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# Book Reviews

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# BOOK REVIEWS

DISCOVERY IN VIRGINIA. W. Hamilton Bryson. Charlottesville: The Michie Company. 1978. pp. 251. $25.00.

*Reviewed by Edward S. Graves**

The publication of the new book by Professor Bryson, enlarging and taking the place of his previous study of some discovery devices, is in order because of wide current dissatisfaction with abuses of discovery and also because of recent changes made in the Virginia rules and statutes as a part of the revision of Title 8 of the Code.

In connection with the first it is well to be reminded, as Professor Bryson does by recurrent references to historic equity practices predating the modern rules, that the value of obtaining advance information from other parties to a lawsuit has been recognized for many years, long before the promulgation of the federal discovery rules in 1938. That discovery practices have formed a part of our historic procedure and withstood the test of time, is reassuring, not only to those who are criticizing discovery because of its abuses but also to those who are concerned that the abuses may lead to measures of curtailment (or even termination) that are not basically necessary and will in the long run constitute a backward step in our procedure.

In connection with the second, the revision of Title 8 in 1977 entailed, as Professor Bryson points out, two notable changes in Part Four of the Rules of Civil Procedure. Discovery was expanded, under safeguards, to three previously omitted fields: domestic relations, eminent domain, and so-called prisoner remedies—habeas corpus and coram nobis; and statutes relating to discovery were repealed, with the purpose of making it possible for practitioners to consult only one resource in their use of discovery tools. With the repeal of statutes governing depositions (except the Uniform Foreign Depositions Act), provisions for the taking of both discovery depositions and those *de bene esse* have been placed in the re-written Part Four, and rule 4:9 has been expanded to replace the statutes providing for subpoenas duces tecum. Professor Bryson points out that the task of replacing all discovery statutes with Part Four has not yet been completed, since the practitioner has to resort to statutes governing discovery in such

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areas as the State Corporation Commission, the Industrial Commission, and certain administrative agencies. Perhaps in the additional legislation following up the massive enactment of October 1, 1977, the job will be completed or at least made more comprehensive than at present.

While the book will be most helpful to those engaging in discovery it does not and was not intended to replace Part Four, which the practitioner must always consult. For example, on page 36 the author states that if the party ". . . examined pursuant to rule 4:10 takes the deposition of the examining physician, he waives thereby any physician-patient privilege;" the rule itself limits the waiver to other examinations in respect of the same condition; on page 41, only a partial summary is made of matters to which the responding party has a continuing duty to supplement his responses; on page 87, the use of depositions against a P.U.D. is limited to those taken in the presence of his guardian ad litem or attorney, without mentioning the use of depositions upon agreed questions. The statement is reiterated several times (see pages 1, 30, 63-4, 110, and 119) that the scope of discovery is limited to matters relevant to the subject matter of the proceeding *and* which will lead to admissible evidence. This interpretation of rule 4:1(b) does not, it is believed, accord with the view of other practitioners, although it might, if adopted, lead to a good end in the limitation of excess discovery.

Professor Bryson's timely book should certainly serve as a reminder that discovery is of ancient lineage and has been regarded as a valuable aid to the discovery of truth and thus the proper administration of justice; and this reminder may be as important to the Bar as the availability of an excellent source book.

MINORITY QUOTAS IN LAW AND MEDICINE. By George H. Jaffin. 1977. pp. 55.

*Reviewed by David L. Ross**

Citing Aristotle's *Nichomachean Ethics*, for the principle that "[i]n the field of moral action, truth is judged by the actual facts of life," George H. Jaffin, Attorney Emeritus, Department of Justice, in his recent monograph, *Minority Quotas in Law and Medicine*, applies a "facts of life" approach to his examination of the central issues which have been presented to the United States Supreme Court in the landmark cases of *DeFunis v. Odegaard*[1] and *Bakke v. Board of Regents*.[2] While Jaffin's monograph predates the Supreme Court's decision in *Bakke*,[3] it, nevertheless, provides an interesting insight into the dilemma which has plagued professional school admissions directors and administrators who have attempted to develop constitutionally-sound means of ensuring that educational opportunities are available to members of minority racial and ethnic groups while, at the same time, attempting to avoid unconstitutional infringement upon rights of the majority.

The author describes his work as a study of what he terms the "double-standard-minority-quota system," with special reference to law and medicine, as a subject of constitutional test litigation. In that context, he offers the following principal themes for discussion and analysis: The development of constitutional rights; the technology of constitutional adjudication; the case for the ultimate goal (of a substantial increase in the number of minority lawyers and doctors); the case for the application of double standards and minority quotas; and, finally, the case for alternatives.

While not finding fault with the desirability of increasing the number of minority professionals, including lawyers and doctors, the author does suggest that the means by which academia has chosen to achieve this "ultimate goal" warrant further reflection and analysis. Specifically, with reference to law and medical schools, Jaffin offers the premise that the application of double standards in the admissions process can be justified only if the following truths are established: that the minority college graduate still suffers from cultural deprivation; that the minority college graduate is prejudiced by the intrinsic cultural bias of the Law School Admission Test (LSAT) and Medical College Admissions Test (MCAT); and, finally,

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1. 416 U.S. 312 (1974).
2. 438 U.S. 265 (1978).
3. *Id.*

that even if the LSAT and MCAT are not tainted by cultural bias, they are not valid predictors of minority student performance in professional schools. He suggests that the burden of establishing the validity of these premises must fall upon those who promote the use of double standards.

Moving to the even more difficult problem of justifying minority quotas, and with the observation that any such justification must pass both constitutional and statistical muster, the author suggests that a much too simplistic approach to minority quotas has been followed in academia, particularly when quotas have been geared to national population percentages. By applying such quotas, the author concludes, academia has failed to take into account factors such as the localized dimensions of professional schools, the limitations of professional schools, the limitations upon pre-professional manpower, and the localized value of professional opportunities and services.

The author concludes his study with a reflection upon the case for available alternatives "less drastic than double-standard minority quotas." Citing the voluminous and suggestive literature which identifies a wide range of alternatives which have heretofore been explored, the author suggests that one particularly promising alternative, predicated upon psychometric and pedogogical experience, appears to have escaped serious consideration.

Pointing to psychometric experience, which suggests that individuals in virtually all groups can be classified in terms of their relative standing in the bell-shaped curve of statistical distribution or frequency, the author observes that there are "smart, average, mediocre, and stupid individuals in all races and ethnic groups." This, coupled with pedagogical experience, which, according to the author, supports the hypotheses that the "educational sifting process is almost automatic," and that despite initial cultural deprivation, "talent should eventually assert itself at some point in the educational process," leads the author to conclude that if latent talent has not surfaced before the completion of college, there is less justification for attempting the pursuit of professional or graduate education. This latter point, the author acknowledges, is premised upon the assumption that the necessary talents for post-collegiate education can be correctly identified, isolated and measured, an assumption which, the author further acknowledges, has not gone unchallenged.

When considered, as the author states, in conjunction with the "unavoidable fact . . . that admission requirements vary among professional schools," and, accordingly, that the schools themselves can be classified into a similar bell-shaped curve, Jaffin concludes that a viable alternative solution to the dilemma facing academia is to devise a matching process to mate the individual with the appropriate school whereby "the more talented applicants would go to the more prestigious schools; others

would go to other schools." By this process, Jaffin adds, "the double-standard-minority-quota system can be entirely eliminated."

Anticipating the objection that the net effect of his proposal would be that few minority students would go to the prestigious schools, Jaffin suggests that relatively few majority applicants presently go to the prestigious schools and that most go elsewhere. However, and with the implicit acknowledgment that his suggested alternative to double-standard-minority quotas is not the only viable solution, Jaffin suggests that the mere availability of alternatives "opens a challenging field for further exploration."

Jaffin concludes his work with a reflection upon two general questions which, he suggests, presented themselves at the outset of his research effort and which serve to epitomize the epilogue to his work, namely: "Before adopting the double-standard-minority-quota system, did academia complete its homework?" and "To what extent do the facts tend to indicate that 'cultural deprivation,' 'cultural bias,' 'parity,' etc. may be 'mere words?' "

While *Minority Quotas in Law and Medicine* will serve as "food for thought" for the interested reader, it is clear that the author's conclusions will not be well received by many, including staunch proponents of affirmative action. Nevertheless, Jaffin's work provides an interesting and thought-provoking analysis of an issue which, the author suggests, has become the constitutional *cause celebre* of the final quarter of the 20th Century.