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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-235

Marco DeFunis and Betty DeFunis, his wife
Marco DeFunis, Jr. and Lucia DeFunis, his wife
Petitioners

v

Charles Odegaard, President of the University of Washington; Richard L. Roddis, Dean of the University of Washington Law School; Richard Kummert, Robert T. Hunt and Richard L. Roddis, Admissions Committee of the University of Washington Law School; Harold S. Shefelman, James R. Ellis, R. Mort Frayn, Robert L. Flennaugh, Jack G. Newpert, Robert F. Philip and George B. Powell, Regents of the University of Washington;

Respondents

On Writ of Certiorari to the Supreme Court
of the State of Washington

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MOTION FOR LEAVE TO FILE

The Petitioners have refused to grant consent to the filing of an amicus curiae by the American Bar Association. The respondent has consented to allowing the American Bar Association to file an Amicus Curiae brief in the instant case.

It is respectfully requested that this court grant this motion to allow the American Bar Association to submit its brief amicus curiae in support of the respondent Charles Odegaard *et al.* The American Bar Association (ABA) is an unincorporated, voluntary association the members of which are members of the bar of the states, territories, and possessions of the United States. It is the largest organization of the legal profession in the United States, having over 170,000 members. Its purposes include the maintenance of representative government, the promotion of the administration of justice, the application of the knowledge and experience of the profession to the promotion of the public good, and the promotion of activities of bar organizations in the country in the interests of the profession and the public.

In 1967, the Association endorsed in principle the development of a national program to encourage and assist qualified but underprivileged persons from minority groups, such as Negro, Indian, and Spanish speaking citizens, to enter law school and the legal profession. This action was taken because, although the above minority groups comprise a significant part of our population, they comprise only about 1 per cent to 2 per cent of the legal profession. The Association recognized that lawyers have traditionally played a leading role in the political, economic, and social development of our country and that more lawyers from minority groups are needed to enlarge the availability of legal services to members of those groups and to guide and assist those groups in becoming more a part of American life and society. Without an affirmative program of concern and assistance, they are not in the forseeable future likely to achieve greater representation in the profession.

To that end, the Association became one of the sponsors and constituent members of the Council on Legal Education Opportunity. The American Bar Endowment is one of the organizations which has provided substantial funds to CLEO to make its purpose a reality. The Association itself has considerable expense in administering CLEO funds and assisting in its programs and funding.

Three of the twenty-two sections of the Association have given their attention to the trial court's decision in the DeFunis case and have asked the Association to participate in an amicus brief on appeal, in support of the position of the University of Washington. One, the Section on Legal Education and Admissions to the Bar, is the part of the Association most directly interested in the field of legal education. Another, the Section on Individual Rights and Responsibilities, has expressed the view that the position of special concern in the admission of heretofore underrepresented minorities, such as that espoused by CLEO, is fully defensible and wholly necessary in the context of American legal education.

Third, the Association's Law Student Division expressly urged participation in this litigation in support of the University of Washington's position. The Law Student Division consists of some 16,000 dues-paying law students attending law schools throughout the country, including 120 within the State of Washington.

As recently as February 7, 1972, the Association's House of Delegates reaffirmed its previous expressions by adopting the following resolution:

Resolved, that the American Bar Association encourages programs at law schools having as their purpose the admission to law school and ultimately to the legal profession of greater numbers of interested but disadvantaged members of minority groups who are capable of successful completion of law school.

Further Resolved that the Association encourages the Law Student Division of the Association, as well as law student bar associations throughout the nation, to work with and assist the administration and faculties of law schools to this end.

For the foregoing reasons, the Association believes that programs encompassed by the above resolution, of which that in issue in this appeal is but one of many, are in the best interests of the legal profession as well as our nation. It believes that the Constitution permits such programs. If, as the trial court has held, the Constitution does not, the basis for the Association's encouragement of and participation in such programs will seriously be jeopardized, if not nullified altogether.

OPINION BELOW

The opinion of the Supreme Court of Washington is reported in 82 Wash. 2d 11; 507 P.2d 1169 (1973).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). Certiorari was granted on November 19, 1973.

QUESTION PRESENTED

Whether a state can take affirmative steps to remedy past discriminatory practices against black people that have resulted in an imbalance in the legal profession, an imbalance demonstrated by the fact that black American comprise only one per cent of the practicing Bar.

STATEMENT OF THE CASE

Petitioners in the instant case are, Marco DeFunis and his wife, Betty DeFunis, and their son, Marco DeFunis, Jr. and his wife, Lucia DeFunis, residents of Seattle, Washington.

Marco DeFunis, Jr. applied for admission to the University of Washington School of Law after his graduation from the University Washington in 1970. He was not accepted, but was placed on a waiting list. On August 2, 1971 he received his second notice of denial.

Plaintiff brought suit against the University of Washington, an agency of the State of Washington, the President of the University, Charles Odegaard and members of the Board of Regents, challenging the constitutionality of the admissions procedure employed by the School of Law.

The admissions committee primarily utilized a formula to derive the Predicted First Year Average. This formula is based upon the Law School Admissions Test score and undergraduate grade point average. Certain other applicants possessing special characteristics were admitted not strictly based upon their PFYA.

Such special characteristics included military applicants (those deferred from attending law school because of induction into the armed services), students engaged in an outstanding number and quality of extra-curricular activities, students who are members of minority groups, and students who attended schools of exceptionally high academic standards.

The plaintiff, had a PFYA of 76.23 (GPA--3.6, and average LSAT score 582). Seventy-four of the 155 applicants accepted for the Fall of 1971 had PFYA's lower than plaintiffs. Thirty-six of these were representatives of minority groups.

In selecting applicants the admissions committee did study and consider all qualities of the individual applicants to determine not only the potential ability to perform in law school but also, the ability to significantly contribute to the community and legal profession as a whole.

One of the several factors given consideration in evaluating the potential of the applicant was the racial characteristic of the student. The Superior Court upheld the plaintiff's claim of racial discrimination.

While the university enrolled plaintiff in compliance with the Superior Court order, it appealed the trial court's decision to the Supreme Court of Washington.

On March 8, 1973, that court in a 6-2 decision reversed the Superior Court ruling and upheld the right of the University to consider race as a factor in selecting students for its law school.

On June 5, 1973, enforcement of the judgment of the Supreme Court of Washington was stayed by Justice Douglas pending the disposition of this petition for a writ of certiorari in this court. On November 19, 1973, this court agreed to review the case.

SUMMARY OF ARGUMENT

Affirmative action programs are valid where they are used to redress the negative results of past racial discrimination and to correct present racial imbalance. Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions, DeFunis v. Odegaard*, 49 Wash. L. Rev. 1 (1973).

The argument for affirmative action programs is especially compelling in the case of law schools and the legal profession. While blacks make up approximately 12.5 per cent of the population they only comprise about 1 per cent of the practicing bar.

With the advent of the age of mobility, coupled with state bar examinations taking on a national character through adoption of the multi-state examination, it becomes incumbent upon the legal profession to insure and support programs that present opportunities. Opportunities heretofore have been denied a large segment of the American population solely because of the color of their skin. Gellhorn, *The Law Schools and The Negro*, (1968) Duke L. Jo. 1069. States taking affirmative steps to remedy the long standing injustice do not violate current equal protection precedents and are constitutionally within traditional bounds of state police power. To award a racially conditioned preference in law admissions so long as the state does so within carefully constructed affirmative action programs in valid and not in violation of the Equal Protection Clause of the Fourteenth Amendment. Similar practices are in existence throughout federal and state housing and work programs.

It is submitted that the states' need for curing an imbalance in the legal profession is short-termed, and if this nation is to develop a colorblind society in the long run it must 'refuse to be color-blind in the short run' B. Bittker, The Case for Black Reparations 120 (1973).

The State of Washington has presented a valid state interest in establishing its compensatory program at the University of Washington School of Law. This Court should pay deference to the legislative intent, needs, and rational behind its compensatory programs and affirm the decision of the Supreme Court of Washington.

ARGUMENT

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT FORBID EQUALIZING THE ACCESS OF MINORITY GROUPS TO HIGHER EDUCATION AND PROFESSIONAL CAREERS WHERE A COMPELLING STATE NEED IS DEMONSTRATED.

The instant case presents this Court with issues that far exceed the boundaries of the State of Washington. The State in good faith is attempting to remedy past national discriminatory practices. It is not only the compensatory program of the University of Washington that is at issue, but also a national policy of corrective programs aimed at *de facto* and *de jure* discrimination. The American Bar Association's concern is with the national impact that would result from this Court overturning the decision of the Supreme Court of Washington. Instead of being limited to the status of one individual in the system of legal education, the case thrusts upon this Court the responsibility of determing the validity of compensatory programs in all aspects of American life.

Compensatory programs similar to the one at issue in *De Funis v. Odegaard* are being implemented not only in higher education but in business and professional communities as well. See *Associated General Contractors of Massachusetts Inc. v. Altshuler,* (1st Cir., Nov. 30, 1973). See also B. Bittker, The Case for Black Reparations 120 (1973). *De Funis*, therefore, deals not only with the validity of ameliorative or compensatory admission policies in higher education, it also pertains to the problem of determining reasonable methods to be employed by the state in achieving a necessary goal. That goal is not only an increase in minority representation in the legal field but also an integration of these presently alienated and estranged culture groups into the mainstream of American society in order to promote the general welfare of the entire population. See Bell, *School Litigation Strategies for the 1970's; New Phases in the Continuing Quest for Quality Schools,* (1970) Wise, L. Rev. 257.

Many of the minority groups in the United States have been and are experiencing antisocial feelings of hostility and separateness toward American society. Studies by the National Advisory Commission on Civil Disorders report the explosive

quality of the alienation and indifference towards the institutions of law and government and the white society that controls them. U.S. Riot Commission *Report of the National Advisory Commission on Civil Disorders (1968).*

Social scientists recognize that most social change takes definitive form through the rule and operation of law. Henderson, *New Roles for the Legal Profession in Race, Change and Urban Society*, 483 (Orleans and Ellis ed. 1971). Unfortunately, in regard to the minority population, the legal profession itself has in the past failed to effectuate necessary changes. Some law schools have been especially slow in opening their doors to the minority student. Legal Education Advance Planning, *An Introductory Study of Minority Law Student Development Potentials* (Dec. 1971). A history of racial discrimination has resulted in underrepresentation of a substantial minority population. See Franklin, *History of Racial Segregation in the United States*, 34 Annals Amer. Aca. of Pol. and Soc. Sci. 1-5 (Mar. 1956); L. Litwaock, North of Slavery 113-117 (1961): See, *e.g., Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1958).

There exists, then, a legacy of past governmental and societal discriminatory practices establishing a compelling need for affirmative action. These discriminatory practices revolve around three manifestations of state action:

1. Failure to adequately prepare minority students to compete for matriculation positions in law schools. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

2. Failure to provide minority students with a sound legal education. *Missouri ex rel Gaines v. Canada, supra; Sipuel v. Board of Regents of Oklahoma*, 332 U.S. 631 (1948(; *Sweatt v. Painter*, 339 U.S. 629 (1950; *Florida ex rel Hawkins v. Board of Control of Florida*, 350 U.S. 413 (1956).

3. Failure to provide opportunities for admission into law school results in a lack of equal access to job opportunities for minority group law graduates. Note, *The Negro Lawyer in Virginia: A Survey*, 51 Va. L. Rev. 521 (1965); C. Woodson, The Negro Professional Man and the Community (1934); Haynes, *The Negro Federal Government Worker*, 3 Howard Univ. Studies in Soc. Sci. (1941).

1 - PRE-LAW PREPARATION FOR MINORITY STUDENTS

Minority students are unable to successfully compete for admission to law schools because of the inadequacy of the elementary and secondary education which they have received. Good, A History of American Education (1956).

In the segregated Southern system and in the residentially separate Northern system blacks suffered from a public which saw little value in educating blacks in other than vocational fields. The expectation level for blacks was several notches below the white 'norm'. Research has shown the self fulfilling prophecy of expectation, particularly in the educational setting. Good, A History of American Education 267 (1956).

In 1965 it was reported that children in the Massachusetts *de facto* segregated schools were as much as three years behind children in other schools in the city. In Atlanta, Georgia children in black schools were reading three grade levels below children in white schools. J. Kozol in his book *Death at an Early Age* described the harsh realities of the dual color system in the 1960's.

> "One of the saddest things on earth is the sight of a young person already becoming adolescent, who has lost about five years in the chaos and oblivion of a school system and who still not only wants to but plans to learn."
> J. Kozol, Death at an Early Age, 45-46 (1967).

Educators and social scientists have produced large bodies of evidence documenting the conclusion that racial separation has a powerful and injurious impact on the self image, confidence, motivation, and school achievement of Negro children. In *Brown v. Board of Education, supra,* this Court pointed to the inherently adverse effects of racially imbalanced school systems upon the class being discriminated against. Until very recently, and despite the mandate of *Brown,* some states openly and directly continued to maintain separate school systems for majority and minority races. See, *e.g., Cooper v. Aaron,* 358 U.S. 1 (1958); *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218 (1964) and *Swann v. Charlotte-Mecklenburg, supra.* A glaring disparity existed between the quality of education afforded the Negro and that granted the white. See, *e.g., Serrano v. Priest,* 96 Cal. Rep. 601; 487 P.2d

1241 (1971). The curriculum varied greatly between the white high school and the black high school. Kirp, *The Poor, The Schools and Equal Protection, Educational and Legal Structure,* Harvard Educational Review (Reprint 6 1971). Where there was one high school, there was always the possibility of a tracking system where blacks could be programmed into the vocational areas. See Kozol, Death at an Early Age, *supra.*

One teacher in a black Massachusetts school asked the students to write an essay about their school. This exerpt reflects the student's attitudes toward the facilities or lack of facilities:

> "The room is dirty. The auditorium is dirty, the seats are dirty. The light in the auditorium is broke. The curtains in auditorium are ragged. They took the curtains down because they was so ragged. The bathroom is dirty. The cellar is dirty." Kozol, Death at an Early Age, *Supra,* at 133.

When students emerge from such school systems they are not able to perform on the same level as their white counterparts. If they attend integrated universities for their baccalaureate degree, their grade point average is not as high as that of the average white student. Gellhorn, *The Law Schools and The Negro, supra* at 1089-1092. Their admission test scores for prefessional schools are not as high as those of the average white student. There have been many criticisms of the nationwide tests, particularly of the entrance examinations used for college and professional school admissions. Attempts have been made to create culture fair tests. However, the tests may not be the bias, the key may lie more in the posture of test taking.

> "The average child on a low income level has been shown to approach any kind of test negatively since he believes that it will only expose his shortcomings and remind him that he is at the end of the procession. To shorten the period of discomfort he usually spends little time on difficult items and makes haphazard guesses instead of thinking things through. The middle class child, on the other hand, has been taught to do his best on all tests and is accustomed to meeting the challenge with all the mental equipment he has at his command."

Goldensen, *The Encyclopedia of Human Behavior* 284 (1969).

The disparities in grade point average and test scores do not, however, prove that the black student lacks potential ability. See, L. Ehrman, G. Omen, and E. Caspari, Genetics, Environment and Behavior: Implications for Educational Policy (1972); O'Neil, *Preferential Admissions,* 80 Yale L. Jo. 699 (1971), and Legal Education Advance Planning, *An Introductory Study of Minority Law Student Development Potentials, supra.*

2 - HISTORICAL STATE COMMITMENT TO LEGAL EDUCATION FOR BLACK STUDENTS

Just as minority students have not had an equal chance to compete for admission to law schools, they have likewise been been denied an equal opportunity to participate in a legal education. This is caused, first of all, by societal pressures which disincline minority youths from aspiring to a legal career. Legal Education Advance Planning, *supra.* The most highly qualified Blacks have gone into medicine, teaching, and social work. Interest in the legal field has been limited for the following reasons, among others, contends Gellhorn:

1. Belief that there is a dual justice system with lack of justice or injustice the rule for minorities,
2. Limited financial potential for minority lawyers
3. The great gulf between the expenses for a legal education and the money in hand
4. Inadequately developed communication skills
5. Ignorance of professional opportunities in the law
6. Failure to understand the scope of the legal system

In addition, the process of vocational goal setting, of acquiring roles, is partly dependent on the individual's early opportunities to observe the activities of those in the roles and to role play. However, many minority children have had little or no opportunity to observe the activities of the lawyer or the judge or the law enforcer from a positive perspective. These have been foreign roles with little role playing appeal. The concept of the role expectation - the rights and obligations of the individual in relation to the law did not develop. The lack of models contributed to the void in knowledge about the legal profession.

Furthermore, until the very recent past, the legal system has often had no place for many minority students. Gellhorn, *The Law Schools and the Negro, supra* 1069. Although the first black graduated from an American law school (Harvard) in 1869, there were law schools in 1971 which never had black graduates. Atwood, James and Long, *Survey of Black Law School Enrollment* 16 Student Law, 18, 36-38 (1971). In most Southern states, law schools and bar associations completely denied entrance to minority students until the late 1950's, even after the decision in *Sweatt v. Painter*, 399 U.S. 629 (1950) and *Florida ex rel Hawkins v. Board of Control*, 350 U.S. 413 (1956). The situation has not greatly improved since then. The University of Alabama, for instance, as of 1968, had no blacks in the law school and had not graduated a single black lawyer. Outside of the South the situation is almost as acute. In many predominantly white universities and law schools, blacks were often rarly seen. Leflar, *Legal Education: Desegregation in Law Schools,* 43 A.B.A. Jo. 145 (1957) and M. Davie, Negroes in American Society 163 (1949). Indiana University, for instance, had 27,000 undergraduates in 1968. Included in that number were some 1,700 blacks, the largest number of black students on any Big Ten campus. Yet Indiana had only three black law students enrolled during the 1967-1968 academic year. Gellhorn, *The Law School and the Negro, supra*, 1069, 1081. Not until 1965 were all member institutions of the Association of American Law Schools able to assert that admission was denied to no applicant on the ground of race or color. Until 1968, there were 200 blacks among the 10,000 graduating annually from the nation's law schools. Gellhorn, *The Law School and the Negro, supra* at 1077-1080.

The result of these discriminatory practices has been a dearth of black attorneys. Nationally, as of 1968, the legal profession numbered some 3,000 black attorneys among the more than 300,000 lawyers in the United States. Although blacks constitute in excess of 12.5 per cent of the nation's population, they were constituting less than 1 per cent of the attorneys. Whereas in 1970 there was one lawyer for every 637 persons in the United States, there was only one black lawyer for every 7,000 blacks and 14 American Indian lawyers to service 800,000 Indians. Legal Education Advance Planning, *supra* at 65.

The State of Washington mirrors the national figures. In 1970 the population of the state of Washington was 3,409,169. Black Americans counted for 71,308 or 2.1 per cent; American Indians made up 1 per cent of the population. U.S. Dept. of Commerce Bureau of Census, *General Population Characteristics of the State of Washington Tables* 17-18 (1973). In 1970 there were approximately 4,550 active members of the Washington State Bar Association. Only twenty of these members were black. In 1970 there was one white lawyer for every 720 whites; there was only one black lawyer for every 4,195 blacks and only one American Indian lawyer for every 6,677 American Indians in the state. See generall, Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions, DeFunis v. Odegaard* 49 Wash. L. Rev. 1, 35-41 (1973).

As the court below observed, "minorities have been, and are, grossly underrepresented in the law schools—and consequently in the legal profession—*of this state* and this nation." *DeFunis v. Odegaard, supra* at 82 Wash. 2d 32-33; 507 P. 2d 1182 (emphasis added).

As Professor Arval A. Morris of the University of Washington School of Law noted:

> "The State of Washington has a deep and abiding interest in correcting these disparities and in making sure that legal education is in fact made equally available. While the state voluntarily undertook to provide a corrective program of law school admission it may actually have been under a constitutional duty to have done so.
>
> That access to legal education has effectively been denied to minority group members in the State of Washington is only too painfully evident from these statistics. Yet, minority group members pay state taxes, a part of which go to support the University of Washington and its law school. In fact, since minority groups in the state are found disproportionately in the lowest income classes, and since Washington's tax structure is highly regressive, minority groups tend to incur a disproportionately heavy state tax burden.

> Given that Washington's minority groups have not enjoyed an equal share of public legal education and that they pay state taxes, part of which support the law school, it is obvious that the state has a compelling and overriding interest in effectively making public legal education equally available to minority group for the simple reason that under the equal protection clause a state is obligated to provide equal opportunity to all its citizens. The state's law school may fulfill that obligation voluntarily by using a racially conditioned preferential admissions policy."
>
> Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions, Defunis v. Odegaard, supra* at 37-40.

3 - UNEQUAL ACCESS TO JOB OPPORTUNITIES FOR BLACK LAWYERS

The third manifestation of state action has been the absence of equal job opportunities for minority lawyers. This has resulted from the failure to provide opportunities for admission into law schools. Compare *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See also, Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions De Funis v. Odegaard, supra* at 5 (1973).

Since it is clear that minorities have not had equal access to a legal education, and consequently, the opportunity to become lawyers, the question arises as to why it is important that minority groups enter the legal profession. The question is dealt with quite adequately in Atwood, James, and Long, *Survey of Black Law Student Enrollment, supra.*

> "First, the leadership of our country at every level of government is largely dominated by lawyers. Yet within the black community two traditional avenues to relative success have been through social work and the ministry.

> Black leadership, as a result, has often arisen from these professions. However, as the struggle for equal opportunities has moved from the streets to the courts and ballot box, it has been the black lawyer whose leadership qualities have increasingly been sought, especially for elective office. And who in the black community, other than the lawyer, is best able to effectively deal with institutions of power in our society -- legislative bodies, courts, administrative agencies, business and labor?" *Id* at 20.

The objectives of the University of Washington School of Law are similar to most other law schools: 1. prepare the student for public service, 2. prepare the student for the practice of law, 3. prepare the student for law teaching, and 4. to prepare the student for legal research. It is the special role of the state supported law school to supply the state as well as the nation with social inventors and social mechanics. From the University of Washington School of Law emerge the main body of political leadership in the state. See Morris, *Equal Protection Affirmative Action and Racial Preferences in Law Admissions, Defunis v. Odegaard, supra* at 41-42. The situation existing in Washington is reflected and magnified at the national level.

As long as minority groups remain underrepresented in the legal field, in excess if 12.5 per cent of the nation's population will likewise be underrepresented in positions of power. They will continue to suffer disillusionment with and alienation from the legal system through which the organization and maintenance of law and order is procured. They will seek other means, possibly violent ones, to meet their needs. See generally, U.S. Riot Commission Report, *supra.* See also Joint Economic Commission, *1964 Joint Economic Report No. 931,* 88th Cong., 2d Sess. 61 (1965).

There is, then, an evil to be cured. Minority groups are denied both access to a legal education and equal representation in the legal profession. Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions, supra* at 5. There is, furthermore, a compelling state interest in curing this evil. As long as it exists, a significant portion of our population is denied the opporunity to participate in the affairs of government, and the serious possibility of social unrest, if not upheaval, exists. We must ask, then, what steps can be taken to compensate for the discriminatory practices which have led to the evil which exists?

The policy followed in good faith by the University of Washington School of Law, at issue in the instant case, is one such step, and it is the only kind of policy that can be used at the present time. The simple fact is that nationally, it works. Gellhorn, *The Law School and the Negro, supre* at 1081-1085. Before compensatory programs began, minority groups were denied admission to law schools. *Id.* at 1075. Until 1968 there were about 200 Blacks out of a total of 10,000 graduating from American law schools annually. *Id.* at 1077. In the past three years, since the advent of compensatory programs, black student enrollment has increased more than 200 per cent.

UTILIZATION OF COMPENSATORY PROGRAMS ARE PERMISSIBLE WHEN RELATED TO A VALID STATE INTEREST

The University of Washington utilized race as one factor in selecting students for law school admission. Until the decision of the court below, *De Funis v. Odegaard,* 82 Wash. 2d 11, 507 P.2d 1169 (1973), lower courts had not yet squarely faced the issue of whether the ameliorative racial classification for academic admission was highly suspect, thus being subject to rigid scrutiny, or whether the university speaking for the state could demonstrate that the use of its policy was essential to the achievement of a compelling governmental objective. Ordinarily racial classifications were inherently devisive; they tended to involve a certain degree of prejudice toward persons on both sides. Thus, as the petitioner points out, the power to classify on the basis of race could be dangerous. See also *Associated Gen. Contractors of Massachusetts v. Altshuler, supra* at 13-14. However, when legislatures enacted laws based in part upon racial distinction, but designed to eliminate racial inequality, courts generally took the position that the classification could be sustained if it was rationally related to an overriding governmental purpose. The classification must be established as not invidious. It must also relate to a compelling state interest and provide a rational means of implementing that interest. See, e.g., *Brooks v. Beto,* 336 F.2d 1 (5th Cir. 1966); *Porcelli v. Titus,* 431 F.2d 1254 (3rd Cir. 1970) and *Swann v. Charlotte-Mecklenburg Board of Education, supra.*

1. *The classification in De Funis is not invidious:*

Case law has clearly established that preferential programs enhancing minority access to the mainstream of American society are not 'invidious' discrimination since the goal of compensatory programs is not the separation of the races but the equalization of two cultures within one society.

> "(T)he function of equal protection...is to shield groups of individuals from stigmatization by government. Whetheror not particular legislation stigmatizes is largely a sociological question requiring consideration of the structure and history of our society as well as examination of the statute itself. Legislation favoring Negroes, then, would be constitutional because it is rational *and* because in *our* society it would not stigmatize whites." Wright, *The Role of the Supreme Court in a Democratic Society - Judicial Activism or Restraint?* 54 Cornell L. Q. 1, 18 (1968) see also; *Hobson v. Hansen*, 269 F. Supp. 401, 492-508 (D.D.C. 1967).

In accordance with these views, housing and employment racial classification have been permissible. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d, 920 (2d Cir. 1968); *Otero v. New York City Housing Authority, 484* F.2d *1122* (2d Cir. 1973); *Associated General Contractors of Massachusetts v. Altshuller, supra.* Likewise, in elementary and secondary education, the goal of equal opportunity for all stands so important that racial classifications are considered permissible. *Offermann v. Nitkowski*, 248 F. Supp 129 (W.D.N.Y. 1965), *Wanner v. School Board of Arlington County*, 357 F.2d 452 (4th Cir. 1966); *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966); *United States v. Plaquemines Parish School Board*, 291 F. Supp. 841 (E.D. La. 1967); *Hobson v. Hansen, supra*, and *United States v. Board of Public Instruction of Polk County*, 395 F.2d 66 (5th Cir. 1968). School boards which have consciously utilized race in the past in an effort to separate students must now use racially conscious policies to bring students together. *Swann v. Charlotte-Mecklenburg Board of Education supra.* Thus, racial classifications are permissible when utilized to eradicate the vestiges of dual society. Although most courts have held that a

state need not afirmatively act to fd *de facto* segregation for which it is not directly responsible, courts generally have permitted governmental discretion in selecting and implementing policies to overcome all forms of segregation. See, *e.g.*, *Associated General Contractors of Massachusetts v. Altshuler, supra.*, and *Otero v. New York City Housing Authority, supra.* One vestige of racial discrimination is the lack of minority access to the political and legal machinery in this country. The meagerness of such access affects the entire legal profession.

2. *There is a compelling state interest.*

This Court has held that racial classifications can be part of programs that further overriding or compelling state interests. See *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964). See also *Brooks v. Beto,* 336 F.2d 1 (5th Cir. 1966). In *McLaughlin,* this Court required proof that racial classification did indeed seek to remedy effects of past racial discrimination. See also *Norwalk CORE v. Norwalk Redevelopment Agency, supra,* and *Asso. General Contractors of Massachusetts v. Altshuler, supra.* *Brooks* illustrated that the intentional inclusion of blacks on a grand jury was a permissible means of remedying the effects of past racial discrimination. In *Brooks,* the community in question supported a population of 10 per cent blacks, yet it had not employed a black member on a grand jury. Likewise affirmative action requirements promulgated by federal agencies have generally been upheld. For example, the Department of Labor's affirmative action program insuring minority hiring on federal construction projects was upheld in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 311 F. Supp. 1002, 1009 (E.D. Pa. 1970). See also, Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions, De Funis v. Odegaard, supra* at 35-46.

3. *The State has adopted a rational means of implementation.*

The intentional use of racial classification by the state is a reasonable means of implementing the compelling state interest in having more minority representation in the legal profession. Increasing the number of minority lawyers requires greater input into the educational system of minorities who are currently

disproportionately underrepresented in the major academic institutions in the United States.

NECESSITY FOR AND RATIONALE BEHIND RACIAL CLASSIFICATION

It is respectfully submitted that these circumstances cannot be artificially separated and dealt with in isolation as suggested by petitioners. It is further submitted that these circumstances present this Court with a compelling issue of national concern. Early childhood deprivation and the lack of adequate preparational expectation in the primary and secondary school systems have made it impossible for a large number of otherwise qualified minority students to have the opportunity to qualify for law school admission on a competitive bases. See generally Schrader & Pitcher, *Predicting Law School Grades for Black American Students,* LSAC Annual Report (1973), and Bell, *In Defense of Minority Admissions Programs: A Response to Professor Gaglia,* 119 U. Pa. L. Rev. 364 (1970). Consequently, more than 12.5 per cent of the nation's population experiences disillusionment with the educational system as well as the legal system through which the organization and maintenance of law and order is procured. See, generally, U.S. Riot Commission Report, *supra.* This cannot be viewed solely as an individual state's problem, because of the mobility which typifies the American character and which is on the increase within the academic and professional communities. Legal Education Advance Planning, *supra* at 125-128. Those receiving undergraduate education in one state will often attend a professional school in another state. *Ibid.* Many southern blacks have been forced to go east or west or north in order to obtain a legal education. Couple this fact with the increased emphasis upon the multi-state bar examination, *ibid.*, and the increased freedom of movement, *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); *United States v. Guest,* 383 U.S. 745 (1966), for the purpose of securing more meaningful benefits, *Shapiro v. Thompson,* 349 U.S. 618 (1969), and it becomes clear that the issues involved in the instant case take on national proportions.

SINCE THIS NATIONAL ISSUE EVOLVED FROM A HISTORY OF STATE ACTION, GOVERNMENTS HAVE ACCEPTED THEIR RESPONSIBILITY TO ACT AFFIRMATIVELY

The First Circuit Court of Appeals in *Altshuler* stated that:

> "...discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's more intransigent and deeply rooted inequalities. Intentional, official recognition of race has been found necessary to achieve fair and equal opportunity. . ." *supra* at 11-12.

Consequently, this Court and many of the lower federal and state courts that have considered the issue make it clear that the Constitution is color conscious where color is to be taken into account to prevent perpetuation of a discrimination and to undo the impact and effects of past segregated practices. See collection of cases cited in O'Neil, *Preferential Admissions Equalizing the Access of Minority Groups to Higher Education*, *supra* at 707-709. See, also, *Associated General Contractors of Massachusetts v. Altshuler* and cases cited therein, *supra* at 11-14.

As this Court noted in *Green v. County School Board*, 391 U.S. 430 (1968), past state discriminatory practices have so diluted educational programs for blacks that now the burden rests upon school boards to come forward with plans that promise realistically to work, and to work *now*. Judge Sobeloff added, in *Bowman v. County School Board*, 382 F.2d 326, 333 (4th Cir. 1967) (concurring opinion), that 'the school officials have the continuing duty to take whatever action may be necessary to create a unitary non-racial system.' In *Springfield Community v. Barksdale*, 348 F. 2d 261 (1st Cir. 1965), the court noted:

> "Racial imbalances disadvantage Negro students and impair their educational opportunities as compared to the other races to such a degree that they have a right to insist that school authorities consider special problems along with all other relevant factors.

> (Given a) racial group which has historically been the object or victim of the state generated discrimination, the selectors can perform their constitutionally prescribed duty only by being conscious of that class. This means they must be conscious of that race and be conscious that the system constructed or followed by them has as its conscious the supplying of that race for inclusion in the universe."
>
> *Norwalk CORE v. Norwalk Board of Education* added:
>
> For this court to intervene in a case such as this (attempt to overcome *de facto* segregation by busing) would be to discourage voluntary action by enlightened public officials attempting to correct one of the underlying causes of racial tension in this nation." 298 F. Supp. 213, 226 (D. Conn. 1969).

But the problem at issue is not confined to the realm of school admissions. Courts have supported similar programs in business and professional arenas. In *Porcelli v. Titus*, 431 F.2d 1254 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971), white teachers alleged that the local school board had bypassed them when it abolished the regular promotion schedule for selecting principals and vice principals and had instead given priority to black candidates in order to increase the integration of the system's facilities. In upholding the board's judgment to eliminate the ordinary promotion system, the court stated that state action based partially on considerations of color is not necessarily a violation of the Fourteenth Amendment when color is used in furtherance of a proper governmental objective. The emphasis rested upon the legitimate purpose, the valid state interest to be achieved. The court further held that in some situations the means of achieving the valid state interest may appear to be administratively awkward, or inconvenient, or may even impose burdens on some. However, awkwardness or inconvenience cannot be avoided in an interim period when adjustments are being made to eliminate dual school systems. *Swann v. Charlotte-Mecklenburg, supra; Associated Contractors of Massachusetts v. Altshuler, supra* at 11.

As noted in *Evers v. Jackson Municipal Separate School District*, 328 F.2d 408 (5th Cir. 1964), the time for footdragging is over. Since the early 1950's, law schools have known that they must open their doors to the minority student. In 1974, there are still law schools that have failed to produce a black graduate. Consequently, 'the rule has become the later the start, the

shorter the time allowed for transition.' *Lockett v. Board of Education of Muskogee County School District,* 342 F.2d 225 (5th Cir. 1965). See, also, *Singleton v. Jackson Municipal Separate School District,* 348 F.2d 729, 730 (5th Cir. 1965).

As the Court below noted in *De Funis,* the shortage of minority attorneys, resulting in the shortage of minority prosecutors, judges, public officials, governors, legislators, and the like, constitutes an undeniable, compelling state interest. If minorities are to live within the rule of law, they must enjoy equal representation within the legal system. *De Funis v. Odegaard, supra* at 35.

There is a compelling need to insure proper representation of attorneys within the minority community. This need must focus upon and favor those racial minority groups not only underrepresented but also disproportionately the:

> "(a) victims of overt racial discrimination; (b) socioeconomically disadvanted; (c) unfairly appraised by standardized tests; and those who are (d) graduates of overcrowded, rundown and badly staffed high schools. Most black, Spanish-American and American Indian applicants clearly meet these criteria and therefore present the strongest claims for special consideration.' O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, supra* at 750.

Thus, the consideration of race in the law school admissions policies meets the test of valid state interest and necessity because its goal is to alleviate the racial imbalance existing in the legal profession. This goal can be achieved only by providing a legal education to those minority groups which have been historically deprived of equal educational opportunities.

The most compelling argument in favor of the test was stated by the majority opinion in the Court below when the court noted:

> 'It has been suggested that the minority admission's policy is not necessary, since the same objective could be accomplished by improving the elementary and secondary education of minority students to a point where they could secure equal representation in law school through direct competition with non-minority applicants on the basis of the same academic criteria. This could be highly desirable, but 18 years have passed

> since the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and minority groups are still grossly underrepresented in law schools. If the law school is forbidden from taking affirmative action, this underrepresentation may be perpetuated indefinitely." *De Funis v. Odegaard, supra* at 36

Twenty years have now passed since *Brown*, and minority groups are still denied proportionate representation. The unfortunate legacy of the past action continues.

Thus the case law is clear. The states may identify and correct serious racial imbalance where the goal is to insur legal training and to represent those who have in the past been systematically shut out of the legal profession. Such action is permissible even though it does not provide an immediate solution to the entire problem of equal representation within the legal system.

It is a bold beginning that has, in the past three years, borne the fruits of its efforts. For this Court to sustain the petitioner's argument would be the equivalent of sustaining the segregation of the past. The case law is clear that segregation cannot be tolerated; remedial programs voluntarily entered into by state and national governments aimed at ending segregation within professions and within professional schools should be approved as meeting a compelling state need.

> "It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when one's lenses are removed." *Associated General Contractors of Massachusetts v. Altshuler, supra* at 11.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the Supreme Court of Washington be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Fletcher N. Baldwin, Jr., Attorney for the American Bar Association as Amicus Curiae and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day on January, 1974, I served copies of the foregoing Brief and motion for leave to file on petitioners and respondents there in named, by mailing copies in a duly addressed envelope, with postage prepaid, to Josef Diamond, Esquire, 400 Hoge Building, Seattle, Washington 98104 *and* James B. Wilson, Esquire, Senior Assistant Attorney General, 112 Administration Building, University of Washington 98195.

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