities, to accept broader responsibility for better racial balance in the labor force. In large part the absence of minorities in certain employment classifications cannot be attributed to present discrimination, but to narrow recruitment policies and to minority ignorance or lack of qualification. Commissions should strive to induce those controlling job opportunities to broaden their sources of recruitment, to abandon frequent unnecessary tests and requirements (*e.g.*, high school diplomas, which many Negroes do not have, for every employee), to provide special training programs to increase the number of qualified minority applicants. Furthermore, we think commissions should cooperate with public and private employment services, guidance counselors, civil rights organizations and others by seeing that they receive information about openings gained by commission efforts, and by encouraging and assisting them in whatever way practical to induce minority persons to prepare themselves and to seek these opportunities.

Frequently there are accounts of desirable jobs available to Negroes which go begging because qualified and interested Negroes do not present themselves. In addition to lack of knowledge, a significant barrier here is the Negro attitude that it is pointless to try for many jobs traditionally closed to their race, often accompanied by ignorance of antidiscrimination laws or belief that enforcement

bodies are ineffectual and perhaps indifferent to protection of Negro interests. To inform possible minority applicants, to encourage them to prepare and to apply, commission activities ought to be publicized more extensively and forcefully, particularly through popular media likely to reach substantial numbers of minority persons. This is particularly true with respect to the nature and significance of conciliation agreements and the products of informal negotiations, since virtually all of the commissions' impact has been and will continue to be at these levels. This publicity should stimulate complaints, particularly in the areas involved, and these complaints in turn should facilitate commission programs. On the other hand, much of the general educational work which commissions have long emphasized now seems relatively unproductive and should be given low priority so far as commission resources are concerned.

The changes suggested in commission administration of the fair employment practice laws call for large increases in present inadequate commission appropriations and in the size of their staffs. However, an increase of three or four hundred per cent would still leave the cost below ten cents per capita in most jurisdictions—a small price for the unique and vital, even though limited, functions the commissions can perform in dealing with what has been aptly described as our "Negro economic crisis." Of course legislatures may refuse to appropriate such amounts—though their resistance might be less than anticipated if presented with effective and comprehensive commission plans. To the degree that commissions must proceed with less than optimum appropriations, thoughtful advance planning to obtain maximum effect from commission resources rather than *ad hoc* reaction to whatever results from private complaints becomes more vital. Related here is our concern whether commissions have been spread too thin by being assigned responsibility for discrimination in public accommodations and private education, as well as discrimination on such diverse grounds as age, sex and military status, thus contributing to the fragmentary and superficial aspects of their performance.

Finally, with respect to commission personnel there seems to be great need for a substantial infusion of new blood, of new outlook, to accomplish what we regard as more constructive administration of the laws. Every effort should be made to appoint dedicated, imaginative, first-rate persons to commission positions, particularly as the responsibility and discretion of the commissions increase, if the laws are to have maximum beneficial effect.

We turn now to several special problems as to formal commission powers and organization. We believe the determining consideration in the solution of these problems will be the point that we have made above; namely, that the basic commission tool will be persuasion and negotiation rather than adjudication. Accordingly, the precise forms of adjudication are not highly significant. What is significant is that the commissions do have some effective enforcing powers or that there be such powers they can invoke.

Probable Cause

There is considerable controversy concerning the requirement that commissions find probable cause of unlawful discrimination as a condition for exercise of their enforcement powers. Civil rights organizations, for example, have demanded more elaborate and precise definitions as to this requirement, arguing that their activities in support of the law and their appraisal of commission determinations are handicapped by present uncertainty. Putting to one side the great difficulty in formulating more precise standards, we do not believe, however, that implementation of the laws, by civil rights organizations or otherwise, has been retarded materially by indefiniteness in the probable cause concept. As a matter of fact, indefiniteness has a positive aspect to the extent that it gives commissions more flexibility and control over their activities. What critics really want seems not so much greater definiteness or elaboration as relaxation of the requirement as it has been applied by commissions. There appears to be considerable justification for this demand. From commission dismissal of about one-half of the complaints filed with them for lack of probable cause and from other evidence, one gets the strong impression that commissions have required too rigorous a showing of discrimination. Standards for applying the law here certainly should not be as strict, for example, as those used in the criminal law. This is particularly true when the focus of agency action is shifted from specific instances of discrimination to improvement of industry or area hiring and job practices generally.

Combination of Investigating, Initiating, Conciliating and Judging Functions

The combination of initiating and/or conciliating and judging functions and the combination of conciliation and judging functions are in certain situations highly controversial. Generally speaking, our tradition is against combining the functions of prosecution and adjudication in the same officers or organization. One who prosecutes a claim is apt to look at evidence with an eye to confirm his prosecutory intention. A somewhat different question is raised by the combination of conciliation and arbitral or adjudicatory functions; and there is a great deal of dispute, especially in the world of labor arbitration, whether the two functions should be combined. An arbitrator who has attempted to conciliate may learn certain things or may acquire certain attitudes toward one or the other party which, when he becomes a judge, distort his application of the law to the facts. Nevertheless, the values of combining prosecutory and adjudicatory functions have sometimes (as, for instance, with the National Labor Relations Board and Federal Trade Commission) been thought to outweigh its disadvantages, though even here the law has in recent times been modified significantly. The Labor Board now has a prosecuting arm distinct from the members of the Board, and the Administrative Procedure Act has provisions which attempt to mitigate the disadvantages of combination. Thus there must be an independent trial examiner who is re-

quired to conduct a hearing and make a report, and the Board itself in making its decision must not consult with the prosecutory staff.

However, the problem is much less significant in our situation. We base this statement once more on our basic premise that conciliation rather than adjudication will be at least for some time the chief reliance. Obviously this consideration cuts both ways. It makes it of less significance than in Labor Board cases (for example) that functions are combined. But also it makes it less important from the point of view of enforcement that the agency have the power both to prosecute and judge. Insofar as experience were to show that the combination of functions creates resistance or provides a basis for criticism, probably not much would be lost by providing some form of independent adjudication. It might be as in the case in Minnesota, a panel of hearing officers from which choice may be made. Such hearing officers might have the power of final decision or might, as under the Administrative Procedure Act, be limited to intermediate decision with ultimate authority in the agency. One question concerning the use of *ad hoc* hearing officers is whether they will be sufficiently aware of developments and concepts in the field. That depends on whether the questions are of a technical character and whether the ideas are those of the society at large and as such known to the intelligent layman. Because it is hoped that these laws rest on an enlightened public opinion and an acceptance of the basic premises of our society, there may be certain advantage in using *ad hoc* lay hearing officers.

Rights of Aggrieved Persons

There is a question whether aggrieved persons should have the right to compel the agency to investigate, conciliate and adjudicate and whether such a right should be reinforced by judicial review. In systems in which adjudication proceeds on the basis of a formal complaint filed by an aggrieved person, the assumption may be that the agency must adjudicate the case and that its duty to do so can be enforced by judicial procedure. Under the procedure of the Labor Board and Trade Commission the issuance of a complaint is in control of the agency, and the refusal to investigate or issue a complaint cannot be questioned in the courts, though there may be an exception if the refusal is based on the premise that the agency does not have jurisdiction. This procedure is justified on the ground that the agency should have the power to control the deployment of its limited resources of men and energy. It does place an enormous power in the hands of an agency, and where there are no alternatives opened to an aggrieved person, it is a questionable policy. One alternative is to allow the aggrieved person to bring an action in court either at his option or if the agency refuses to act.

The solution that we would tentatively suggest is that the agency's refusal to proceed should not be subject to judicial control but that the aggrieved person should have a right to proceed on his own in court if the

agency refuses to act. In our opinion, the agencies are presently confronted with an enormous potential workload. We have emphasized the great importance of agency initiative, of industry-wide investigations, of concentration on significant employer situations in terms of employer's entire hiring policy. Proceedings of this sort consume enormous time and energy, and for this reason the agency should have the power to refuse to investigate or to proceed in cases which it regards as marginal or of minor significance, or based on unfounded claims or distorted conceptions. For these reasons we suggest that aggrieved persons do not have a right to compel an agency to proceed.

We recognize, of course, that as the statutes presently read agency discretion is not that broad. At least if the agency is driven to the conclusion that there is probable cause, it may well be that it is required to process a complaint even though in terms of the whole program its significance may not be thought to warrant the expenditure of time. But it would still be within the agency's power to treat the case in more summary fashion and to limit its objective to removing the specific discrimination. In any case, to the degree that the agency can be master of its agenda, it should concentrate its resources on the broader objectives.

A different question is raised where the agency has proceeded and after formal hearing decides against the complainant for assertedly insufficient or incorrect reasons of law. It is customary for such determinations to be reviewed, and there is no reason for not applying the customary policy in these cases.