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DEFUNIS V. ODEGAARD, THE SUPREME COURT AND PREFERENTIAL LAW SCHOOL ADMISSIONS: DISCRETION IS SOMETIMES NOT THE BETTER PART OF VALOR

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INTRODUCTION

In its October 1974 term the Supreme Court of the United States had an opportunity to fashion a meaningful definition of equal protection by deciding the issue of how the infusion of blacks into American professional life could constitutionally be accomplished. The Court failed, however, to accept this responsibility. Had the Court done so, it could have once again assumed the role of educator and protector of a maturing Bill of Rights and would have served as a stimulant for implementation of meaningful changes in the racial, cultural, and philosophic profile of the legal profession in America.

By its failure to decide the merits of *DeFunis v. Odegaard* the present United States Supreme Court clearly cannot be accused of libertarian judicial activism, at least within the areas of compensatory programs and equal protection of the law. Unfortunately, the Court chose to view its role quite narrowly. Thus, it is important to review the Court's posture in *DeFunis;* to examine the issues of compensatory programs as they affect legal education; and to discuss the role the Court *should* play in implementing a policy that is more reparation than reverse discrimination.

IS THERE A RIGHT TO BE TREATED EQUALLY

> It is by now well understood 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 lenses are removed.[1]

Marco DeFunis, Jr., a white citizen of the State of Washington and an honor graduate of the University of Washington, applied for admission to that university's school of law. Initially placed on a waiting list, DeFunis received notice that he was denied admission on August 2, 1972, thus prompting his

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1. Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 16 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974).

suit against the University challenging the constitutionality of the admissions procedure employed by the University of Washington School of Law.[2]

The selection procedure of the Washington Law School Admissions Committee depended primarily upon the "Predicted First Year Average" (PFYA) formula, which utilized the applicant's Law School Admissions Test score, writing ability score, and undergraduate grade point average. In addition, some applicants possessing special characteristics were considered for admission even though their PFYA was not competitive. Such special applicants included veterans unable to matriculate because of induction into the armed services, persons possessing outstanding extracurricular records as undergraduates, members of minority groups, and persons who attended schools of exceptionally high academic standards.

Marco DeFunis had a PFYA of 76.23 derived from a 3.71 undergraduate grade point average and an average LSAT score of 582. Seventy-four of the 155 applicants accepted for the fall 1971 term had PFYAs lower than that of DeFunis. Thirty-six of these were representatives of minority groups. In selecting applicants the Admissions Committee considered many qualities of the individual applicants to predict not only their performance in law school, but also their ability to contribute significantly to the total community and legal profession. Because one of the factors given consideration in evaluating the potential of the applicant was race, the Superior Court of Washington accepted the plaintiff's claim of impermissible racial discrimination, holding that the state could not permit the consideration of race as a criterion in its admissions process and ordering DeFunis admitted to the entering law class.[3] Citing *Brown v. Board of Education*[4] the court concluded that the equal protection clause is colorblind, requiring states to treat all races alike.[5]

The University enrolled DeFunis in compliance with the superior court order, but appealed the decision to the Supreme Court of Washington, which, in a 6-2 opinion, reversed, upholding the right of the University to consider race as a factor in selecting law students.[6] The majority declared that the classification utilized in the admissions policy was necessary to accomplish a compelling state interest – increased minority representation within the legal profession.[7] Noting that the lower court had relied exclusively upon *Brown v. Board of Education,* the Washington supreme court concluded:

> *Brown* did not hold that all racial classifications are *per se* unconstitutional; rather, it held that invidious racial classifications – *i.e.,* those

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2. DeFunis v. Odegaard, No. 741,727 (Wash. Super. Ct. for King County, Sept. 22, 1971), *rev'd,* 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot,* 416 U.S. 312 (1974).

3. The oral opinion is reproduced in Andersen, *The Admissions Process in Litigation,* 15 ARIZ. L. REV. 81, 108 (1973).

4. 347 U.S. 483 (1954).

5. *Contra,* Comment, *Equal Protection and Benign Racial Classification: A Challenge to the Law Schools,* 21 AM. U.L. REV. 736 (1972); Comment, *Legal Education – Preferential Admissions: A Constitutional Challenge,* 52 B.U.L. REV. 304 (1972).

6. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

7. *Id.* at 31-32, 507 P.2d at 1181-82.

> that stigmatize a racial group with the stamp of inferiority — are unconstitutional.[8]

The court recognized the overwhelming burden upon the state to establish a compelling need for considering race in its law school admissions policy, but the state interest in improving the plight of minorities in the legal profession was found to satisfy this requirement.[9] In support of its conclusion, the court first pointed to the serious under-representation of minority groups in law schools.[10] The court refused to consider the de jure-de facto dichotomy, noting:

> [T]he question before us is not whether the Fourteenth Amendment *requires* the law school to take affirmative action to eliminate the continuing effects of de facto segregation; the question is whether the constitution *permits* the law school to remedy racial imbalance through its minority admissions policy.[11]

Because the admissions policy was voluntarily adopted, the court concluded that the de jure-de facto distinction was inapplicable. The court then concluded that the great shortage of minority members in the legal community constituted an "undeniably compelling state interest"[12] in increased minority enrollment in law schools. Thus, for the Washington supreme court:

> The considerations of race in the law school admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived.[13]

The United States Supreme Court, not wishing to decide the issue, found the case mooted by DeFunis' imminent graduation from law school — a circumstance secured by the intervention of Mr. Justice Douglas.[14] The rationale adopted by the majority was that DeFunis did not bring a class action, but asked for relief only for himself. The University stated through the attorney general of Washington that DeFunis' status would not change regardless of the outcome of the case; thus, the majority concluded that the issue as to DeFunis was no longer capable of repetition and was therefore moot.[15] In this manner the Court distinguished the "recurring nature of the controversy" avoidance of mootness elaborated in *Roe v. Wade*.[16] Unlike the petitioners in

8. *Id.* at 27, 507 P.2d at 1179.
9. *Id.* at 33, 507 P.2d at 1182.
10. *Id.* at 33-35, 507 P.2d at 1182-83. *See* Toles, Report of Black Lawyers and Judges in the United States, 1960-1970, 116 CONG. REC. 30,786 (1970); *see, e.g.*, Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). *See also* O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. TOL. L. REV. 281.
11. 82 Wash. 2d at 34, 507 P.2d at 1183 (emphasis in original).
12. *Id.* at 35, 507 P.2d at 1184. *See also* O'Neil, *supra* note 10.
13. 82 Wash. 2d at 35, 507 P.2d at 1184.
14. DeFunis v. Odegaard, 416 U.S. 312, 315 (1974).
15. *Id.* at 319-20.
16. 410 U.S. 113 (1973).

Wade, who challenged the constitutionality of anti-abortion statutes, DeFunis "will never again be required to run the gauntlet of the Law School's admissions process, and so the question is certainly not 'capable of reptition' so far as he is concerned."[17]

Justice Brennan in dissent challenged the majority's simplistic resolution of such a complex national issue.[18] Brennan argued that at the time of the rendering of the decision DeFunis was still a student subject to the regulations and control of the University, including possible dismissal.[19] He further noted that the University's position on DeFunis' enrollment in the law school implied no concession that its admissions policy was unlawful and that the University would continue its present admissions policy until ordered to do otherwise by the Court.[20] Observing that at the time the majority stated DeFunis had lost his stake in the controversy, the case had already been fully litigated in the state courts, and briefs had been filed and oral arguments presented in the United States Supreme Court, Brennan concluded that the case was properly in the High Court and ripe for decision on a fully developed record.[21] Most important, however, was Justice Brennan's argument that the majority had done a disservice to the public interest by delaying the inevitable.[22] Noting that twenty-six organizations had filed *amici curiae* briefs, he concluded that an issue of such grave national importance should be met squarely by the Court and not avoided on technicalities.[23]

Certainly the issue presented in *DeFunis* is one of national concern that the Court will not be able to avoid for long. If the Court is waiting for "breathing time" its hope for a respite comes far too late in the nation's inglorious history of race relations. *DeFunis* presented the High Court with issues that far transcend boundaries of the State of Washington. It was not only the compensatory program of the University of Washington to remedy past discriminatory practices that was at issue, but also a national policy of corrective programs aimed at de facto and de jure discrimination. *DeFunis* thrust upon the Court the responsibility of determining the validity of such compensatory programs in all aspects of American life — a responsibility the Court has so far refused to recognize.[24]

Compensatory programs similar to the one in *DeFunis* have been implemented not only in higher education but in other areas as well.[25] *DeFunis,* therefore, dealt not only with the validity of ameliorative or compensatory

17. 416 U.S. at 319.
18. *Id.* at 348-50 (Brenan, J., dissenting).
19. *Id.* at 348.
20. *Id.* at 349.
21. *Id.* at 350.
22. *Id.*
23. *Id.*
24. For example, the Court refused to overturn a First Circuit Court of Appeals decision that upheld a compensatory program in Massachusetts requiring contractors engaged in state public construction work to maintain fixed racial hiring quotas on all jobs. Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974).
25. *See id. See also* B. BITTKER, THE CASE FOR BLACK REPARATIONS 120-21 (1973).

admission policies in higher education, but spoke directly to the problem of determining reasonable methods states may employ to achieve the goals of increasing minority representation in the legal profession, and integrating significant but presently estranged culture groups into the mainstream of American society.[26] Preferential programs are not, as Justice Douglas suggested in his dissent, a device to incorporate within the bounds of ameliorative program guidelines groups so diverse as to defy ethnic labels.[27] Justice Douglas would have an admissions committee base its decisions on "individual attributes, rather than . . . solely on the basis of race."[28] Although Douglas argued that classification on the basis of race conflicts with equal protection,[29] his proposal would certainly dilute the effectiveness of compensatory programs directed toward "disadvantaged" groups and designed specifically to promote equality.

Justice Douglas was the only member of the Court to confront the complex problem of categorizing persons as "disadvantaged." His analysis demonstrated the frustratingly elusive nature of the creature sought to be labeled. If compensatory programs are found to be constitutionally permissible, are blacks and American Indians alone to be admitted to them? What of such groups as Mexican-Americans and Appalachian whites? There is no precise definition for "disadvantaged." Consequently, Justice Douglas would prefer individual evaluation of disadvantaged status. Noting that "there is no superior person by constitutional standards,"[30] he argued that there is, therefore, "no constitutional right for any race to be preferred."[31] Justice Douglas did not consider, however, all the variable degrees of disadvantage. In spite of his zeal for equal protection, or perhaps because of it, he was unwilling to consider degrees and techniques of discrimination or to accept the idea that clearly disadvantaged groups should be identified, where possible, and given preferential treatment if it will aid in bringing them closer to parity wth the "advantaged." Further, within groups identified as "disadvantaged," some are historically more disadvantaged than others. In the United States, blacks have borne greater governmental disrespect[32] than any other group. It is the *law* and the manner of its application that can do harm to a minority when selectively manipulated by the majority. As a result of experiencing an inordinate amount of such disrespect, blacks merit priority status within the "disadvantaged" category. As Professor Hughes points out:

> [The blacks'] need is so pressing that in the short run at least the mere fact of a person's being black in the United States is a sufficient reason for providing compensatory techniques even though that person may in some ways appear fortunate in his personal background.[33]

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26. *See* Ball, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257.
27. 416 U.S. at 332 (Douglas, J., dissenting).
28. *Id.*
29. *Id.* at 334.
30. *Id.* at 337.
31. *Id.*
32. *See generally* Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. REV. 1063 (1968).
33. *Id.* at 1073.

Thus, the general category "disadvantaged," into which blacks are placed, should be distinguished from other descriptive indicators such as "underprivileged," which usually denotes either economic deprivation, educational disadvantage caused by inferior schools, or inadequate knowledge of the English language.

The general category "disadvantaged," as defined in this article, connotes governmental oppression so grievous as to warrant official reparation.[34] American Indians and black Americans historically have been the targets of such oppression.[35] Moreover, it is the black and the Indian who have borne the brunt of hostilities of a racist society. Dr. James Miller has noted that problems resulting from racism include:

> [A] lack of intellectual discipline resulting from poor early schooling, an impoverishment of opportunities to obtain general knowledge, and a hopelessness of being able to profit from the fruits of learning in a prejudiced society. The anxiety, dependency, and defensiveness elicited by all this are as handicapping as the much more obvious disabilities that hinder the learning process in some other students . . . .[36]

Although many minority groups in the United States have experienced an alienation from American society, only black Americans and American Indians have suffered from discriminatory legislative, executive, and judicial pronouncements regulating their conduct.[37] Studies by the National Advisory Commission on Civil Disorders report the explosive quality of blacks' rejection of the institutions of law and government and the white society that controls them.[38]

Social scientists recognize that most social change takes form through the rule and operation of law.[39] Unfortunately, in regard to the minority population, the legal profession itself has failed to effectuate necessary internal changes. Law schools have been especially slow in opening their doors to minority students.[40] A history of racial discrimination and systematic exclusion in the legal field has resulted in an image of lily-white justice and the gross underrepresentation of a substantial minority population.[41]

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34. *Id. See also* B. BITTKER, *supra* note 25.

35. *See generally* D. BELL, RACE, RACISM AND AMERICAN LAW (1973); B. BITTKER, *supra* note 25; B. FOGEL & S. ENGERMAN, TIME ON THE CROSS (1973); Kerr, *Constitutional Rights, Tribal Justice, and the American Indian,* 18 J. PUB. L. 311 (1969); Note, *The Indian: The Forgotten American,* 81 HARV. L. REV. 1818 (1968).

36. Miller, *Minority Student Burdens from Racism,* in LEGAL EDUCATION ADVANCE PLANNING, AN INTRODUCTORY STUDY OF MINORITY STUDENT DEVELOPMENT POTENTIALS 105 (Dec. 1971) [hereinafter cited as *Minority Student Burdens*].

37. *See* D. BELL, *supra* note 35.

38. RIOT COMMISSION, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS (1968) [hereinafter cited as CIVIL DISORDERS].

39. *See* Henderson, *New Roles for the Legal Profession,* in RACE, CHANGE, AND URBAN SOCIETY 483 (Orleans & Ellis eds. 1971).

40. *See Minority Student Burdens, supra* note 36.

41. *See* L. LITIUACK, NORTH OF SLAVERY 113-17 (1961); Franklin, *History of Racial Segregation in The United States,* 34 ANNALS 1-5 (1956). *See also* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); State *ex rel.* Hawkins v. Board of Control, 93 So. 2d 354 (Fla. 1957);

There exists, then, a legacy of past governmental and societal discriminatory practices that established, as the Washington supreme court recognized, a compelling need for affirmative action. Discriminatory state practices pervade the entire process of legal education, including: failure to adequately prepare minority students to compete for admission into law schools;[42] failure to provide minority students with a sound legal education;[43] and failure to insure equal access to job opportunities for minority law graduates.[44]

PRE-LAW PREPARATION FOR MINORITY STUDENTS

The degree of deprivation suffered by blacks is demonstrated by the simple fact that they are often unable to compete successfully for admission to law schools because of the inadequacy of their elementary and secondary education.[45] The history of education for the black American is short. As late as the post-Civil War period every southern state had laws declaring that meetings held to teach blacks to read and write constituted "unlawful assemblies." Black participants were flogged and whites who helped to teach blacks were jailed and fined.[46] In the South and in the residentially separate North, the public saw little value in educating blacks for other than vocational pursuits. The expectation level for blacks was well below the white norm, a prophesy that has proved self-fulfilling — especially in education.[47] In 1956 it was reported that children in Massachusetts' de facto segregated schools were as much as three years behind children in other schools in the state. In Atlanta, children in black schools were reading three grade levels below children in white schools.

Educators and social scientists have accumulated a large body of evidence supporting the conclusion that racial separation has a powerful and injurious impact on the self-image, confidence, motivation, and educational achievement of black children.[48] In *Brown* the United States Supreme Court pointed to the

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Blacks and the Law, 407 ANNALS 147 (1973); Toles, *supra* note 10; *Survey of Minority Group Students in Legal Education*, 24 J. LEGAL ED. 487 (1972).

42. *Cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Brown v. Board of Educ., 347 U.S. 483 (1954).

43. Florida *ex rel.* Hawkins v. Board of Control, 350 U.S. 413 (1956); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

44. C. WOODSON, THE NEGRO PROFESSIONAL MAN AND THE COMMUNITY (1934); Haynes, *The Negro Federal Government Worker*, 3 HOWARD UNIV. STUDIES IN SOCIAL SCI. 9.81-.82 (1941); Note, *The Negro Lawyer in Virginia: A Survey*, 51 VA. L. REV. 521 (1965).

45. J. GOOD, A HISTORY OF AMERICAN EDUCATION (1956).

46. *Id.* at 267.

47. J. GOOD, *supra* note 45; J. KOZOL, DEATH AT AN EARLY AGE (1967); *Minority Student Burdens*, *supra* note 36. *See also* A. HALEY, THE AUTOBIOGRAPHY OF MALCOLM X (1964) (description of effect of respected teacher's dismissal of goal of career in law for child because he was black).

48. *E.g.*, U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967); *The Effects of Segregation and the Consequences of Desegregation*, 37 MINN. L. REV. 427 (1953) (reprint of brief for Appellants in the school segregation cases). *See also* Gregor, *The Law, Social Science, and School Segregation: An Assessment*, 14 WES. RES. L. REV. 621 (1963); Lewis, *Perry and Riposte to Gregor*, 14 WES. RES. L. REV. 637 (1963).

inherently adverse effects of racially imbalanced school systems upon the class discriminated against.[49] Until very recently, states, despite *Brown,* continued to maintain separate school systems for majority and minority races.[50] A glaring disparity existed between the quality of facilities and instruction afforded black and white Americans.[51] The curriculum varied substantially between the white high school and the black high school,[52] and, even where there was only one high school there existed the probability of a tracking system whereby blacks were programmed into vocational-technical training.[53]

When black students emerge from such school systems they are not able to perform on the same level as their white counterparts. In integrated universities the mean cumulative grade point average is lower for black students than for white students,[54] and admission test scores for professional schools follow the same pattern. The many criticisms of present college and professional school entrance examinations, most of which were collected by Justice Douglas in his dissent in *DeFunis,*[55] have led reformers to attempt to create culturally unbiased tests. Content of the tests, however, may not be the only problem; indications are that disadvantaged children develop a negative attitude toward examinations that adversely affects their test-taking technique.[56]

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49. 347 U.S. 483, 493-95 (1954).

50. *See, e.g.,* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), *rehearing denied,* 414 U.S. 883 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Griffin v. County School Bd., 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958). *See also* Maynard, *The* Brown *Decision: 20 Years Later,* Wash. Post, May 12, 1974, at 1, col. 1.

51. *See, e.g.,* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Serrano v. Priest, 4 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). *See also* Berke, *School Finance and Inequality of Educational Opportunity,* in J. BERKE, A. CAMPBELL & R. GOETTEL, FINANCING EQUAL EDUCATIONAL OPPORTUNITY: ALTERNATIVES FOR STATE FINANCE 1, 5-10 (1972).

52. Kirp, *The Poor, the Schools and Equal Protection, Educational and Legal Structure,* 38 HARV. EDUC. REV. 635 (1968).

53. *See* KOZOL, *supra* note 47.

54. *See* Gellhorn, *The Law Schools and the Negro,* 1968 DUKE L.J. 1069, 1089-92.

55. 416 U.S. at 320-45. Whether the LSAT is so culturally biased as to render it unreliable as a predicter of first-year law school performance for black students was not at issue in *DeFunis.* 82 Wash. 2d at 40-41, 507 P.2d at 1186-87, wherein the Supreme Court of Washington examined the validity of the LSAT under the rationale of Griggs v. Duke Power Co., 401 U.S. 424 (1971). Mr. Justice Douglas, in his dissent in *DeFunis,* resurrected the issue of cultural bias in the LSAT. See DeFunis v. Odegaard, 42 U.S.L.W. at 4586, wherein Douglas argues that "[t]he key to the problem is consideration of such applications in a *racially neutral way.* Abolition of the LSAT test would be a start. The invention of substitute tests might be made to get a measure of an applicant's cultural background, ability to analyze, and his or her relation to groups. They are highly subjective, but unlike the LSAT they are not concealed, but in the open." 416 U.S. at 340.

56. "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." R. GOLDENSON, THE ENCYCLOPEDIA OF HUMAN BEHAVIOR 284 (1969).

Poor grades and test scores thus do not prove that black students lack ability.[57] In fact, there is a considerable body of research suggesting that numerical indicators of academic ability derived from traditional testing are unreliable in predicting minorty performance.[58]

HISTORICAL STATE COMMITMENT TO LEGAL EDUCATION FOR BLACK STUDENTS

Just as past state action has denied minority students an equal chance to compete for admission to law schools, it likewise has discouraged their participation in legal education. This is first caused by societal pressures that discourage minority youths from aspiring to a legal career. The most highly qualified blacks have traditionally gone into medicine, teaching, and social work. According to Professor Gellhorn, blacks' interest in the law as a profession has been limited primarily by: (1) belief that there is a dual justice system that discriminates against minorities; (2) limited financial potential for minority lawyers; (3) the expense of a legal education; (4) inadequately developed communication skills; (5) ignorance of professional opportunities in the law; and (6) failure to understand the scope of the legal system.[59]

In addition, many minority children have had little or no opportunity to observe from a positive perspective the activities of lawyers, judges, or law enforcement officers, or to find role models from their minority group in these positions. This absence of models has contributed to ignorance and misunderstanding of the legal profession.

Furthermore, until very recently the legal system has made no place for even the most qualified of minority students.[60] Although the first black graduated from an American law school (Harvard) in 1869, there remained law schools in 1971 that had never had a black graduate.[61] In most southern states, law schools and bar associations completely denied entrance to minority students even after the 1950 decision in *Sweat v. Painter*[62] and the 1957 ruling in *Florida* ex rel. *Hawkins v. Board of Control.*[63] In many places the situation has not greatly improved. As late as 1968 the University of Alabama had no blacks in the law school and had not graduated a single black lawyer.[64] In pre-

57. *See* L. EHRMAN, G. OMEN & E. CASPARI, GENETICS, ENVIRONMENT, AND BEHAVIOR: IMPLICATIONS FOR EDUCATIONAL POLICY (1972); *Minority Student Burdens, supra* note 36; O'Neil, *Preferential Admissions,* 80 YALE L.J. 699 (1971).

58. *See* Fleming & Pollack, *The Black Quota at Yale Law School,* 19 PUB. INTEREST 44 (1970); Gozanski & De Vito, *An Enlightened Comparison: The Relevant Strengths and Weaknesses of the CLEO Program and the Pre-Start Program of Emory University,* 1970 U. TOL. L. REV. 719; Scoles, *Challenge and Response in Legal Education,* 48 ORE. L. REV. 129 (1969); Comment, *Current Legal Education of Minorities: A Survey,* 19 BUFFALO L. REV. 639 (1970).

59. Gellhorn, *supra* note 54.

60. *Id.* at 1069.

61. Atwood, James & Long, *Survey of Black Law Student Enrollment,* 16 STUDENT LAW. J. June 1971, 18, 36-38.

62. 339 U.S. 629 (1950).

63. 350 U.S. 413 (1956). *See* Florida *ex rel.* Hawkins v. Board of Control, 93 So. 2d 354 (Fla.), *cert. denied,* 355 U.S. 839 (1971).

64. Gellhorn, *supra* note 54, at 1081.

dominantly white universities and law schools, blacks were rarely seen.[65] Indiana University, for instance, had 27,000 undergraduates in 1968, including 1,700 blacks. Yet, Indiana had only three black law students enrolled during the 1967-1968 academic year.[66] Not until 1965 were all member institutions of the American Association of Law Schools able to assert that admission was denied to no applicant on the ground of race or color; and until 1968 there were only 200 blacks among the 10,000 students graduating annually from the nation's law schools.[67] Such discriminatory practices have resulted in a dearth of black attorneys. In 1968 black attorneys numbered only 3,000 among the more than 300,000 lawyers in the United States. Thus, although blacks were 12.5 per cent of the nation's population, less than one per cent of attorneys were black. In 1970 there was one lawyer for every 637 persons in the United States, yet there was only one black lawyer for every 7,000 blacks. Only 14 of the 800,000 American Indians were attorneys.[68]

The State of Washington, according to data in *DeFunis,* mirrors the national figures. In 1970 the population of the State of Washington was 3,409,169. Black Americans accounted for 71,308 or 2.1 per cent and American Indians made up one per cent of the population.[69] In 1970 there were approximately 4,550 active members of the Washington State Bar Association, only twenty of whom were black. There was one white lawyer for every 720 whites, one black lawyer for every 4,195 blacks, and only one American Indian lawyer for every 6,677 American Indians in the state.[70] As the Washington supreme court observed: "[M]inorities have been, and are, grossly underrepresented in the law schools — and consequently in the legal profession — of this state and this nation."[71]

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65. LeFlar, *Legal Education: Desegregation in Law Schools,* 43 A.B.A.J. 145 (1957).

66. Gellhorn, *supra* note 54, at 1081.

67. *Id.* at 1077-80.

68. *Minority Student Burdens, supra* note 36, at 65.

69. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, GENERAL POPULATION CHARACTERISTICS OF THE STATE OF *WASHINGTON,* tables 17-18 (1973).

70. Morris, *Equal Protection, Affirmative Action, and Racial Preferences in Law Admission,* DeFunis v. Odegaard, 49 WASH. L. REV. 1, 35-41 (1973). Figures for the State of Florida in 1970 present an even more compelling need for compensatory programs at the state universities. In 1970 there were 5,719,343 white Floridians. The Florida Bar Association numbered 15,649 white attorneys, or one attorney for every 365 citizens. In 1970 the black population in Florida was 1,041,000. There were 86 practicing black attorneys, or one black attorney for every 12,104 black citizens. This is not an argument for proportional representation, but merely demonstrates the lack of black entry into the legal profession.

71. 82 Wash. 2d at 32-33, 507 P.2d at 1182. *See also* Morris, *supra* note 70, at 39-40: "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.

UNEQUAL ACCESS TO JOB OPPORTUNITIES FOR BLACK LAWYERS

The third manifestation of state responsibility for the small representation of minority lawyers in the Bar has been the absence of equal job opportunities for black Americans,[72] the result of the long segregationist history of America, and states' failure to implement programs to rectify vestigial prejudice in hiring practices. An initial question that should be addressed is: Why is it so important for minority groups to enter the legal profession that the fourteenth amendment must be severely tested to accomplish it? The answer has been simply stated:

> [T]he 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, as 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?[73]

The functions of the University of Washington School of Law are similar to those of most other law schools — to prepare the student for either public service, the practice of law, law teaching, or legal research. The state-supported law school supplies the state and the nation with social innovators. From the state universities emerges the main body of state political leadership.[74]

As long as minority groups remain underrepresented in the legal field, a large percentage of the nation's population will likewise be underrepresented in positions of influence and power. They will continue to suffer disillusionment with, and alienation from, the legal system through which law and order are maintained, seeking other, possibly violent, means to reach their goals.[75]

In addition to providing access to the sources of lawful power, an increase in the number of minority lawyers could help to improve the national economy and reduce crime. It has been asserted that if black Americans were assimilated into predominantly white socio-economic strata the result would significantly raise the gross national product and cause proportionate decrease

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"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 groups 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."

72. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967). *See also* Morris, *supra* note 70.

73. Atwood, James & Long, *supra* note 61, at 20.

74. Morris, *supra* note 70, at 41-42.

75. *See* CIVIL DISORDERS, *supra* note 38.

in crime.[76] Thus, as the Supreme Court of Washington noted in *DeFunis,* the shortage of minority attorneys with the consequent shortage of minority prosecutors, judges, public officials, governors, and legislators constitutes an undeniably compelling state interest. "If minorities are to live within the rule of law, they must enjoy fair representation within the legal system."[77]

There is, then, a serious deprivation to be remedied. Minority groups are denied both access to legal education and equal representation in the legal profession. Surely the inequities discussed above are enough to establish a state interest sufficiently compelling to allow the remedy of preferential admissions chosen by the University of Washington. Preferential admissions do help accomplish the desired goal.[78] Until 1968 there were about 200 blacks out of 10,000 students graduating annually from American law schools.[79] Since the advent of compensatory programs, however, black student enrollments have greatly increased.

Utilization of Compensatory Programs Is Permissible when Related to a Valid State Interest

The University of Washington utilized race as one factor in selecting students for law school admission. Before the state supreme court's decision in *DeFunis v. Odegaard,* courts had not squarely faced the issue of whether ameliorative racial classification for academic admission is invidious, and thus subject to rigid scrutiny. Neither had they addressed the question of whether a state university could demonstrate that the use of such policy was essential to the achievement of a compelling governmental objective.

Governmental utilization of race, similar to that at issue in *DeFunis,* has already withstood constitutional attack. Where classification based on race is employed to eliminate discriminatory effects of the past, it has been held valid.[80] Such approved compensatory plans include: ordering unions immediately to enroll a specific number of qualified minority applicants;[81] filling thirty per cent of a union's apprentice classes with blacks;[82] hiring one minority fireman for every two whites hired;[83] and granting priorities in hiring to minority members applying for positions on a police force.[84] Additionally, affirmative action plans have received acceptance by the courts where they have been utilized to achieve specific, realistic minority repersentation goals.[85]

76. *See* Joint Econ. Comm'n, 1964 Joint Economic Rep. No. 931, 88th Cong., 2d Sess. 61 (1965).

77. 82 Wash. 2d at 32, 507 P.2d at 1184.

78. *See* Gellhorn, *supra* note 54, at 1081-85.

79. *Id.* at 1077.

80. *Cf.* Louisiana v. United States, 380 U.S. 145, 154 (1965).

81. *See* United States v. Wood, Wire & Metal Lathers Local No. 46, 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973).

82. United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971).

83. Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972).

84. Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

85. Specific percentage goals and timetable plans have been approved. *See* Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd,* 471 F.2d 680 (7th Cir. 1972)

It is true that racial classifications are ordinarily considered to be inherently divisive. Thus, as DeFunis argued and Justice Douglas noted, the power to classify on the basis of race could be dangerous.[86] Nevertheless, when legislatures have enacted laws based in part upon racial distinction, courts have generally taken the position that the classification could be sustained if it were rationally related to a compelling state interest, if it were not invidious and if it provided a rational means of implementing that interest.[87] In *DeFunis* the Supreme Court of Washington utilized the compelling state interest doctrine in reaching its conclusion that the compensatory program was a valid state activity. The court found the state had demonstrated the existence of a compelling state interest in three areas: (1) the need to eradicate effects of past discrimination;[88] (2) the need to establish a more racially balanced law student community so that the graduates could better cope with the complexities of the modern American community;[89] and (3) the need to alleviate the critical shortage of minority attorneys in the legal profession.[90]

In *DeFunis* it was necessary for the state to demonstrate a compelling reason to employ preferential admissions because the action created a classification that resulted in unequal treatment of individuals, which appeared to be based exclusively upon the plainly suspect criterion of race. In the event that the state cannot demonstrate an overriding need for such a classification, the courts sacrifice the state interest to protect the constitutional safeguard in jeopardy.[91] In *DeFunis* the state's classification appears to be based solely upon race. Yet, it demonstrates the kind of circumstances that might successfully support compelling need for racially oriented compensatory programs.

The Classification in DeFunis *Was Not Invidious*

Case law has established that preferential programs enhancing minority

(Ogilvie Plan); Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (Philadelphia Plan); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970) (Cleveland Plan).

86. 416 U.S. at 336-38 (Douglas, J., dissenting).

87. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970); Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966). *See also* Comment, *Ameliorative Racial Classifications Under the Equal Protection Clause:* DeFunis v. Odegaard, 1973 DUKE L.J. 1126.

88. 82 Wash. 2d at 33-35, 507 P.2d at 1182-83.

89. *Id.* at 35, 507 P.2d at 1183-84.

90. *Id.* at 35, 507 P.2d at 1184.

91. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342 (1972). The question of whether a fundamental constitutional right is involved in the preferential admissions issue was not addressed in *DeFunis*. The United States Supreme Court has yet to classify education as a fundamental right. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). The closest the Court has come to date is the oft-quoted dictum in Brown v. Board of Educ., 347 U.S. 483, 493 (1954), that: "Today, education is perhaps the most important function of state and local governments. . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms." Thus, it appears that considerations of race in admissions decisions will be tested only against the equal protection clause of the fourteenth amendment.

access to the mainstream of American society are not "invidious" because the goal of compensatory programs is not the separation of the races but the equalization of two cultures within one society.[92] As one commentator has explained:

> [T]he function of equal protection . . . is to shield groups or individuals from stigmatization by government. Whether or 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.[93]

In many areas the courts have frequently held that an overly technical interpretation of equal protection must be relaxed where other goals are paramount. For example, in housing and employment cases racial classifications have been allowed.[94] Likewise, in elementary and secondary education the goal of equal opportunity for all is viewed as so important that racial classifications are considered permissible.[95] School boards that have consciously segregated students in the past must now use racially conscious policies to bring students together.[96] Thus, racial classifications are permissible when utilized to eradicate the vestiges of a segregated society. Although most courts have held that a state need not affirmatively act to end 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 racial segregation.[97] Indeed, where governmental action or inaction inadvertently bars blacks from jobs, housing, or school benefits, the courts have stepped in to fashion remedies to cure the discrimination.[98]

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92. *See* cases cited in Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, at 16-17 (1st Cir. 1973). Classification schemes, including percentages, have been approved where the purpose was to correct racial discrimination. Note, *Race Quotas,* 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 128 (1973).

93. 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).

94. *See, e.g.,* Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973); Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968).

95. *See, e.g.,* United States v. Board of Pub. Instruction, 395 F.2d 66 (5th Cir. 1968); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966); Wanner v. County School Bd., 357 F.2d 452 (4th Cir. 1966); United States v. Plaquemines Parish School Bd., 291 F. Supp. 841 (E.D. La. 1967); Hobson v. Hansen, 267 F. Supp. 401 (D.D.C. 1967); Offerman v. Nitkowski, 248 F. Supp. 129 (W.D.N.Y. 1965).

96. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

97. *See, e.g.,* Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 16 (1st Cir. 1973); Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973).

98. In Carter v. Gallager, 452 F.2d 315 (8th Cir. 1971), the court required police and fire departments to hire one qualified minority person for every three whites until a certain percentage of minority employees had been hired, even if this process resulted in bypassing more qualified white applicants. In Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971), the court rejected an equal protection claim and

Similarly, there is a major difference between a quota enforced against a minority and a program of controlled preference designed to improve the status of a disadvantaged group.[99] The former is constitutionally impermissible invidious discrimination; the latter has the approval of many state and federal courts. Thus, it is not quite accurate to say that a white student like DeFunis is "discriminated against" simply because a given black student is preferred. Moreover, the remedial program is, by its very nature, a temporary measure constructed to cure a specific ill and then to disappear, whereas an exclusionary quota is self-perpetuating. Consequently, prohibition against quotas should not lead to the conclusion that remedial and affirmative action programs are likewise to be forbidden. The two are sufficiently different that meaningful distinction can be made by the courts.

There Can Be a Compelling State Interest in Racial Classification

The United States Supreme Court has held that racial classifications can be made part of programs that further overriding or compelling state interests.[100] In *McLaughlin v. Florida*[101] the United States Supreme Court required proof that racial classification was intended to remedy effects of past racial discrimination. In *Brooks v. Beto*[102] the Fifth Circuit Court of Appeals held that the intentional inclusion of blacks on a grand jury was a permissible means of remedying the effects of past racial discrimination. Likewise, affirmative action programs 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 As-*

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required certain unions to follow pre-established guidelines for minority hiring and training. The case arose out of an Executive order issued by President Johnson, Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *as amended*, Exec. Order No. 11,375, 5 C.F.R. 684 (1967-1970), an attempt by the President to implement titles VI and VII of the 1964 Civil Rights Act, 42 U.S.C. §§1971, 1975a-d, 2000. The order required affirmative action in minority hiring by government contractors and all other contractors working on federally-assisted projects. Under the order the Secretary of Labor promulgated percentage goals in hiring of minorities. Each plan was designed for a specific region. Racial percentages have also been utilized by the courts in attempting to eliminate past discriminatory practices in school districts. Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 985 (1971).

99. *Cf.* Kahn v. Shevin, 416 U.S. 351 (1974).

100. Hirabayashi v. United States, 320 U.S. 80 (1943); Korematsu v. United States, 323 U.S. 214 (1944), established the doctrine of "compelling state interest." There the Supreme Court, in a series of decisions, upheld classifications of Japanese-Americans for purposes of taking them from their homes and placing them in "detention" centers for the duration of World War II. The compelling national interest, said the Court, was in the successful waging of war against the Japanese Empire. *See* Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945). Not since the Japanese internment cases has a state been able to show a compelling state interest in classifying on the basis of race. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

101. McLaughlin v. Florida, 379 U.S. 184 (1964). *See also* Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968).

102. 366 F.2d 1 (5th Cir. 1966).

sociation of Eastern Pennsylvania v. Secretary of Labor.[103] Thus, eradication of segregation in a variety of social and economic institutions is recognized as vital to a state's best interests.

Additionally, the intentional use of racial classification by the state is not only a reasonable means of implementing the compelling state interest in having greater minority representation in the legal profession, it may be the only means.[104]

NECESSITY FOR RACIAL CLASSIFICATION

It is unfortunate that the Supreme Court chose to utilize a technicality to avoid a decision on the merits in *DeFunis,* for the complex issue presented cannot be dealt with as an ordinary "law suit."[105] The Court's failure to articulate substantive guidelines in the matter propounded to the Court in *DeFunis* only weakens the Court's position as "Republican Schoolmaster."[106] Manifestly, the precise issues presented in *DeFunis* cannot be viewed solely as an individual state's problem. The mobility that characterizes American society, especially in the academic and professional communities,[107] and the underrepresentation of blacks in the legal community make it apparent that the issues involved are of national proportions.

Yet, as the Court sits and waits for the perfect, procedurally correct case, more than 12.5 per cent of the nation's population must continue to struggle without high court sanction in search of a means that will aid them in achieving fair representation in the legal system. Perhaps more than anything it is the Court's *failure* to announce constitutional support for needed compensatory programs that will exacerbate the disillusionment with the educational system and the legal system that minorities already feel. American courts at all levels have made it clear that the Constitution is color-conscious where race is used to prevent perpetuation of discrimination and to undo the effects of past segregation.[108]

As the Supreme Court noted in *Green v. County School Board,*[109] past state

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103. 311 F. Supp. 1002, 1009 (E.D. Pa. 1970), *aff'd,* 442 F.2d 159 (3d Cir. 1971). *See also* Morris, *supra* note 70, at 35-46.

104. *Cf.* Morton v. Mancari, 94 S. Ct. 2474 (1974) (employment preference for Indians in the Bureau of Indian Affairs did not constitute invidious racial discrimination because rationally designed to further Indian self-government).

105. *See generally* Baldwin, *The United States Supreme Court: A Creative Check of Institutional Misdirection?,* 45 IND. L.J. 550 (1970).

106. *Id.* at 559.

107. *Minority Student Burdens, supra* note 36, at 125-28.

108. "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 most intransigent and deeply rooted inequalities. Intentional, official recognition of race has been found necessary to achieve fair and equal opportunity [in grand jury selection, public housing, and education]." Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 16 (1st Cir. 1973). See the collection of cases cited in O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education,* 80 YALE L.J. 699, 707-09 (1971).

109. 391 U.S. 430 (1968).

discriminatory practices have so adversely affected educational programs for blacks that the burden now rests upon school boards to formulate plans that promise to work realistically, and to work *now*. Judge Sobeloff in *Bowman v. County School Board*[110] stated: "The school officials have the continuing duty to take *whatever action may be necessary* to create a 'unitary non-racial system.' "[111] In *Springfield School Committee v. Barksdale*,[112] the court noted:

> [R]acial imbalance disadvantages Negro students and impairs their educational opportunities as compared with other races to such a degree that they have a right to insist that the defendants consider their special problems along with all other relevant factors when making administrative decisions.[113]

But as suggested earlier the question at issue is not confined to school admissions. For example, in *Porcelli v. Titus*[114] white teachers alleged that the local school board, by abolishing the regular schedule for selecting principals and vice principals, was discriminating against them in favor of black candidates. In upholding the board's judgment to eliminate the ordinary promotion system in order to integrate the system's facilities, the court stated that state action based partially on considerations of color is not necessarily a violation of the fourteenth amendment when such considerations are used to further a proper governmental objective.[115] The emphasis rested upon the achievement of a valid state interest. In some situations the means of achieving a valid state interest may appear to be administratively awkward or inconvenient, or may even impose burdens on some. Such adverse effects cannot always be avoided ,however, in interim periods when adjustments are being made to eliminate dual school systems.[116] The fact that preferential admissions decisions will be difficult should not dissuade courts from approving or even requiring they be made to rectify a recognized social injustice. There is a compelling need to correct the underrepresentation of minorities within the legal community. Arguments that this cannot be done by preferential programs because of the difficulty of selecting fairly who is to be preferred are not persuasive. The appropriate minority groups are well identified:

> Those racial minorities who not only have been underrepresented, but who have disproportionately been (a) victims of overt racial discrimination; (b) socio-economically disadvantaged; (c) unfairly appraised by standardized tests; and who are (d) graduates of over-crowded, run-down and badly-staffed high schools. Most Black, Spanish-American and American Indian applicants clearly meet these criteria and therefore present the strongest claim for special consideration.[117]

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110. 382 F.2d 326, 333 (4th Cir. 1967) (concurring opinion).
111. *Id.* (emphasis added).
112. 348 F.2d 261 (1st Cir. 1965).
113. *Id.* at 264.
114. 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).
115. *Id.* at 1257.
116. 402 U.S. at 28.
117. O'Neil, *supra* note 108, at 750.

The most succint expression of the compelling need for preferential admissions programs for law schools appears in the majority opinion of the Supreme Court of Washington in *DeFunis*:

> It has been suggested that the minority admissions 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 schools through direct competition with nonminority applicants on the basis of the same academic criteria. This would be highly desirable, but 18 years have passed since the decision in *Brown v. Board of Education* [citation omitted], 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.[118]

More than twenty years have now passed since *Brown*. Minority groups still do not have meaningful access to professional education; the unfortunate legacy of past state action remains.

The case law is clear. The states may identify and correct serious racial imbalance where state action has deprived an identifiable group of equal opportunity. Those minorities that have in the past been systematically shut out of the legal profession can surely lay claim to such corrective programs. This is not advocacy of a notion of paternalism;[119] rather it is belated recognition of a constitutional duty. The Supreme Court's refusal to hear the *DeFunis* case is an avoidance of its responsibility authoritatively to legitimatize affirmative state programs designed to compensate for past segregationist policies. The need for greater minority representation is so great, and the remedies of preferential admissions so apt and the legal precedent so strong that it is difficult to explain, much less justify, the Court's failure to respond.

118. 82 Wash. 2d at 36, 507 P.2d at 1184.
119. See Haskell, *Legal Education on the Academic Plantation*, 60 A.B.A.J. 203 (1974).