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The Bakke Problem: Commentary

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COMMENTARY

JULES GERARD*

I would like to begin by making two comments, the first directed at Mr. Days' language argument. I was struck to hear him refer a couple of times to the past history of discrimination with the phrase "rectifying past wrongs," which in a literal sense obviously cannot be done. If it can be done at all, it can be done only in the sense of precluding recurrence. So, we have a language problem there, too.

I also want to comment on Professor Glazer's discussion of the Powell opinion in *Bakke* and the time in which to implement it. In retrospect, most people have agreed that the "all deliberate speed" formula of *Brown v. Board of Education*¹ was a very big mistake. It would have been better had the Court in *Brown* just announced what the Constitution required and let nature take its course, as is customary following judicial decisions. I have a problem with this idea of temporizing in *Bakke*. If "all deliberate speed" was a mistake in *Brown*, I wonder whether it might not also be a mistake in *Bakke*.

Finally, I should like to raise a problem that was not discussed by any of our speakers. I think it is implicit, and borders on being explicit, in everything they said. We have pending in Missouri right now—and it is not the first case of this kind in the country—a lawsuit that argues that the Bar Examination is administered in an unconstitutionally discriminatory manner because it disqualifies or fails a disproportionate number of minorities.² This has to do with Professor Glazer's statistical justice discussion and also to what he referred to as the "in-and-out" argument. I do not share, at least if I understand it, Dean Griswold's apparent optimism that we can avoid deadening absolute egalitarianism. The thing that concerns me about the Bar Examination is that the whole law school enterprise is founded upon the idea that, at some time in the past, our lawyers were not as good as they should have been, and we needed some other method of training than the one we had then. I wonder, if challenges to Bar Examinations are going to be decided on

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1. 349 U.S. 294 (1955).

2. *In re* Edward J. Newsome, Civ. No. 60930 (Mo. S. Ct., filed Aug. 9, 1978).

the same basis as other questions for which statistical arguments are used, whether we are not sooner or later going to undercut the whole justification for professional schools in this country.