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Witherspoon: Administrative Implementation of Civil Rights

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ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS. By *Joseph Parker Witherspoon.* Austin: University of Texas Press. 1968. Pp. viii, 581. $10.

Nearly three decades have passed since June 25, 1941, the birth date of the administrative law of civil rights. On that day President Roosevelt, by executive order, forbade discrimination on the basis of race, creed, or national origin by federal agencies or by defense industries, and established a Committee on Fair Employment Practice to implement his order.[1] Since 1941 there has been a continuous expansion of administrative activity in this area. We have now had almost thirty years to observe the extension of coverage of civil rights laws and the gradual development of more and more powerful enforcement devices. Provisions against discrimination have entered into the legal order at all levels—in federal law, in federal administrative regulations, in the laws of thirty-seven states and dozens of local communities, in scores of labor contracts, and in the rules and regulations of a great variety of public and private institutions. Employment, education, public accommodations, and housing have come under the purview of the administrative law of civil rights. As coverage has increased, so have the variety and strength of formal administrative powers. Originally armed with only moral force, agencies have gradually been granted both interlocutory and permanent enforcement tools.

What are the lessons of these thirty years? Professor Witherspoon seeks to summarize and capture them in a set of proposed model statutes designed to embody both the proved features of past civil rights law and remedies for known defects. Witherspoon understands that the principal weakness of most of the administrative activity of the past has been virtually exclusive reliance on the complaints of aggrieved individuals as the raw material for enforcement programs. This strategy, which I have elsewhere christened the "private-law approach"[2] fails to attack patterns of discrimination. Rather, the energies of administrative agencies are dissipated in the conciliation of an endless stream of relatively trivial incidents—arbitrations of misunderstandings, explanations of unintended sleights, and routine surveillance of employment forms and applications.

These following provisions contain the thrust of Witherspoon's legislative proposals:

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1. Exec. Order No. 9,346, 3 C.F.R. 1280 (1938-1943 Comp.).
2. L. MAYHEW, LAW & EQUAL OPPORTUNITY (1968).

> *Section 502. Basic functions of the Commission.* (a) The Commission shall perform the following basic functions:
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> . . .
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> (3) negotiating with governing bodies and agencies of political subdivisions, with state agencies, and with persons and organizations having statewide operations for the taking of action by them to improve opportunities available to minority and other disadvantaged groups and utilizing of inspections, surveys, private conferences, public hearings, reports, and enforcement actions to assure the effectiveness of negotiation;
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> (4) processing individual complaints . . .
>
> (5) undertaking various types of constructive action designed to eliminate the causes of intergroup-relations problems . . . that result from the continued existence of these problems . . . .
>
> (b) It is the sense of the Legislature that the processing of individual complaints should be regulated as far as possible to local sections and that the negotiation and constructive-action functions of the Commission should receive the greatest emphasis in its administration of the Act. [Pp. 315-16.]

It is my unhappy duty to report that Witherspoon's analysis is both indubitably correct and profoundly shallow: correct because he knows the weaknesses of the traditional approach and the appropriate direction of future movement, but shallow because he does not systematically found his argument for change on a persuasive analysis of the failures of civil rights law in the social structure of American society and in the organization of community life. In part, this weakness of Professor Witherspoon's work results from limitations on his sources of data. He has read a large number of statutes, annual reports of commissions, and secondary sources—the kind of literature one can find in law libraries or receive in the mail. That he accomplished anything with such materials is a testimony to his insight and diligence because there is a noticeable lack of trustworthy and substantial documentation in either the self-serving statements of administrative officials about their own work or the pious *pronunciamentos* of liberals who do not want to believe that thirty years' investment in the administrative implementation of civil rights has come to nought, or at least to a dead end. All too often he betrays the biased sources of his work, to the detriment of his own arguments. At one point he falls into the habit of the annual-report writer and describes a "typical" case of alleged discrimination in employment: A qualified Negro electrician, who was refused employment by a large electric company in Pittsburgh, complained to the Pittsburgh Commission on Human Relations. Intensive investigation revealed discriminatory practices. The Commission corrected them and secured employment for the complainant (p. 112). Such an incident is not only atypical, it is extremely rare. My own research indicates that a case involving a

complaint filed by a dismissed Negro elevator operator, who was replaced by another Negro elevator operator in a building in which all the elevator operators were Negro, is as "typical" as the usual examples given in annual reports. To accept incorrectly the Pittsburgh Commission's designation of the typical case is to undermine the author's own argument that complaints are not effective instruments of law enforcement. Similarly, although Witherspoon recognizes that commissions do not receive many useful complaints (pp. 158-59), he is willing to accept the common argument that the dismissal of a high percentage of complaints betrays a weakness in commission procedures (p. 177). The main reason for a high level of dismissed complaints is that a large proportion are ill founded. The dismissals do not mean that there is no discrimination, but they do indicate that private complaints do not provide an effective means of attacking it. More generally, in assessing performance, Witherspoon does not hesitate to cite comparative statistics from various administrative bodies despite the fact that the commissions generally use unrevealing or deceptive categories of figures which cannot be compared.

Similar caveats must be entered against Witherspoon's faith that more aggressive policies of enforcement directed against patterns of discrimination will be more successful. Here he relies on the reputation and, testimony of commissions that are known to have attempted strategic attacks on whole industries or spheres of employment. The New York State Commission is considered to be quite vigorous and Witherspoon cites its experience as an example of the relative success of militant enforcement, relying on its own reports and a private study by Norgren and Hill[3] (p. 119). However, confronted with adverse criticism of the New York Commission by civil rights groups, he retreats and concludes that they have not moved very far beyond the case method (p. 127). The Philadelphia Commission emerges as an even greater hero, for it has in fact engaged in a broad program of inspection, reporting, and negotiation on an industry-wide basis (pp. 202-05). He accepts its testimony of its own success; to me it is self-serving. Neither the Philadelphia Commission, nor any of the other supposedly aggressive commissions —New York State, Pennsylvania, Pittsburgh, New York City—have been subjected to a rigorous, independent review by a professional investigator. In the absence of an audit by a qualified expert who has access to the record and to the industries in question, the verdict should be that success has not been proved.

Conversely, the Massachusetts Commission emerges as a goat, despite the fact that, were evidence of the quality adduced by Nor-

3. P. NORGREN & S. HILL, TOWARD FAIR EMPLOYMENT (1964).

gren and Hill accepted, Massachusetts has a fine record.[4] The Massachusetts Commission is known to be weak because it has been subjected to close examination by an independent investigator; the Massachusetts Governor's Commission had access to the report of the examination and it, in turn, issued a report which was available to Professor Witherspoon.[5]

So far my criticism has been superficial; it relates to the quality of the evidence and to the confused picture that necessarily emerges when an investigator relies primarily on existing public documents. The problems are deeper. In relying on such documents, one can achieve no more than a rare glimpse of the social context in which agencies operate or the hard social realities that they must face. If the Philadelphia Commission has been more militant, what has allowed the Commission to get away with it? If it has successfully changed patterns of employment in whole industries, how, precisely, did it accomplish that objective? From time to time Witherspoon has glittering insights into the social character of discrimination, the structured exclusion of minority groups from the mainstream of community life, and the political difficulties of commissions, but he does not thoroughly and consistently base his analysis on a solid appreciation of those facts of life.

The fundamental obstacle to the elimination of discrimination is de facto segregation in all its complicated, subtle, and unexpected forms. Early in the history of the administrative implementation of civil rights, the problem was seen as one of eliminating overt, deliberate policies of discrimination. That form has by no means been destroyed, but there is growing recognition that even if racist exclusion is destroyed, the actual structure of minority group participation will not necessarily change. As long as patterns of housing segregation exist, as long as there is segregation in voluntary associations, as long as minority groups are cut off from the networks of communication in the community—in short, as long as segregation remains in any area of life—it will be reproduced in other areas of life, because the various spheres of human activity are linked to each other, embedded in a common social structure. Witherspoon recognizes that patterns of de facto segregation require affirmative action in order to change these social realities. However, he fails to follow the logic of this position to its formidable conclusions. A unified account of de facto segregation would appreciate that there is an intimate affinity between de facto segregation and the failure of the current policy of enforcing equality of opportunity through indi-

4. *See, e.g.*, the statistics presented in MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, 1952 ANNUAL REPORT 9-10.

5. SPECIAL STUDY COMMISSION TO REVIEW THE FUNCTIONS AND POLICIES OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, REPORT (1964).

vidual complaints. Both result from the same cause. Minority groups are so excluded from the mainstream of participation in social life that de facto segregation is everywhere—even, ironically, in the patterns of complaints against discrimination. A passive approach to the administrative implementation of civil rights has the same weakness as a passive approach to the elimination of discrimination within any institution, be it a business firm, an educational facility, or any other association. All require the same remedy, the active construction of *institutions of incorporation*—institutions designed to reach out and include minority groups in their activities.

Institutions of incorporation are more easily recommended than constructed. Here Professor Witherspoon's plans are sketchy indeed. He suggests that we could write a statute calling for a more active approach, but he does not tell us how we could make it work. He merely tells us that it has worked in Philadelphia. Perhaps it is asking too much to demand practical advice from a book devoted primarily to legal analysis; the technical side of negotiating change is beyond the scope of purely legal problems. The flaw in that defense is that the two are not separable: purely legal problems may pose the most serious obstacle to a more active approach. Is it possible that, having spent the better part of thirty years establishing nondiscrimination clauses in the legal order at every level, we will now find that these clauses obstruct the attempt to *include* minority groups in all phases of American life? There is a tension between the idea of nondiscrimination, in the sense of passive color blindness, and active incorporation, in the sense of deliberately constructing avenues of access to opportunity. The latter implies not color blindness but attention to color, even, in some cases, implicit or explicit discrimination against majority groups. The tension leads to legal problems which began to fester in the fifties when an agreement between Negro groups and New York breweries to increase the employment of Negroes by working toward a quota of black workers earned the displeasure of the state commission against discrimination.[6] Recently the federal Office of Education warned Antioch College that it must desegregate its black studies program or face loss of federal funds.[7] More generally, many firms have used state laws against discrimination as weapons against the presidential equal opportunities programs that demand compliance reporting. "How can we tell you how many minority group members we employ when state law tells us we must be color-blind?" Witherspoon's model civil rights act would take care of this particular problem, but not the generic problem as it has become manifest in recent years.

6. STATE OF N.Y. INTERDEPARTMENAL COMMITTEE ON LOW INCOMES, DISCRIMINATION AND LOW INCOMES (1959).

7. 27 CONG. Q. 367 (March 14, 1969).

Indeed, if his proposed reforms are carried out, the latent tensions in the two approaches will become progressively salient. Does Witherspoon's model act require the following amendment?

> Nothing in this act may be construed to forbid the development or implementation of any reasonable program designed to increase economic and cultural opportunities for the members of any racial or ethnic group that suffers from unreasonable deprivations of opportunity.

Would such an amendment be constitutional? At one point Witherspoon does suggest a line of argument that might be used to justify an explicit permissive clause of this sort. His proposed statutes forbid not just discrimination but "certain unreasonable practices and policies; including discrimination" (p. 308). At various points discrimination is defined as direct or *indirect* exclusion. Witherspoon apparently believes that the use of the broad concept "unreasonable practice" would permit the expansion of laws against discrimination to cover the variety of practices that in fact restrict opportunity.

> The principle to be established should be one prohibiting any method of conducting a business, profession, or government agency that unreasonably restricts a person of any race, color, religion, sex, national origin, or age in obtaining employment, housing, home financing, public accommodations, education, or otherwise participating in any phases of community life. [P. 206.]

That is an interesting idea but is too limited. What would Witherspoon's proposed statutes *permit* businesses, professions, and government agencies to do? How far will it allow organizations to go in establishing new forms of opportunity? That the problem has not been seriously considered is clear from the fact that the proposed new acts contain some inappropriate vestiges of the civil rights laws of the past and present. Section 825 of the model state act provides that it is unlawful for any employer prior to employment to make inquiry concerning the race or ethnic origin of any applicant for employment. Such provisions are common in the present civil rights laws, but how can an employer actively seek to employ minority group members and still conform to this edict (p. 341)?

One of the proposed statutory definitions of discrimination, despite its breadth (or perhaps because of it), raises many questions:

> *Section 701. Definitions.* . . .
>
> . . .
>
> (6) "Discrimination" means any direct or indirect exclusion, distinction, segregation, limitation, refusal, denial, or any other differentiation or preference in the treatment of a person or persons on

> account of race, color, religion, ancestry, national origin, age, sex, or economic status . . . . [Pp. 323-24.]

Under that standard, would a training program designed to improve opportunities for Negroes be a case of segregation? Would it *indirectly* discriminate against potential Caucasian trainees?

More aggressive enforcement of the traditional conceptions of equal opportunity will not meet the new and emergent demands of minority groups. And in a very profound sense, civil rights law has always been oriented to trying to meet demands—to the reconciliation of groups. Discrimination has not been treated as a crime, as a violation of the moral order; past civil rights laws have contained penalties not for violating the law but for violating the orders of civil rights commissions. It is as if a victim of robbery could do no more than file a complaint with an antirobbery commission. The commission would then conciliate the claim, attempt to achieve reparations, and order the robber to cease his life of crime. Only after violating the cease-and-desist order could the robber be subject to criminal sanctions. Witherspoon retains this conception of discrimination in his proposed legislation.

Civil rights law has to a large extent been patterned on labor law, specifically the National Labor Relations Act. The emphasis is on negotiation, conciliation, and standards of fairness. If this is to be the approach, then it would seem that the law must recognize and cope with the actual character of the demands that are being pressed. Members of the new generation of blacks do not want their blackness denied; for them, to be treated universalistically is to be denied identity, and, more important, to be denied power. They do not want color-blind treatment, they want a piece of the action. Witherspoon fails to appreciate the significance of this movement from color blindness to color consciousness.

Finally, I should enter a word on Witherspoon's faith in localism in the implementation of civil rights (pp. 215-87). A great deal of Witherspoon's most detailed analysis concerns problems in the Southwest (Austin, Texas, in particular). As to conditions and forecasts for this region I bow to Professor Witherspoon's superior expertise. At the same time, I cannot accept on faith his basic premise that legal action in the local community provides a superior vantage point for attacking problems of discrimination. It is true that one can argue sociologically that the production of change requires action at the grass roots. But one can also argue that it is local politics which is most thoroughly controlled by the least responsible interests in our political system, and that a locally based commission is the most corruptible. Witherspoon argues that the greater militancy of such local commissions as those in New York City, Philadelphia,

Pittsburgh, Chicago, and Detroit is a result of the fact that they are locally based. I would argue that local commissions are more aggressive because they entered the arena at a later point in time. The pioneering action took place at the state level, but the state commissions were initially interested in achieving recognition of their legitimacy, and thus they became circumscribed by relatively conservative enforcement policies. Local commissions moved into the political niche created by the rise of support for militant action because the state commissions were unable to transcend their history. Witherspoon's arguments as to what would constitute constructive action at the local level are excellent, but again he has failed to ground his general analysis on persuasive appeals to the facts of the social order—in this case the facts of power.

Professor Witherspoon's work is well worth careful study. His proposed statutes should be examined by all legislators and groups who seek to improve civil rights legislation. That his work and his proposals can be seriously questioned is merely an inescapable consequence of the tempo of social change. In intellectual activity we must stop from time to time to sort out our impressions and to devise new schemes to account for new facts. While we stop to think, the realities of the social environment move on.

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