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Discrimination Against Discrimination and Affirmative Discrimination: Ethnic Inequality and Public Policy

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BOOK REVIEW

Discriminating Against Discrimination. By Robert M. O'Neil,[1] Bloomington: Indiana University Press, 1975. Pp. 271.

Affirmative Discrimination: Ethnic Inequality and Public Policy. By Nathan Glazer,[2] New York: Basic Book, Inc., 1975. Pp. 248.

Reviewed by Mack A. Player[3]

The term "affirmative action," one of the newer abstractions in our legal jargon, quickly inflames sane persons to debate everything from the merits of compensatory justice to the evils of "reverse discrimination." Two recent books, *Discriminating Against Discrimination* by Robert M. O'Neil and *Affirmative Discrimination: Ethnic Inequality and Public Policy* by Nathan Glazer, examine, without exhausting, this elusive term.

Soon after *Brown v. Board of Education,*[4] the courts discovered that simple institutional neutrality, or nondiscrimination, would not erase the continuing effects of past, officially imposed racial segregation. In addition to nondiscrimination (known in the South as "freedom of choice"), discriminating institutions were obliged to take positive, affirmative steps to proselytize their new, nondiscriminatory direction.[5] This outreach could be called Phase I of affirmative action. Phase II of affirmative action was created when courts required institutions to take steps to remedy their past violations of the law. Exercising their broad remedial powers, courts imposed on a wrongdoer such remedies as racially proportional school districts[6] and black-white hiring ratios.[7]

Affirmative action did not stop there, however. Executive agen-

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[4] 347 U.S. 483 (1954).

[5] *See* United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Clark v. Board of Educ., 369 F.2d 661 (8th Cir. 1966).

[6] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[7] *See* Rios v. Enterprise Ass'n of Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971).

cies, obsessed with statistical underrepresentation of minorities, imposed upon private contractors a virtual requirement of proportional representation in each workplace according to race, ethnic heritage, and sex.[8] By curious logic, school systems had to integrate according to the racial representation in the system in order to refrain from discriminating,[9] and employers who had less than a proportionate work force had the perhaps impossible burden of proving a negative—that they were not discriminating.[10] This is Phase III, the aspect of affirmative action addressed by Professors Glazer and O'Neil.

Prior to 1960 the liberal legal community argued that the Constitution was colorblind and that the color of skin was not a proper factor in the selection of students or workers. Supporting the 1970's version of Phase III affirmative action required a change in theme. Supporters of "benign" discrimination, racial goals, preferences, and double standards set forth numerous reasons why the Constitution was not really as colorblind as had been asserted and that the color of skin is sometimes relevant in selecting pupils and employees.[11] Conservatives, on the other hand, screamed, "You told us the Constitution was colorblind!" Herein lies the debate.

In the narrow context of pupil selection in higher education, Robert M. O'Neil, in *Discriminating Against Discrimination*, supports dual admission programs that will increase the representation of blacks and other minorities in higher education. A major portion of the book outlines the history of the *DeFunis v. Odegaard* litigation;[12] the last one-third is simply a reprint of the decisions from the Washington supreme court and the United States Supreme Court; the balance is little more than an amicus curiae brief containing fairly stock arguments in support of preferential admissions to schools of higher learning. The book offers little insight, except for an attorney who is preparing (for the first time) a defense of a school's dual admissions program.

Nathan Glazer's book, *Affirmative Discrimination: Ethnic Inequality and Public Policy*, is much more catholic in its appeal. In.

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[8] *See* Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *implemented in* 41 C.F.R. Ch. 60 (1975).

[9] *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[10] *See* Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Parham v. South Western Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

[11] *See* Edwards, *Race Discrimination in Employment: What Price Equality?*, 1976 U. ILL. L. F. 572 (1976).

[12] 82 Wash. 2d 11, 507 P.2d 1169 (1973), *dismissed as moot*, 416 U.S. 312 (1974).

recent times unions, employers, school boards, white employees, and parents of all backgrounds have objected to the 1970's Phase III of affirmative action, viewing it as a double standard, a reverse reimposition of color codes. The problems of "reverse" racial preferences have been outlined before;[13] objections are often cavalierly dismissed as motivated by self-interest, corrupted by lack of concern, or tainted by unreconstructed racism. Nonetheless, Glazer's book adds a new historical-sociological dimension to the discussion. Professor Glazer provides articulate support for those who have been stuttering that affirmative action is wrong but have been unable to state objections more profound than "It just ain't right." Glazer traces a dominant sociological thesis of America: America is a nation committed to ethnic neutrality; we are committed to be a nation open equally to all peoples; we have maintained that once a citizen, each person, regardless of national origin, shares equally the rights and duties of citizenship; national policy has rejected giving ethnic groups independent polity (as exists to some degree in Canada and many European states); groups have no political rights as groups; at the same time all citizens are given the freedom to develop and maintain their old world heritage or to abandon that heritage, lose their ethnic identity, and become assimilated. Professor Glazer argues that the emerging trend of affirmative action in education, employment, and housing is contrary to and destructive of this basic historical commitment to ethnic neutrality. Affirmative action places a premium upon individual membership in ethnic groups. Each ethnic group is given an independent and usually competing right. Self-defense forces individuals into artificial continuation of their ethnicity. Glazer believes that this is unnecessary to insure equal opportunity and destructive of the basic American sociological structure.

O'Neil's arguments for affirmative action and Glazer's arguments against it are made with an all-or-nothing attitude. Neither makes the subtle distinctions that can perhaps differentiate and justify varying shades of modern affirmative action. For example, in supporting racially conscious admissions standards in educational institutions, O'Neil correctly points out that race and ethnic heritage can be one of the many valid ingredients in the complex educational

[13] *See* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U. L. REV. 363 (1966).

formula. Factors other than pure academic performance have long been utilized by school administrators in selecting a student body: athletic ability, geographic distribution, career interests, leadership qualities, family or political connections. Adding race and ethnic heritage as a factor is equally appropriate. Indeed, an affirmative action program requiring a mix of race and background would increase the exposure of students and faculty to new ideas and outlooks and would have an *internal* effect on the quality of education received by all students. However, assumptions about the *external* effect of professional education, often made in support of racial preferences and repeated by O'Neil—patterns of discrimination cannot be removed without preferences; preferences will increase delivery of professional services to the minority communities; success of minority persons will provide models for emulation—are unproved and perhaps false (a fact Glazer notes). Yet O'Neil would give these supposed external effects dignity equal to internal impact on the educational program. Herein lies the oversimplification, if not the error: Internal discretion based on valid educational judgments should be distinguished from unsupported assumptions relating to noneducational, external economic or social goals.

While O'Neil takes the "all" approach to ethnic preferences, Glazer prefers a "nothing" approach. Glazer, too, fails to make distinctions between decisions to serve valid internal, institutional needs on the one hand and decisions imposed to further some external goal on the other. Internal justifications for ethnic considerations do exist in education. Even in the employment setting internal needs may occasionally justify ethnic discrimination by an employer. A governmental agency charged with resolving the problems of American Indians may operate more effectively, for example, by employing as many Indians as possible;[14] a church or social action organization may be better able to reach certain groups by employing members of those groups. Where an employer's *own needs* justify the racial preference, they should be honored. Most ethnic discrimination in employment, however, unlike in education, cannot be justified by internal results; only by reference to external social goals can most color discrimination in employment be justified. Glazer condemns external justification for discrimination with documentation and logic but fails to recognize the arguable validity of internal justifications.

[14] *See* Morton v. Mancari, 417 U.S. 535 (1974).

Both authors fail to ascribe any relevance to the source of the affirmative action policies. Effective operation of institutions and the discretion to make decicions relating to that operation are important societal goals. Thus, distinctions can be drawn between policies that are internally generated pursuant to institutional discretion and policies that are imposed from the outside against the will of the institution, frustrating the exercise of discretion.

O'Neil's *Discriminating Against Discrimination* is a narrow book that provides little new legal insight. Nathan Glazer's *Affirmative Discrimination*, however, provides refreshing analysis of the broad area of affirmative action and so-called "reverse discrimination." Because it attacks liberal assumptions and current judicial trends, it is controversial. It is not intended to be a complete legal analysis of this complex area of the law, and it is not. It is, however, a book of our times well worth reading.