

Washington University Law Review

Volume 1979
Issue 1 *Symposium: The Quest for Equality*

January 1979

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Recommended Citation

Drew S. Days III, *Concealing Our Meaning from Ourselves: The Forgotten History of Discrimination*, 1979 WASH. U. L. Q. 081 (1979).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol1979/iss1/11

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COMMENTARY

CONCEALING OUR MEANING FROM OURSELVES: THE FORGOTTEN HISTORY OF DISCRIMINATION

DREW S. DAYS, III*

Of course, I join with all of the people this morning in welcoming many of Dean Griswold's comments concerning the *Bakke* case and what he refers to as the social and philosophical problems raised by the responsibility of society to allocate scarce resources. To those of you who did not attend this morning, and even for those of you who did, let me be so bold as to characterize Dean Griswold's presentation as I understood it. Dean Griswold argued that the Supreme Court has held that race may be a factor in the admissions process; that the decision has some legal basis; and that it represents an interim answer to difficult social and philosophical problems that our society faces in view of the significant absence of minorities from important sectors of our national life. Nevertheless, he finds the *Bakke* decision and some of its implications troubling, first, because of the impact that the decision will have upon individuals whom he refers to as innocent persons who have not been guilty of any discrimination themselves, and second, because of the impact that the decision may have upon standards of excellence and certain merit-derived principles. Finally, he hopes that this essentially social process of experimentation will proceed in a thoughtful and careful manner while we sort out our continuing problems of racial justice and that it ultimately will bring us to the point where we can honestly claim that we have a colorblind society.

Although I do not quarrel with the essence of Dean Griswold's thesis, I do have substantial problems with what I believe is the deemphasis he gives to the role of the law in addressing the problems of affirmative action. Clearly, his reasons for not treating the legal issues are not associated with his lack of understanding of those principles.

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Rather, I think that his article, whether intentionally or not, reflects the subtle but unmistakable shift in focus that our society has taken away from how to remedy the present effects of intentional and systematic discrimination against minorities and women to questions of how the economic and political pies of America ought to be split up, given the various competing claims upon limited resources; away from what is just to what will sell, what will pacify, and what will postpone possible confrontation over the allocation of scarce resources among various groups in our society.

Dean Griswold, to the extent that I am right about this, is not alone. I share part of the responsibility for this subtle shift. Perhaps I have been a victim of the shift. Nevertheless, I think we have seen a significant shift that I find troubling, a shift that is essentially pointed not in the direction of helping ultimately to solve these problems, but toward creating greater confusion in trying to sort out competing claims, allegations of discrimination, and questions of guilt. It seems to me that despite all our history tells us about systematic discrimination against certain minorities, most notably blacks and women, I believe we have reached a point in the late 1970's where most nonminority Americans believe that all problems of discrimination have been solved, and that further claims by minorities for greater access to our institutions constitute overreaching and attempts to take things to which they have no entitlement at the expense of nonminorities whose claims are unassailable.

Dean Griswold, of course, addressed some of the legal considerations, and he recognized that there were legal bases for affirmative action. He talked about the fourteenth amendment and the equal protection clause. He talked about the Civil War and slavery. Certainly, all those things are true, but it seems to me that to the extent we focus narrowly on that history, we miss a significant fact about our society in the 1970's: discrimination continues to be with us. It is a very present fact in our modern day society. We do not have to look to slavery. We do not have to look to Reconstruction. We do not have to look to the years of "separate but equal" after *Plessy v. Ferguson*.¹ We can look, for example, to the 1964 Civil Rights Act,² which demonstrated beyond question the extent to which our society was

1. 163 U.S. 537 (1896) (Louisiana law requiring the railroads to provide equal, but separate, passenger cars for whites and blacks held valid).

2. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000h-6 (1976).

filled—riddled—with the effects of past discrimination and a present and ongoing, intentional discrimination against certain minority groups. We can look to 1965 when Congress passed the Voting Rights Act,³ also the result of a determination by Congress that there was ongoing, pervasive, vicious racial discrimination with respect to the exercise of the franchise. We can look to 1968 when Congress determined that there continued to be extensive discrimination in the fair housing area.⁴ We can look to 1972 when Congress decided that state and local governments and the federal government itself had engaged in discrimination in employment and, therefore, it was necessary for the courts to address that problem and try to develop remedies.⁵ We can look to the 1974 amendments dealing with sex discrimination in housing⁶ and to the 1975 extension of the Voting Rights Act.⁷ So we are not talking merely about slavery. We are not talking merely about the Civil War. We are not talking merely about Reconstruction. We are talking about a very short period of time between 1964 and 1978 during which we have been dealing with present discrimination and the present consequences of longstanding discrimination.

I fear that unless America relearns its history lessons about discrimination, we will be long in seeing the day for which both Dean Griswold and I hope; namely, the day when we can put race aside and go on to the business of building a truly just society that is not devoted to making distinctions based upon race or sex or ethnic origin. Regrettably, very few of our elected officials seem willing to teach that lesson. Our courts also seem to have become less able to do so. And to a certain degree, it seems to me, Dean Griswold, too, fails in his article to make the points and teach the lessons that I feel must be taught.

Let me give you some examples of how far we have fled from the reality of discrimination in 1978. Shortly after the *Bakke* decision, I happened to be in Seattle. I picked up a local newspaper and saw a cartoon that capsulized better than anything else I have seen this flight from reality. Let me describe it to you. It was a cartoon that showed five white men dressed in black robes carrying Allan Bakke quickly

3. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (current version at 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1976)).

4. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, Title II, § 206(a), 82 Stat. 504 (1968) (codified in scattered sections of 42 U.S.C.).

5. 42 U.S.C. § 2000e-16 (1976).

6. 42 U.S.C. §§ 3604, 3605 (1976).

7. Voting Rights Act Amendments of 1975, 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1976).

past a group of bedraggled, downtrodden, shabbily dressed blacks carrying picket signs that asserted the need for further remedies for discrimination. And out of the mouth of the Allan Bakke character came the phrase, "Free at last, free at last." For those of you who miss the irony of that cartoon, let me remind you that the quotation is most often attributed to Martin Luther King's speech—the "I Have A Dream" speech⁸—to his dream that one day his children would be able to live in a society that had no discrimination. What the cartoon communicates, I think, is that we have really forgotten about discrimination. We have forgotten the history of discrimination. We have forgotten that there is ongoing discrimination with which we must deal.

If I were a Martian and visited the earth last year and looked at the docket of the United States Supreme Court for the 1977-78 term, and if I were a learned Martian and had read *An American Dilemma*⁹ several years back and wanted to figure out what had happened to American society in terms of dealing with this problem since 1944, I think that I would have been forced to conclude some very remarkable things about this society; essentially, that discrimination against minorities had ended (certainly discrimination against blacks) and that, in fact, the problem had become that blacks were in the majority and were controlling the institutions of the society and allocating scarce resources in ways that discriminated against the white minority. The *Bakke* case, of course, is a perfect example. If one reads *Bakke* out of context, it is quite possible to reach the conclusion that minorities are populating our professional and medical schools in incredible numbers—in fact, taking places from thousands and thousands of nonminority students. Of course, we know the reality is that most black medical students are educated at two institutions in this country—Howard University and Meharry Medical College. But one would think, looking at *Bakke* and the discussion surrounding it, that somehow this is not the case. If one looks at the *A.T. & T.* case that the Supreme Court decided not to accept after the *Bakke* decision—simply denied certiorari¹⁰—one might conclude that the largest corporation in the world with some three-

8. King, *I Have a Dream*, in *BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY* (A. Meier, E. Rudwick, & F. Broderick eds. 1971).

9. G. MYRDAL, *AN AMERICAN DILEMMA; THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

10. *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir.), cert. denied, 98 S. Ct. 3145 (1978).

quarters of a million employees was controlled by minorities and women, and that white males had been kicked out of lucrative and important positions in that institution. Well, of course, that is not true. The *A. T. & T.* consent decree was at issue for five years and had some goals for increased participation of minorities and women that approached two percent. If one looks at the *Los Angeles Set-Aside* case,¹¹ a case that the Supreme Court remanded to the district court for consideration of mootness after *Bakke*, one might think that minorities had taken over federal procurement and the federal works process and were forcing nonminorities out of that business. In fact, we are talking about a ten percent minority set-aside, and in many instances we are talking about situations in which participation of minorities has not begun to approach ten percent.

Now, how this can possibly happen is to me a question that we must attempt to address. Certainly, one of the answers, it seems to me, is language. I was forced to confront this as a possible answer by my recollection of an essay by George Orwell, "Politics and the English Language,"¹² which I read many years ago as a college student. Without going into great detail, what he essentially said was that political language is used to hide truth, to obscure reality; and certainly some types of intentions—bad intentions—can be developed and articulated en masse in political language so that thought can corrupt language, if you will. But he said something that I think is even more interesting. He said that there is the chance that we can use this political language to the point where we begin to believe it. We begin to forget that it is indeed political language designed to mask reality, and it begins to mask reality even from ourselves. I think that has happened to a certain extent when we look at the language of affirmative action. In fact, the phrase "affirmative action" itself may be the greatest violator of one of Orwell's principles. It means all things to all people. It can mean everything from hard-and-fast racial quotas to recruitment efforts that direct an increase in the pool of minorities or women who might be considered for certain types of positions in our society. To paraphrase Orwell, such usages can become so incorporated into our speech that they begin to construct our sentences for us.¹³ They even think our

11. *Associated Gen. Contractors of Cal. v. Secretary of Com.*, 459 F. Supp. 766 (C.D. Cal.), *vacated*, 98 S. Ct. 3132 (1978).

12. G. ORWELL, *Politics and the English Language*, in *A COLLECTION OF ESSAYS* 162 (1954).

13. *Id.* at 163.

thoughts for us, and to a certain extent, as needed, they will perform the important service of partially concealing our meaning even from ourselves. Our nation's history of racism and sexism is indeed a painful one with which to live, and it is not surprising that we have reached out for alliterate and innocuous terms to mask the fact that what we are doing is attempting to rectify our past wrongs.

I talked about affirmative action. What about the phrase "underutilization"? In many instances it is used to mask the fact that what is being addressed is intentional, systematic discrimination against minorities and women. We talk about "economically and culturally deprived" persons—again, another mellifluous phrase that I think avoids having to confront the fact that we still have very present and painful problems to resolve.

Of course, when we become so obscure in the language that we use in order to mask the fact that we are dealing with past discrimination, it brings forth another set of phrases that is equally devoid of meaning, that corrupts the whole intellectual process of trying to analyze what we are about and how we resolve the problems that we have identified. "Preferential treatment"—who knows what that means? We talk about it out of context, and it becomes anything that anyone wants it to be. We talk very much about the distinction between quotas and goals. Well, there is, in my estimation, and I think Dean Griswold touched upon this point, no real distinction between quotas and goals if we look at specific contexts. Certainly, when we constantly talk about it in the abstract, it is possible to play all kinds of games with those semantic distinctions. And, of course, we speak of "reverse discrimination," which I assume is the opposite of discrimination. I really do not know what this phrase means, but it is a phrase that begins to infect our language with ambiguity and imprecision.

So, we really do not know where we are going. And I think we reach the ultimate point when those who are trying to deal with forms of discrimination begin to use the language of obscurantism and say: "No, we are not trying to impose quotas; we are seeking goals," or, "we are not engaging in reverse discrimination; we are engaging in affirmative action." That type of dialogue, it seems to me, does not advance the discussion at all.

Now, there is another explanation, it seems to me, for what I think is this sad state of affairs. There has been an absence of litigation in recent years by minorities and women directed toward establishing the

existence of past discrimination. It may well be, and I use this phrase with some trepidation, that the people who were most likely to bring suits challenging exclusionary practices of our institutions have been “bought off” by affirmative action. I use the term “bought off” not to describe any evil intent or evil participation or bribery, but to say simply that they have been, as very talented people, admitted into these programs, admitted into these institutions, and therefore, incorporated into the process. If we look at the pre-*Brown* period, we see the Gaines’ and the Sweatt’s and the Sippuel’s and the McLaurin’s. They were the cream of the crop of minority students, and they were kept out. They sued and they got in. Well, such people are now *in* many institutions.

There also has been an absence of administrative records on the existence of discrimination in many activities. I look at the statutes that I enforce through the courts or through administrative agencies. The nature of modern civil rights statutes, regulations and executive orders is that there often is no need to establish past discrimination. If we look at Title VII, which relates to employment discrimination,¹⁴ it has reached the point where one can make a *prima facie* case of discrimination by showing discriminatory effects; it is not a necessity to show evil purpose or intent to discriminate. Similarly, under the housing discrimination statute, Title VIII,¹⁵ there has been a general acceptance of an “effects” test. I administer provisions of the Voting Rights Act¹⁶ under which I am not required to find that there has been discrimination or discriminatory intent at work in the development of a proposed change in voting procedures. I simply write a very nice letter that says I am unable to conclude that the proposed change is not the result of a purpose to discriminate, or will not have a discriminatory effect. Therefore, no record is made in this process.

To the extent that there has been litigation, it seems to me, it has been litigation on a bare record in which issues of discrimination are the last ones to be dealt with or often not dealt with at all. *Bakke*, of course, is a perfect example of this. These lawsuits essentially have the following defects. First, we are engaged in so-called reverse discrimination. And we find an unwillingness on the part of institutions sued by whites or males to rely upon past discrimination—or present discrimination, for that matter—to justify special programs for minorities

14. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

15. 42 U.S.C. § 2000f (1976).

16. 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1976).

and women. Second, the compulsion to present the bold questions of racial and gender preference to the courts for adjudication really reduces these lawsuits to what Dean Griswold referred to as essentially social and philosophical questions. And third, to the extent that these programs have been attacked, they reveal that there has been little effort on the part of the affected institutions to tailor their "affirmative action" or special admissions programs to the facts at hand, to the unique problems that those institutions have faced in the past or are facing presently.

In the *Bakke* case, as you probably are aware, there was no effort to evaluate the extent to which discrimination by the University of California system had occurred in the past or was occurring at the time that *Bakke* sued, nor the extent to which other state agencies in California had been guilty of discrimination that had or might have had an impact upon the exclusion of minorities at the Davis Medical School. There was instead a reliance by the medical school upon a desire to remedy "societal discrimination," to increase the "mix," to insure that there were greater numbers of minorities in the medical profession providing medical assistance to minority groups.¹⁷ And, of course, there was no record on the extent to which there was an attempt to tailor the program at Davis Medical School to the unique problems of that institution.

One can look at other examples presently before the Court. Dean Griswold referred to issues that don't specifically relate to admissions or education, and I will do so as well for a limited purpose. He mentioned the *Weber* case.¹⁸ The *Weber* case, as he correctly described, involves a program in which minorities and women were given special preference in entering training for craft positions at a Kaiser plant in Grammercy, Louisiana. The record in that case is devoid, as Dean Griswold correctly points out, of any indication of past discrimination. But I think it is helpful to understand that though the record does not include anything with respect to past discrimination, there is nevertheless a very strong indication that the plant had engaged in past discrimination. Now, why was that omitted from the record? One of the things that the United States Government has attempted to do in the *Weber* case and in other comparable cases is to bring to the attention

17. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

18. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 99 S. Ct. 720 (1978) (No. 78-435).

of the courts that these records are inadequate, that they do not present the full picture.

Bakke did not involve any participation in the case by minority students who were the beneficiaries or potential beneficiaries of the affirmative action or special admissions programs. Their absence from the litigation, it seems to me, deprived the court of an opportunity to hear a critical voice in the debate over whether the program was justified and legitimate. Dean Griswold mentions the *Cramer* case,¹⁹ a sex discrimination case, which is back in the district court after *Bakke*. Dean Griswold pointed out that the Fourth Circuit opinion is unrecorded and unpublished. I have the benefit of getting such unpublished opinions. Let me point out to you that the reason why the Court decided that the case ought to be remanded to the district court was that the United States Government demonstrated a substantial question whether there had, in fact, been discrimination against Professor Cramer. Indeed, there was evidence that Cramer was considered, that other white males were considered, and that, in fact, a white male was ultimately selected for one of the remaining positions. And yet, this information was never presented to the Court. It was not offered by the University; it was not presented by Professor Cramer. It took the United States Government to come into the case to raise this question and to bring to the court this additional information.

The *Detroit Police* case²⁰ is another case in which the Government has intervened. Now, this is somewhat different from the other cases I have mentioned because the mayor of Detroit had found woeful “underrepresentation”—that is a “weasel” word also—of minorities in the police department in a community that was fifty percent minority; he set about the task of increasing black representation. He talked very little about remedying the effect of past discrimination; he essentially talked about the social and philosophical and theoretical problems of justice in Detroit. When that particular program was challenged by white police officers, the district court found that “reverse discrimination” had occurred, and that there was no basis for the mayor of Detroit to set up such a program. Our analysis of the record in that case leads us to conclude that there was ample evidence of past discrimination, and we have filed an amicus brief in the court of appeals that goes

19. *Cramer v. Virginia Commonwealth Univ.*, 586 F.2d 297 (4th Cir. 1978).

20. *Detroit Police Officers Ass'n v. Young*, 16 Fair Empl. Prac. Cas. (BNA) 1005 (E.D. Mich. 1978).

on for eighty-nine pages to document evidence from the record of that discrimination.

It is understandable, however, that these records are inadequate. Why not be on the side of the angels? Why should an institution go to the point of admitting its past discrimination? It serves the purpose of the institution to simply say that it is merely seeking to provide a better mix, better diversity, better opportunities to participate in society for those members who happen to be minorities or women. And, of course, from a strictly legal standpoint, there are pitfalls for institutions in admitting that they have been guilty of past or present discrimination. The minute they do, they leave themselves open for suits by minorities and women seeking backpay and other types of equitable relief based upon that evidence of past discrimination, that admission. But it seems to me that the consequence of this process, absent some intervention by a third party (such as the Justice Department or minorities or women) who has a stake in the outcome that goes beyond that of the parties heretofore involved in the litigation, is a jurisprudence that attempts to reconcile the use of race or ethnic origin or sex for political or social reasons, on the one hand, with constitutional colorblindness in general, on the other.

Now, Professor Calebressi of Yale University Law School recently gave a speech at Catholic University in Washington in which I think he correctly pointed out, and I am telescoping remarkably his very thoughtful comments, that we can come up with suggestions such as diversity, or providing better access, or theories of philosophical equality to justify what we are doing. But that will last only for so long. At some point we have to come face to face with the fact that we have constitutional principles that are at odds. That conflict cannot be "fudged." The solution ultimately will have to come from an identification of the truly legal and constitutional bases for what we are doing.

What must be done? It seems to me that we have to reject the notion that the matter before us amounts to essentially a political or social question; it is at root a question of discrimination, of constitutional or statutory violation. We should remember that if we scratch below the surface of most American institutions, we will find racism and sexism. The crucial inquiry, then, is not whether, but how much. How that inquiry is resolved and answered will determine the nature of the remedy. It seems to me that further action through litigation or administrative action must emphasize the extent to which discrimination

actually exists. There, of course, has to be permissible scope for voluntary action based upon some reasonable estimation of the existence of past discrimination. And I join Dean Griswold in thinking that many of the answers may come from legislative and executive action. But I think it is important even at the legislative and executive action level that those efforts be bottomed upon discrimination not from the distant past, but upon discrimination known to exist today. In one sense, we are at a stage very much like that which we experienced a few years after *Brown v. Board of Education*²¹ when a number of northern school desegregation cases were brought. They essentially asserted that *Brown* stood for the proposition that if blacks were isolated in public education, there was a violation of the fourteenth amendment, and there was a need for remedy. But the courts said that was not true; there was a necessity to demonstrate intent. And so we spent approximately thirteen or fourteen years up to the Denver school desegregation decision²² rethinking the nature of discrimination in the North and developing techniques to demonstrate the existence of that discrimination. It seems to me that if we do not focus once again upon the nature and scope of discrimination, we are really on the “slippery slope.”

Dean Griswold’s article and presentation suggest that there is really very little likelihood that we will come up with meaningful and satisfactory answers to the social and philosophical problems that he has raised, and that we will become more obscure and more inexact in terms of defining what we want. I sincerely hope this does not occur. But unless we are extremely careful, I think that we will be thrown into the political process in the worst sense of the word—a dog fight over scarce resources that ultimately cannot advance the society and will not bring us to the point of being a colorblind society truly open to talent.

21. 347 U.S. 488 (1954).

22. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

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