Vanderbilt Law Review

Volume 29
Issue 3 *Issue 3 - Symposium: Financial Institutions, Municipal Finance, and Community Development*

Article 7

4-1976

Book Review

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BOOK REVIEW

Equality of Opportunity or Result?

AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY. By Nathan Glazer. New York: Basic Books, Inc., 1975. Pp. 248. $10.95.

*Review by R. Lawrence Ashe, Jr.**
*and Donald R. Stacy***

This volume appears at first blush to fall into a freshet of recent writings on the limits of our capacity for effective social engineering. Among these writings are Daniel Patrick Moynihan's *Maximum Feasible Misunderstanding*, James Q. Wilson's *Thinking About Crime*, and James S. Coleman's qualifying affidavit in the Boston School case and subsequent articles. Upon full reading, however, Professor Glazer's attack is seen to be directed more at the dubious moral mandate for group statistical preferences than at their evidently doubtful impact on the social problems at which they have been aimed.

Although Harvard sociologist Glazer is consistently arresting and cogent as an ethnologist, one cannot as confidently rely upon him as an historian, political scientist, or legal scholar. For example, Glazer posits that there was a liberal and humane consensus in the mid-60's—exemplified by the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Immigration Act of 1965—that race and national origin ought not *in any way* affect an individual's entitlement. Glazer further hypothesizes that single-minded bureaucrats aided and abetted by unrepresentatively liberal and personally unaffected lawyers and judges have skillfully enticed us away from this humane and liberal consensus.

Glazer, however, is over-selective with the data upon which he bases his finding of a consensus. The rigorous coherence he describes did not characterize the mid-60's, and the public temper was more ambiguous than Glazer recalls. The statutes that he adduces probably indicated nothing more than a consensus that race and nationality should not be a *barrier*, and there is little evidence that their

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recognition for "benign" purposes had then been rejected. Glazer omits any mention of President Johnson's June 1965 commencement address at Howard University in which he set out the rationale of Executive Order 11,246, the source of the affirmative action requirement in hiring, which was issued a few weeks later. The President told the black graduating class that he sought "not just equality as a right and as a theory but *equality as a fact and equality as a result.*" The as yet not fully appreciated conflict between the equal treatment language of the statutes and the equal results stance of the Executive Order and subsequent judicial gloss on the statutes, particularly upon Title VII and 42 U.S.C. § 1981, was present even in the mid-60's. Those were years of expanding employment. The conflict among the statutes, their expansive reception in the courtroom, and the Executive Order is clearest in times of shrinking or limited employment when to hire or retain one is consciously to deny others.

It was as much the trade cycle as skillful bureaucratic seduction that brought us acutely to reconsider the rationale for affirmative action. Even though there has been since early 1968 an apparent lack of presidential interest in, or effectiveness at, exerting leadership in domestic affairs, the Equal Employment Opportunity Commission ("EEOC"), the Office of Federal Contract Compliance ("OFCC") in the Labor Department, and the Office of Civil Rights at HEW have not had the internal coherence or mutual cohesion to exploit this lassitude. Glazer is clearly wrong in his notion that the Equal Employment Opportunity Coordinating Council, created by congressional mandate in 1972 and consisting of the Departments of Justice and Labor, the Civil Service Commission, the EEOC, and the Civil Rights Commission, is seeking to impose even more stringent employment selection guidelines than those issued by EEOC in 1970. The majority of the agencies on the Coordinating Council, as is reflected in its draft guidelines distributed for comment,[1] would give recognition to a larger spectrum of professionally approved devices for the validation of hiring tests and would offer guidance on technical requirements that courts have been chary of addressing. Glazer is correct, however, in his understanding that the validation of employee selection devices under the EEOC's guidelines is such an expensive, beyond the state-of-the-art undertaking that employers are almost irresistibly prompted to hire and promote on the basis of race or sex or national origin so as to avoid having to validate

1. 2 CCH EMPL. PRAC. GUIDE ¶ 5186.

clinically even the most obvious device. (Glazer here but echoes the concern that Mr. Justice Powell voiced over so Orwellian a turn of events.)[2] The EEOC's resistance to the Coordinating Council's issuing more realistic and readily achievable standards—standards that are as professionally well accepted as the current guidelines—connotes a disregard for giving usable guidance to the measurers of competence in a meritocracy and a calculating preoccupation with the complexion of the results. So standardless, nay, mystic a notion of the "right" racial or ethnic mix has ironically resulted in the EEOC's being adjudged to have violated the statute that the Commission itself enforces when it selected a white over a better qualified black to avoid having too many black district directors in the region.[3]

Glazer, co-author of the earlier work, *Beyond the Melting Pot*, is an accomplished ethnologist who makes his most telling points in questioning the distributive fairness of the hiring preference implicit in affirmative action and the effectiveness for any purpose of the further reaches of transportation for school integration. He faults employment preferences for failing to embrace all groups that have been victims of prejudice or privation meriting redress and for embracing individual group members who have individually suffered no discernible prejudice or privation. The claim of preferential treatment based on the Spanish surname of a Nicaraguan, Castillian, or Anglo-Saxon wife thereof highlights an absurdity of affirmative action.

Glazer's analysis of claims based on race differs from his analysis of claims based on national origin. The claims of blacks are different in kind, not just in degree. A legacy of slavery and segregation sets them apart from the other immigrants. Although white indentured servants likewise arrived in a state of "unfreedom," colonial statutes of the 1660's forward confirmed, as Oscar Handlin has demonstrated,[4] that the indenture of blacks did not necessarily expire, that their civil disability was heritable, and that black family members were separately merchantable chattels.

Glazer's critique of affirmative action for blacks is that affirmative action is irrelevant to the staggering levels of unemployment endemic to minority communities of our inner cities. This unemployment he attributes to lack of education, commercially useful

2. Albermarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975).
3. Rogers v. EEOC, 403 F. Supp. 1240 (D.D.C. 1975).
4. RACE AND NATIONALITY IN AMERICAN LIFE (1957).

skills, and serviceable work habits—handicaps that preferential hiring cannot remedy. Blacks who have made occupational strides under affirmative action have, in Glazer's view, those middle class attributes that would have enabled them to progress even without governmental intervention.

Glazer may well go too far in reckoning affirmative action irrelevant to the high levels of black unemployment; affirmative action may instead be, in the logician's terms, necessary but not sufficient. The further equipping of unemployed core-city blacks with the habits, skills, and attitudes rewarded by the market place may well depend upon the regimen of community self-policing and self-development that Jesse Jackson so ardently propounds.[5] On the other hand, Glazer's hindsight view of what opportunities would have been available to those middle class blacks with merchantable skills and industrious work habits absent the pressures of affirmative action requirements under executive orders and court decrees would seem to be overly sanguine in many instances. The membership and even the guest policies of most (genuine) private clubs casts legitimate doubt upon the willingness of the white and usually also Christian establishment to move towards equality of opportunity when there has been no pressure to do so.

Affirmative action requirements will most likely continue to be frequently used by regulatory and granting agencies as well as the courts. Since affirmative action proceeds (albeit "benignly") on differences that the Supreme Court has repeatedly held to be constitutionally suspect classifications, affirmative action should be analyzed in terms of the constitutional doctrine of the least drastic alternative. Agencies persuaded of their own rightness often trench on constitutional limitations.

This is the warning sounded by Mr. Justice Douglas' dissent in *DeFunis*[6] and given but lip service by the New York Court of Appeals in the recent *Alevy* decision.[7] Douglas would countenance special consideration of all those who overcome privation, not a racially or ethnically defined few. Under the medical school admissions system attacked in *Alevy*,[8] black applicants and those of Puerto Rican descent *alone* had their academic achievements separately screened on the ground of educational, financial, and cultural disadvantage.

5. *Give the People a Vision*, NEW YORK TIMES MAGAZINE, Apr. 18, 1976, at 13.
6. 416 U.S. 312, 320 (1974).
7. Alevy v. Downstate Med. Center, 44 U.S.L.W. 2482 (N.Y. Ct. App. 1976).
8. Alevy v. Downstate Med. Center, 78 Misc.2d 1091, 359 N.Y.S.2d 426 (S. Ct., Kings County 1974).

The admissions committee apparently proceeded on the doubtful and particularist assumption that doctors who are black or of Puerto Rican descent will (or ought) return to tend the poor of "their own kind" and resist the enticements of a middle class practice, thereby fostering the state's interest in the health of minority communities.

New York's highest court, after explicitly rejecting strict scrutiny of benign discrimination, stated that it would suffice to ask whether the preference is justified by a substantial state interest and whether a nonracial or less restrictive racial classification would serve the same purpose. The court first assumed the presence of a substantial state interest and then skirted the question of a less restrictive alternative by noting that the plaintiff was so far down the waiting list (155th) that the manner in which the twenty-one places taken by black medical students and those of Puerto Rican descent were allotted did not merit further scrutiny. The court adroitly sidestepped discussing so obvious a nonracial classification as a commitment to work as a physician among the target community for a term of years, a provision commonly linked to fellowship assistance.

Glazer has overstated the affirmative action requirements of the courts in the employment field. For example, the Supreme Court did not adopt the entire EEOC guidelines *in haec verba* in *Griggs v. Duke Power Company*.[9] Indeed, the Court has flatly contradicted the EEOC's guidelines by placing the burden of demonstrating the existence of less restrictive alternative personnel selection devices on the plaintiff rather than the employer.[10] Glazer can further be faulted for ignoring the use by employers of patently non-job-related selection procedures such as high school level verbal aptitude tests for janitors. The effective date of Title VII was subsequently proved a less than propitious time for the introduction of these tests.[11]

In the housing area, Glazer's predictions of judicial activity have been borne out by the Supreme Court's recent decision in *Hills v. Gautreaux*.[12] Moreover, two recent lower court cases of even greater potential impact have held that a municipality cannot ex-

9. 401 U.S. 424 (1971).

10. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *see* 29 C.F.R. § 1607.3(b); *cf.* N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 51-52 (1975). In Washington v. Davis, 44 U.S.L.W. 4789 (U.S. 1976), the Supreme Court gave to evidence of construct or content validity that equivalent acceptance which some have argued that the EEOC's guidelines deny it. 44 U.S.L.W. at 4794 n.13. *See* 29 C.F.R. § 1607.5(a).

11. *Cf.* Griggs v. Duke Power Co., 401 U.S. 424, 428-29 (1971).

12. 44 U.S.L.W. 4480 (1976).

clude families of low and moderate income by zoning only for detached, single-family houses with minimum floor space and lot sizes,[13] and that the pervasive "red-lining" of integrated neighborhoods by financial institutions violates the 1968 Fair Housing Law.[14] The authors of this review are troubled, however, by Glazer's possible implication that even the most dismal of black ghettos serve cherished American goals and help "to maintain values which need some degree of concentration to survive . . . ."[15]

The "sharp distinction"[16] drawn by Glazer between "voluntary" actions taken by local communities before litigation and those in fact mandated by the courts is either naive or disingenuous. Some school boards simply do not care for the notoriety, expense, and inconvenience of being sued successfully. Moreover, Glazer ignores the not infrequent political element of judicial intervention in the school cases: for political or social reasons school boards sometimes deem it necessary to be publicly ordered to take steps that they have been instructed by their attorneys not to oppose in the off-the-record privacy of judicial chambers. Even Governor Wallace's well-publicized posturing in the schoolhouse door was not followed by extensive active resistance to the integration efforts then at issue.

Glazer's book is well and forcefully written. The occasionally uneven quality of his objectivity is understandable in an erudite and provocative polemic. Although the truly excellent quality of the ethnological scholarship displayed in the book inevitably suggests adverse comparisons with the book's occasional inadequacies of a historical, political, and legal nature, Glazer's critique of affirmative action makes an estimably weighty contribution to a comprehensive and reflective dialogue.

13. South Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. Super. Ct. 1975).

14. Laufman v. Oakley Bldg. & Loan Co., 44 U.S.L.W. 2381 (S.D. Ohio 1976).

15. GLAZER, *supra* note 10, at 107.

16. *Id.* at 116.

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