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A Supplementary State Civil Rights Act

ROBERT E. RODES, JR.*

Under the following statute, civil rights groups, with the approval of the state civil rights commission, may enter into agreements with employers, labor organizations, school authorities, or other public or private agencies, for a direct attack on de facto segregation through a deliberate mixing of races in a desired proportion. Professor Rodes characterizes his draft as "a suggestion for controlled concessions to the principle of direct mixing of the races" in such a manner as to be "philosophically consistent with an ultimate commitment to a society in which racial considerations play no part."

ACTION taken for the purpose of "redressing racial imbalance" by deliberately mixing the races in desired proportions has been attacked as a form of "inverse discrimination" on the theory that only rigorous disregard of race is consistent with a moral and legal commitment to equal treatment.¹ On the other hand, it has been defended as the only way to escape from the toils of *de facto* segregation—the theory being that only by deliberately having people of different races rub shoulders with one another can the sociological and cultural barriers to true equality be broken down.

The following draft is offered as a suggestion for controlled concessions to the principle of direct mixing of the races. It endeavors through its classifications to make such concessions philosophically consistent with an ultimate commitment to a society in which racial considerations play no part. It endeavors through its administrative controls to limit such concessions to cases where they are really needed, and to insure that such concessions will be understood as only a temporary expedient. It endeavors through requiring the participation of civil rights organizations to insure that such concessions will in fact contribute to the lessening of racial tensions.

Even with all this to be said in its favor, I am not sure whether,

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1. See e.g., Fair Share Org. v. Mitnick, 134 Ind. App. 675, 188 N.E.2d 840 (1963); Hughes v. Superior Court, 339 U.S. 460 (1950).

after preparing this draft, I would favor its enactment. I have yet to be convinced that the way to implement the principle of equal treatment is temporarily to depart from it. I offer the draft simply in the hope that the formidable questions of principle and policy involved can be more intelligently addressed in the light of a concrete proposal.

The question of the constitutionality of the proposed legislation—as well as its compatibility with the federal civil rights act—will probably turn out to be basically the same as the underlying policy question of the desirability of direct attacks on *de facto* segregation. To be sure, there is a colorable contention here that at least some of the provisions involve no state action, but I do not find the contention very persuasive. Perhaps more persuasive is the argument that making a special class of victims of discrimination is not to be equated with the making of gratuitous classifications based on race: the racial classification is made not by the legislature but by the very situation the legislature is trying to alleviate.

Despite the force of this argument, if discrimination in favor of minority groups is to be judged by the same standards as discrimination against them, I doubt if this legislation will stand up. To uphold such measures as these, we must say with the Supreme Court of New Jersey that:

Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts at segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation.²

Whether the Supreme Court will accept this principle has yet to be determined.

AN ACT

To Encourage the Integration of Minority Groups into the Schools, Communities, and Workplaces of the State by Empowering the Civil Rights Commission to Require Certain Agencies of Government to take Action to that End, and to Permit others to do so.

²Morean v. Board of Educ. of Montclair, 42 N.J. 237, 243-44, 200 A.2d 97, 100 (1964). See also Balaban v. Rubin, 14 N.Y. 2d 193, 199 N.E.2d 375 (1964).

PART I. PURPOSE AND DEFINITIONS**SECTION 101. *Short title.***

This Act shall be known, and may be cited, as the “[State] Supplementary Civil Rights Act.”

SECTION 102. *Definitions.*

As used in this Act:

(a) “Commission” means the [State] Civil Rights Commission created by [citation].

(b) “Minority group” means all persons of any one race, color, creed, national origin, or ancestry who live or work in any county, if in such county (1) there exists a custom or practice of discriminating against such persons with respect to education, employment, the purchase or occupancy of housing accommodations, or the use or enjoyment of public accommodations, and (2) such custom or practice is so widespread and so burdensome as to create a substantial impairment of the educational, economic, social, or cultural opportunities of such persons.

(c) “Segregation” means the concentration of disproportionate numbers of persons of any one minority group in a limited number of schools, neighborhoods, workplaces, types of employments, or public accommodations in a county described in subsection (b) of this section, if such concentration causes or contributes to (1) ill feeling toward such minority group on the part of other persons, (2) such custom or practice of discrimination as is described in subsection (b) of this section, or (3) a substantial impairment of the economic, social, educational, or cultural opportunities of members of such minority group.

(d) “Civil rights organization” means any non-profit corporation or voluntary association active in a county described in subsection (b) of this section, having for its primary purpose the elimination of segregation, of discrimination based on race, color, creed, national origin, or ancestry, or of other conditions burdensome to the members of a minority group as such.

PART II. QUALIFICATION; IMPLEMENTATION OF AGREEMENT**SECTION 201. *Qualification petition.***

Any civil rights organization or organizations may file with the Commission a petition alleging as to a designated county, that:

(a) The persons of a designated race, color, creed, national origin, or ancestry, who live or work in such county constitute a minority group as defined in subsection (b) of section 102.

- (b) Members of such minority group are subject to segregation as defined in subsection (c) of section 102.
- (c) Petitioner or petitioners are actively pursuing in such county the purposes described in subsection (d) of section 102, and enjoy substantial support among the members of such minority group.

Not less than ten nor more than thirty days after receiving such a petition, the Commission shall hold a public hearing in the county seat of the county designated in the petition. If, from the evidence introduced at such hearing, the Commission shall find the allegations of the petition to be true, it shall enter an order declaring the provisions of this Act in effect in such county with respect to the minority group designated in the petition.

SECTION 202. *Employment, housing, public facilities: Approval and implementation of agreement.*

In any county in which there shall be in effect an order entered pursuant to section 201, it shall be lawful to make and implement, with the approval of the Commission, any agreement between a civil rights organization and any school board, employer or labor organization, or group of employers or labor organizations, proprietor or group of proprietors of public accommodations, or owner, builder, or lessor, or group of owners, builders, or lessors of housing accommodations, reserving to members of the minority group not more than twenty per cent of the places or positions in any school, workplace, type of employment, or contiguous group of housing accommodations covered by such agreement, or excluding members of the minority group from not more than sixty per cent of such places or positions, or both. When such an agreement has been made, the parties to it shall file with the Commission a petition for approval. Not less than seven nor more than twenty-one days after receiving such a petition, the Commission shall hold a public hearing. If, from the evidence introduced at such hearing, the Commission shall find:

- (a) that the agreement in question was entered into by the civil rights organization in a good faith attempt to ameliorate, reduce, or eliminate segregation, or other undesirable conditions described in subsections (b) and (c) of section 102;
- (b) that the implementation of such agreement will in fact have such an effect; and
- (c) that such agreement constitutes a desirable temporary expedient for the accomplishment of the ultimate goal of equal treatment of all persons regardless of race, color, creed, national origin, or ancestry, the Commission shall enter an order approving such agreement.

SECTION 203. *Education, training: Approval and implementation of agreement.*

In any county in which there shall be in effect an order entered pursuant to section 201, it shall be lawful to make and implement with the approval of the Commission any agreement between a civil rights organization and any school board, private educational institution, employer or labor organization, or group of employers or labor organizations, or any other person or persons for any plan of education, apprenticeship, on-the-job training, or other literary, cultural, or vocational instruction for members of the minority group. When such an agreement has been made, the parties to it shall file with the Commission a petition for approval. Not less than seven nor more than twenty-one days after receiving such a petition, the Commission shall hold a public hearing. If, from the evidence introduced at such hearing, the Commission shall find:

- (a) that the agreement in question was entered into by the civil rights organization in a good faith attempt to ameliorate such impairment of the economic, social, educational, or cultural opportunities of the minority group or its members as described in subsections (b) and (c) of section 102;
- (b) that the implementation of such agreement will in fact have such an effect; and
- (c) that such agreement constitutes a desirable temporary expedient for the accomplishment of the ultimate goal of equal treatment of all persons regardless of race, color, creed, national origin, or ancestry, the Commission shall enter an order approving such agreement.

SECTION 204. *Compliance.*

In case of the failure of any party to an agreement approved under section 202 or section 203 to comply with the requirements of such agreement, the Commission may proceed in accordance with the provisions of the [State] Civil Rights Act for conciliation in cases of discriminatory practices, but if such conciliation is unsuccessful, the Commission shall proceed no further, except as is provided in section 403 of this Act. No proceeding shall be entertained in any court or administrative agency for the enforcement of any such agreement except as provided in this section or in section 403.

PART III. INTEGRATION OF PUBLIC SCHOOLS**SECTION 301. *Authority of Commission to propose and implement plan.***

If it shall appear to the Commission that:

- (a) conditions of segregation exist in any public school system in a

county in which there is in effect an order entered pursuant to section 201; and

(b) such an agreement as is described in section 202 would contribute materially to the amelioration, reduction, or elimination of such conditions of segregation; and

(c) negotiations aimed at the formation of such an agreement have been in progress for not less than ninety days, and the Commission has used its good offices pursuant to section 501 to assist in such negotiations; and

(d) it is unlikely that an agreement conformable to section 202 can be reached within a reasonable time, the Commission may formulate a plan for the distribution of pupils belonging to the minority group among the several schools of such school system. The plan may reserve to members of the minority group not more than twenty per cent of the places in any such school, exclude members of the minority group from not more than sixty per cent of the places in any such school, or both. Copies of such plan shall be served upon the school board or other authority in charge of such school system, and upon any civil rights organization involved in the negotiations referred to in subsection (c). Not less than seven nor more than twenty-one days after such service, the Commission shall hold a public hearing. If, from the evidence introduced at such hearing, the Commission shall find:

(e) that all the matters set forth in subsections (a), (b), (c), and (d) are verified;

(f) that the implementation of the plan proposed by the Commission will contribute materially to the amelioration, reduction, or elimination of the conditions of segregation referred to in subsection (a); and

(g) that such plan constitutes a desirable temporary expedient for the accomplishment of the ultimate goal of equal treatment for all persons, regardless of race, color, creed, national origin, or ancestry, the Commission shall enter an order that such plan be put into effect.

SECTION 302. *Compliance.*

In any case of failure on the part of the authority in charge of a school system subject to a plan adopted pursuant to section 301 to comply with the requirements of such plan, the Commission shall proceed in accordance with the provisions of the [State] Civil Rights Act for cases of discriminatory practices. No proceeding shall be entertained in any court or administrative agency for the enforcement of any such plan except as provided in this section or in section 403.

PART IV. LEGALITY; EXPIRATION; TERMINATION**SECTION 401. *Effect of [State] Civil Rights Act.***

Neither the [State] Civil Rights Act nor any other law or ordinance dealing with discrimination on account of race, color, creed, national origin, or ancestry shall be construed to prevent the implementation of any agreement approved by the Commission under section 202 or section 203, or any plan adopted by the Commission under section 301.

SECTION 402. *Expiration.*

Any order entered pursuant to section 201, any agreement approved pursuant to section 202, or section 203, or any plan adopted pursuant to section 301, shall expire at the end of three years from the date of the Commission's final action thereon, unless an earlier expiration date is specified in such order, agreement, or plan. The expiration of an order entered under section 201 shall not affect the validity of any action taken while such order was in effect. The expiration of an agreement approved under section 202 or section 203, or of a plan adopted pursuant to section 501, shall not restrict the protection extended by section 401 to any action taken pursuant to such agreement or plan while it was in effect. The Commission may by order extend the protection of section 401 to any action it finds reasonably necessary for the orderly termination of any such agreement or plan during a period of not more than two years after its expiration.

SECTION 403. *Termination.*

The Commission may, on the complaint of any interested party, terminate any agreement approved under section 202 or section 203, or any plan adopted pursuant to section 301, if it finds after a public hearing:

- (a) that the implementation of such agreement or plan no longer serves the purposes set forth in section 202, or section 203, or section 301, as the case may be; or,
- (b) if the complainant is a party (other than a civil rights organization) to the agreement in question, or is an authority in charge of a school system subject to the plan in question, that the implementation of such plan or agreement arouses such opposition among the members of the minority group as to constitute a substantial economic, social, or political burden to the complainant; or,
- (c) in the case of an agreement, that such agreement is not being implemented in good faith by the parties to it.

For purposes of this section, an interested party shall include any civil rights organization, any party to the agreement in question, the authority in charge of any school system subject to the plan in question, or any person who has been discriminated against on account of race, color, creed,

national origin, or ancestry through any action taken pursuant to such plan or agreement, *provided*, that no plan or agreement shall be terminated under subsection (b) of this section except on the complaint of a party described therein.

PART V. PROCEEDINGS BEFORE THE COMMISSION

SECTION 501. *Assistance in negotiations.*

The Commission shall use its good offices to assist in the negotiation of such agreements as are described in sections 202 and 203. To this end, it may hold hearings, take testimony under oath, subpoena witnesses, books, records, or documents, and publish findings and recommendations.

SECTION 502. *Authority to exclude negotiating parties.*

The Commission may, on its own motion, or on the complaint of any civil rights organization:

- (a) Exclude from further negotiation of agreements under section 202 or section 203 any civil rights organization which it finds to lack substantial support among the members of the minority group.
- (b) Exclude from acting as a civil rights organization under this Act any organization which it finds not to fall within the definition set forth in section 102 (d).

Action shall not be taken pursuant to this section except on a preponderance of the evidence introduced at a public hearing.

SECTION 503. *Rights of participants.*

Full participation in the hearings provided for in this Act, including the right to appear in person or by counsel, to introduce written or oral evidence, to examine written evidence introduced by others, and to cross-examine witnesses presented by others, shall be afforded by the Commission as follows:

- (a) In a hearing provided for by section 201, to any civil rights organization active in the county, and to any government agency concerned with race or intergroup relations or with public education in such county.
- (b) In a hearing provided for by section 202 or section 203, to any party to the agreement in question.
- (c) In a hearing provided for by section 301, to any authority in charge of a school system subject to the plan in question, and to any civil rights organization involved in the negotiations referred to in subsection (d) of said section 301.
- (d) In a hearing provided for by section 403, to the complainant, to any

party to the agreement in question, or to any authority in charge of a school system subject to the plan in question.

(e) In a hearing provided for by section 502, to the organization affected and to the complainant, if any.

The Commission shall provide by regulation for participation by other interested persons.

PART VI. MISCELLANEOUS

SECTION 601. *Judicial review.*

Except as is otherwise provided in this Act, all proceedings before the Commission under this Act, and all proceedings to obtain judicial review of the orders and determinations of the Commission under this Act, shall be conducted in accordance with the applicable provisions of the [State] Civil Rights Act and of the [State] Administrative Procedure Act.

SECTION 602. *Severability.*

[Severability provision.]

COMMENT

PART I. PURPOSE AND DEFINITIONS

SECTION 102. *Definitions.*

This draft presupposes the existence of a state civil rights act. That is, the general principle of equal treatment for all regardless of race is to be the ordinary legal approach; the approach of this draft is to be the exception.

Subsections (b) and (c) are intended to define the situation we refer to when we speak of *de facto* segregation. The classification, as I have said, is meant to be so worded as to be philosophically consistent with the principle of equal treatment, in that it deals with members of a minority group not simply as such, but as victims of discrimination. Thus, the act defines a class as to which a serious problem exists. Only if racial classifications are held to be unreasonable per se can the classification be objected to.

Subsection (d) is intended to insure that the participation by the minority group in the arrangements contemplated is through

organizations specialized to do the work. I debated including "and enjoying substantial support among the members of a minority group" among the elements in this definition (*cf.* § 201(c); § 502(a)), but I decided not to, as I felt that the Commission should review this question periodically in a special proceeding. Such a proceeding is provided for in section 502(a).

PART II. QUALIFICATION; IMPLEMENTATION OF AGREEMENT

SECTION 201. *Qualification petition.*

This section is calculated to limit the operation of the act to places where there exist conditions of *de facto* segregation (sub-sections (a) and (b)), and where responsible leaders among the victims of such segregation are persuaded that the procedures set up in the act will be a desirable way of dealing with such segregation. Subsection (c).

SECTION 202. *Employment, housing, public facilities: Approval and implementation of agreement.*

This section defines the cases in which direct action to redress racial imbalance will be approved by the Commission. The requirements of good faith on the part of the civil rights organization and independent approval by the Commission are meant to insure that the plan will not serve as a cover for mere token integration. The requirement that the plan be found a desirable temporary expedient is to make sure that the ultimate goal is not lost sight of.

The twenty per cent and sixty per cent figures are intended to avoid token integration, and to avoid a situation in which an all-white establishment, once opened to Negroes, becomes all-Negro. It should be noted that if an agreement reserves twenty per cent of the places in a given establishment to Negroes it does not follow that the other eighty per cent are reserved to whites. Under the state civil rights act, the other eighty per cent must be made available to whites and Negroes on equal terms unless the agreement provides further that sixty per cent or less are to be reserved for whites.

SECTION 203. Education, training: Approval and implementation of agreement.

This section makes possible the establishment of special education and training programs for members of the minority group without violating the provisions of any law requiring equal treatment in such matters. Its purpose is to overcome any educational or cultural disadvantage that may result from segregated conditions.

SECTION 204. Compliance.

See *infra*, comment on section 302.

PART III. INTEGRATION OF PUBLIC SCHOOLS**SECTION 301. Authority of Commission to propose and implement plan.**

Where the conditions of *de facto* segregation involve a public school system, this section places on the Civil Rights Commission instead of on the school board the ultimate responsibility for balancing the interest in racial distribution against the other educational interests to be served. As the issues raised transcend the matters of educational policy with which the school board is equipped to deal, this distribution of authority seems desirable. Such a provision might also improve the situation of otherwise unobjectionable school administrators whose usefulness is impaired by their inability to reach agreement with representatives of the civil rights movement.

SECTION 302. Compliance.

Except in the case of a public school, it is intended that there be no sanctions included in an arrangement under this act except to allow the state civil rights act to run its course and require equal treatment for all. I had thought of giving the Civil Rights Commission power to enforce any approved agreement, but I felt that such a power might in some cases raise constitutional problems under *Shelley v. Kraemer*, 334 U.S. 1 (1948), and might also inhibit the negotiation of such agreements and their use to alleviate racial tensions.

PART IV. LEGALITY; EXPIRATION; TERMINATION**Section 401. *Effect of [State] Civil Rights Act.***

This section shields approved arrangements from the charge that they violate the state civil rights act by "inverse discrimination." By implication, it would also shield peaceful demonstrations by a civil rights organization in order to bring about such an arrangement. Such demonstrations have been enjoined in the past on the ground that their objectives were unlawful. This would not, of course, prevent a holding that such an arrangement violated the federal civil rights act. If, however, the federal courts can be persuaded that the policy of attacking *de facto* segregation in this way is a sound one, they may well hold that the implementation of that policy does not violate the federal act. Otherwise, some action by Congress would be required to give this act full scope.

SECTION 402. *Expiration.*

This section is intended to insure the temporary character of any arrangement entered into pursuant to this act. It would not, of course, preclude the entry of a new order under Section 201 if the requisite conditions still obtained upon the expiration of the old order.

SECTION 403. *Termination.*

This section is designed to deal with changed conditions (subsection (a)), with the case where the arrangement does not afford a party the good relation with the minority group that he intended to achieve by entering into it (subsection (b)), and with the case where a party takes advantage of his state civil rights act immunity without living up to his agreement (subsection (c)). If a plan or agreement is terminated under this section, the parties will, of course, be subject to the provisions of the state civil rights act as if such plan or agreement had not been adopted.

PART V. PROCEEDINGS BEFORE THE COMMISSION**SECTION 501. *Assistance in negotiations.***

Section 501 gives the Commission the same kind of powers in assisting in the negotiation of agreements under this act that it probably now exercises in conciliation proceedings under the state civil rights act.

SECTION 502. *Authority to exclude negotiating parties.*

No arrangement under this act can serve its purpose unless it is supported by the minority group. Without such support, there is no guarantee that the arrangement will not increase, rather than decrease, the burden of discrimination; there is no guarantee that one who enters into such an arrangement can improve his relations with the minority group by doing so. For this reason, it is imperative that no organization claim to speak for the minority group in this respect when it has in fact no real authority to do so.

SECTION 503. *Rights of participants.*

This section is intended to insure adequate participation by interested persons in administrative proceedings conducted under the act.

PART VI. MISCELLANEOUS**SECTION 601. *Judicial review.***

If the state civil rights and administrative procedure acts do not adequately deal with procedural matters left open by the foregoing sections, this section will have to be expanded.

