North Dakota Law Review

Volume 50 | Number 1 Article 11

1973

Constitutional Law - Public Schools - A Challenge to Preferential Minority Admissions

Sheryl Ramstad

with the owner furnishes no reason why the negligence of the latter should be excused.' "[43] Therefore, *Johnson v. Hassett*,[44] relying on the rationale of *Brown v. Merlo*,[45] should be viewed as a precedent-setting ruling by other courts in North Dakota.

The purposes of the guest statutes were to prevent "the proverbial ingratitude of the dog that bites the hand that feeds him,"[46] and to prevent collusive suits. However, the statutes go much further. Recovery under these statutes is denied in every case where the passenger is a gratuitous guest and the defendant is guilty only of negligence. As a result, many claims where no collusion is attempted or no ingratitude is shown are forbidden in their inception, and the burden of loss is shifted to the one who is less able to withstand it. Furthermore, the courts had difficulty in applying the statutes and as a result every state has a unique statute buried in confused case law.[47] The courts have also had problems harmonizing the provisions of the guest statutes and the common law, since our law has long held that one who undertakes to act must act with a due regard for the safety of others. The value that our people place on human life and safety is clear. The ruling in the instant case is important precedent for the abolition of the guest statute which can no longer be justified either legally or socially.

MARY MUEHLEN

CONSTITUTIONAL LAW—PUBLIC SCHOOLS—A CHALLENGE TO PREFERENTIAL MINORITY ADMISSIONS

Petitioner was denied admission to the first-year class at the University of Washington School of Law.[1] He alleged that lesser qualified minority students were admitted to the class as a result

43. Brown v. Merlo, 8 Cal. 3d 855, 867, 506 P.2d 212, 220, 106 Cal. Rptr. 388, 396 (1973), *quoting* Hewlett v. Schadel, 68 F.2d 502, 507 (4th Cir. 1934).

44. Johnson v. Hassett, No. 138A (Ramsey County, N.D., Aug. 2, 1973), *appeal docketed*, No. 8968, N.D. Sup. Ct., Oct. 18, 1973.

45. Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

46. Crawford v. Foster, 110 Cal. App. 2d 81, 87, 293 P. 841, 843 (1930).

47. Among the various problems confronting the courts are: Can an owner be a guest in his own car if someone else is driving? What if a child is not old enough to know that he is a guest? What about a guest who wants to get out of a car but is not allowed to do so? Is a guest who is injured a moment after he leaves the car still a "guest"? The problems appear endless.

1. The Court found that, on the facts presented, petitioner had standing to sue. Although there was no way of telling whether petitioner would have been admitted to the class regardless of the number of minority students accepted, his interest constituted the requisite "personal stake . . . to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1177 (1973), *quoting* Baker v. Carr, 396 U.S. 186, 204 (1962); *accord*, Flast v. Cohen, 392 U.S. 83, 99 (1968).

of the preferential admissions policy employed.[2] After respondent law school[3] had been temporarily enjoined[4] from filling petitioner's position, the Superior Court of Washington for Kings County ruled that the school had discriminated against petitioner in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and ordered his admission three days following the commencement of the 1971-72 school year.[5] On appeal, the Supreme Court of Washington *held*, inter alia, that the racial and ethnic background of applicants could be considered by the law school as one factor in selecting its student body. *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

In considering the constitutionality of preferential minority admissions, the threshhold question is whether a state law school can create racial classifications or whether it must be neutral and color blind in its approach. There is some authority for the view that the Constitution is "color-blind"[6] and that therefore racial classifications may not be used for any governmental[7] purpose. This position created a constitutional dilemma, however, in that neutral responses to prior discrimination reinforced its effects, but affirma-

---

2. The court dismissed petitioner's due process attack on other admissions procedures. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1187 (1973).

In considering the applicant files, the Law School Admissions Committee removed the files of those applicants who had identified themselves as members of minority races, to be considered by a sub-group of the committee deemed particularly competent to evaluate them. Within this group were some applicants whose mechanical credentials were lower than some of the non-minority applicants but whose records showed the committee they had a high probability of succeeding in law school.

Minority and non-minority applicants' records were then subjected to a formula consisting of a combination of Junior-Senior grade-point averages and scores from the nationally-administered Law School Admissions Test. These two factors combined to provide a "predicted first-year average." In close cases, the law school took into account such things as recommendation letters, academic standards of the undergraduate school attended, and quality and consistency of academic records. *Id.* at 1173-75.

3. Defendants in the original action included the President of the University of Washington; Dean of the University of Washington Law School; three members of the Law School Admissions Committee; seven Regents of the University; the Registrar of the University; and the University of Washington. Brief of Respondents at 1, DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

4. It is to be noted that Mr. DeFunis is currently in his final year at the law school by reason of the initial order entered by the Superior Court of the State of Washington. The order, though reversed by the Supreme Court of the State of Washington, is still in effect due to the stay entered pending final determination by the United States Supreme Court. Respondents' Brief for Motion of Dismissal of Appeal at 6, DeFunis v. Odegaard, No. 73-235 (U.S.Sup.Ct., filed Sept. 12, 1973).

5. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 2169, 1172 (1973); Note, 52 B.U.L. REV. 304 (1972).

6. Plessy v. Fergusson, 163 U.S. 537, 559 (1896) (dissenting opinion). Mr. Justice Harlan was writing in the context of discrimination against, rather than preferential treatment for, minority groups; but the interpretation of the equal protection clause over the years has suggested that the motive behind a racial classificaion may be irrelevant. O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U.TOL. L. REV. 281, 288.

7. The law school officials are delegates of broad discretionary power granted by the legislature to the regents of the university to establish admissions requirements. WASH. REV. CODE ANN. § 28 B.10.050 (1970).

In support of its motion to dismiss the appeal now before the United States Supreme Court, the respondents argue that "this 'policy' should not be equated with a 'legislative act'. . . . The real act challenged here is the discretionary one. . . ." Respondents' Brief, *supra* note 4, at 8. However, it does not follow from the fact that an act is discretionary that it is not state action challengeable in the courts. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1254-69 (1970).

tive efforts to redress the balance produced inequality of a different sort.[8] As a result, the United States Supreme Court began to recognize that formal equality often results in great inequality.[9] Consequently, in determining what courses of action should be available in solving the problems arising from past discrimination, it is necessary to look behind the classification.[10]

At first glance, *Brown v. Board of Education*[11] might be read to prohibit color classifications in educational matters entirely. Recent decisions, however, have undermined such an interpretation by requiring the state to be color conscious to undo previous unconstitutional discrimination.[12] Where a racial classification has been used to insure against rather than to promote deprivation of equal educational opportunity, it has generally been upheld.[13] In this light, the principle of color blindness forbids discrimination only when valid reasons cannot be given to justify the differential treatment.[14]

---

8. O'Neil, *supra* note 6, at 281.

9. The term "formal equality" as used herein is intended to mean that the same standards are applied to all men, regardless of race. Kaplan, *Equal Justice in an Unequal World*, 61 NW.U. L. REV. 363 (1966).

10. *See* Hamm v. Virginia State Board of Elections, 230 F. Supp. 156 (E.D. Va. 1964). The court upheld a Virginia law requiring that every divorce decree indicate the race of the husband and wife. The designation of race aided "vital statistics." And, in Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), the court permitted systematic inclusion of black jurors in the trial of a black defendant.

These two cases suggest that racial classifications are not per se unconstitutional, even though the purpose may be to maintain separate records based on racial data. However, in such analogous contexts, members of the majority suffered little, if at all, from explicit racial preference so that the impact may have been far less discriminatory than in the instant case. Furthermore, in these cases the agency using the classification had a constitutional duty to achieve racial balance. O'Neil, *supra* note 6, at 289-93.

11. Brown v. Board of Educ., 347 U.S. 483 (1954).

12. *E.g.*, Green v. County School Bd. of Educ., 391 U.S. 430 (1968); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967). *cert. denied.* 389 U.S. 840 (1967); G. GUNTHER & N. DOWLING, CONSTITUTIONAL LAW 1416 (8th ed. 1970).

13. *See* cases cited, note 12 *supra.*

14. Three standards have been developed by the Court for review under the Equal Protection Clause: (1) permissive review under the rational basis test; (2) per se unconstitutional position; (3) strict review under the compelling state interest test.

The permissive standard is used only in cases of "benign" discrimination when the classification works in favor of a group. In *DeFunis*, the court discarded this alternative because the preferential admissions policy works a hardship on certain non-minority applicants who may be displaced by minority students with comparable or inferior qualifications.

By reading *Brown* as holding that only those racial classifications that stigmatize a racial group with the stamp of inferiority are unconstitutional, the Supreme Court of Washington refuted the lower court's position that the use of race is per se unconstitutional. The court referred to an article by O'Neil which stated:

> Preferential admissions do not represent a covert attempt to stigmatize the majority race as inferior; nor is it reasonable to expect that the possible effect of the extension of educational preference to certain disadvantaged racial minorities will be to stigmatize whites.

O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 713 (1971). However, the O'Neil article goes on to say that stigmatization is largely a sociological question which requires an examination of the overall situation. While the court found that preferential admissions does not stigmatize whites, it failed to consider whether such a policy can stigmatize minority group students.

In the instant case, the court applied the third alternative for review. Application of the strict standard required asking two questions: whether or not (a) there is a compelling state interest; and (b) less restrictive means would serve the governmental interest. While the court expressly applied the strict standard, its analysis of *DeFunis* failed to consider possible alternative measures to attain the desired end. On the basis of the incomplete

In the instant case, *Brown* provided a starting point but was not dispositive.[15] To uphold the admissions policy[16] of the University of Washington, the court used a two-pronged test.[17] It appeared to focus both on the goal of the differential treatment, by asking whether the state had a "compelling interest" in eliminating racial imbalance within public legal education,[18] and the means of implementing that goal, or the effectiveness[19] of the preferential policy employed. For the school to take into account the race of the applicants, it must show that such a consideration necessarily accomplishes a compelling state interest. Because the law school had made such a showing, the court ruled that the policy could stand.[20]

In declaring the minority admissions policy to be constitutionally permissible,[21] the court enunciated three reasons upon which it based its determination:

1. The underrepresentation[22] of minority group members in the legal profession is being perpetuated by the shortage[23] of minority[24] law students.

---

factual record, it would appear to be premature for the court to conclude, as it did, that "[n]o less restrictive means would serve the governmental interest here." DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1184 (1973); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 713 (1971); Note, 52 B.U. L. REV. 304 (1972).

15. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1179 (1973).

16. An analogy can be drawn between the establishment of a preferential admissions policy and the establishment of a preferential hiring and promotion plan designed to benefit minority workers. Recently the United States District Court for the District of New Mexico ruled against such a system.

The non-Indian plainiffs, longtime employees of the Bureau of Indian Affairs, challenged a policy which gave preference to persons of one-quarter or more Indian blood in initial hiring, training, promotion, and reinstatement. While the question before the court was whether the statute on which the policy was based must give way to the Civil Rights Acts, the court stated that "the statute would also fail on constitutional grounds under these circumstances." This case is highly pertinent because it brought the issue of preferential treatment squarely before a federal court. In reaching its decision, the court attacked the premise in the instant case, that unless an affirmative, race-conscious effort is made to include minority group members, they will almost certainly be excluded. *See* Mancari v. Morton, 359 F. Supp. 585 (D.N.M. 1973).

17. O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 712 (1971).

18. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1182 (1973).

19. *Id.* at 1180.

20. *Id.* at 1184.

21. The Court stated,

> [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.

Id. at 1183. It is arguable, however, that the case for allowing special treatment is so compelling as to press it toward recognition of a constitutional right. Yet such a position goes far beyond anything the courts have held. For the moment, however, it is necessary to lay the foundation for sustaining preferential policies. *See* O'Neil, *supra* note 6, at 309.

22. Although 12 per cent of the national population is black, only 1 per cent of the members of the legal profession is black. Other minority groups, for which exact figures are unavailable, are more poorly represented than blacks. Moreover, there are particular areas of underrepresentation where minority leaders are most needed and yet the shortage is greatest. In the South, where half of all blacks live, only 17 per cent of the black attorneys can be found. Altogether, the minority group members comprise less than 3 per cent of the total law school environment. Gellhorn, *The Law School and the Negro*, 1968 DUKE L.J. 1069, 1073.

23. In view of the small number of minority lawyers, there is a shortage now by any

2. The deficit of minority attorneys denies certain racial groups access to political power.[25]

3. The preferential admissions policy is educationally beneficial to both minority and non-minority students.[26]

If educational and sociological data can be used to support a finding,[27] then other empirical information must be examined to determine the validity of the court's conclusion that a preferential admissions policy will alleviate these problems.[28]

The first reason necessarily assumes that admissions standards prevent minority group students who have the requisite aptitude from entering law school. By relaxing the mechanical credentials required of minority law school applicants, the court reasoned that the racial imbalance in the legal profession would be corrected.[29] However, the court failed to consider other reasons which have been advanced to explain the disproportionately small number of minority law students and lawyers. These reasons include: (1) the discouraging effect of past discrimination;[30] (2) the lack of appeal of the legal profession to minority college graduates;[31] (3) the limited prospects

---

definition of the word. It is premature to discuss the question of whether the number of minority lawyers should be directly proportionate to the minority population or when preferential policies should be discontinued. *See* Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U.TOL. L. REV. 377, 381 n. 8.

24. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1184 (1973). "Minority," as used herein, includes only four races—Blacks, Chicanos, Indians, and Philippine-Americans. The School of Law limited its application of preferential admissions to those racial minority groups most in need of help. They based their determination on two factors: (1) the minority must be underrepresented in the law schools and legal profession, and (2) the members of the minority group must be unable to secure admission if strictly subjected to the standardized mathematical criteria.

Quaere: Is testimony that Asian-Americans can meet the general requirements sufficient to conclude that they need not be treated as minority applicants?

25. *Id.*

26. *Id.* at 1183.

27. One's conclusion about the legal support for the proposition of preferential minority admissions policies depends in part on one's reading of *Brown*. The Court used sociological data in *Brown* to conclude that segregated schools were inherently unequal. Such use of sociological data to support a finding of a violation of a Constitutional right has been criticized. *See* Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

By analogy to the instant case, in *DeFunis*, the court makes many assumptions which are not based on the Constitution or statutes. The philosophical discussion of these matters not in the record may be viewed as extending the court's conclusions to controversial and arguable questions.

28. The court applied the test stated in *Green*, judging the policy by "its effectiveness." The court concluded that: "[t]he minority admissions policy of the law school [is] the only feasible 'plan that promises realistically to work, and promises realistically to work *now*'." DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1184 (1973).

29. *Id.* at 1184.

30. Historically, discrimination in law schools and the legal profession seems to have discouraged minority college graduates. As a result, minority representation in the practice of law has been significantly less than in other professions, such as teaching or the ministry. While Northern law schools have always been nominally open to blacks, openly discriminatory standards still existed in several Southern schools as late as the 1960's. *See* Atwood, *Survey of Black Law Student Enrollment*, 1971 STUDENT LAWYER J. 18. Gellhorn, *supra* note 22, at 1069-70.

31. Serious pressures face minority students who enter law school. Blacks, for example, have often been called "uncle toms" merely interested in perpetuating the status quo. Moreover, their white classmates may see them as "missionaries" charged with educating fellow students about what it is like to be a minority group member. By feeling that they were admitted solely because of race and not because of demonstrated ability or academic

of the minority lawyer for professional success;[32] (4) insufficiency of personal financial resources.[33] To ignore these factors may result in a "misstatement of the problem and a misuse of resources to the damage of those sought to be helped."[34]

Secondly, the court found that the shortage of minority lawyers seriously disadvantages the minority community.[35] Taking judicial notice[36] of the relationship of attorneys to the community,[37] the court assumed that increasing the number of minority attorneys will directly increase the political power of minority groups. However, it appears that equalizing the opportunity to enter the legal profession without equalizing anything else is of limited value.[38] Although it seems to be symbolically important to establish that minority students can do as well in law school as whites, merely producing more minority "leaders" does not insure that they will have the political power necessary to adequately represent the interests of minority communities. Therefore, instead of accepting the proposition that power is synonymous with legal training and that legal training is the key to equality, it is important to recognize that equality depends largely on other factors.[39]

Finally, the court pointed out that the preferential admissions policy is educationally beneficial.[40] The rationale seems to be that exposure forces diverse people to tolerate and understand those unlike

---

promise, the self-confidence of such students may further be undermined. However, experience has shown that when the minority student enrollment reaches a significant enough percentage of the total law school population, many of these difficulties disappear. *See* Gellhorn, *supra* note 22, at 1078; O'Neil, *supra* note 6, at 311-13; McPherson, *The Black Law Student: A Problem of Fidelities*, ATLANTIC MONTHLY, April, 1970, at 99.

32. Only recently have law firms, business, and government offered jobs to the relatively small number of minority lawyers. Traditionally, graduates have had trouble finding positions upon graduation. Many have spent their time in the courtroom, which is only a small part of the legal arena and an insignificant part of most white attorneys' practices. Gellhorn, *supra* note 22, at 1071; Summers, *supra* note 23, at 387.

33. Undoubtedly, the greatest obstacle to increasing the minority ranks in law schools is the insufficiency of financial resources of both the minority student and the law school. Many minority students cannot afford four years of undergraduate work, much less three more years of law school. Less than half as many go to graduate school as do non-minority students, and many other fields of graduate study have more funds available to subsidize them than law. Summers, *supra*, note 23, at 387.

34. *Id.* at 380.

35. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1184 (1973).

36. Three species of facts fall within the perimeters of judicial notice: (1) those generally known by all people within the community; (2) facts capable of determination by turning to sources of indisputable accuracy; and (3) "legislative facts" which are hardly indisputable but reflect the court's own thinking when faced with the task of creating law based upon grounds of policy that hinge upon social, economic, political or scientific facts. There is disagreement among authorities as to whether judicial notice includes only facts which are indisputably true or also encompasses those more than likely true.

In *DeFunis*, the Court took judicial notice of some things which may or may not be true, such as, the assumption made that it is necessary to increase the percentage of minority students in the law school. Thus, much of the decision is based on "legislative facts."

For a lengthy discussion on judicial notice, *see* MCCORMICK, EVIDENCE 757-82 (2d ed. 1972); *see also* Brief for Respondents at 34, DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

37. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1183 (1973).

38. C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 37 (1972).

39. *See* JENCKS, *supra* note 38, at 7, 30.

40. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1183 (1973).

themselves. Assuming that there are substantial educational values in having minority students in law classes,[41] this may be an educational benefit primarily to the non-minority student.[42] Because of his status in the law school and pressures on him, the result for the minority student may be quite the contrary.[43]

To eliminate powerlessness and underrepresentation among the minority population and to enhance the training of all law students, the court concludes that legal education must be provided those minority groups which have been previously denied.[44] In so reasoning, the court has overstated its justifications and has failed to focus on other pertinent factors contributing to these problems. As a result, the court is unrealistic in predicting the impact of this policy. Without knowing the future response[45] of law schools[46] and society to accommodate the needs and capabilities of minority students, it is premature to assess the effects of *DeFunis*. However, it should be emphasized that preferential admissions ought to be regarded as a short-term measure. Granting the evils of the present situation, it must not be assumed that such a policy may be substituted for additional and more effective means[47] that, combined with the el-

---

41. There is extremely scanty evidence that tolerance and understanding are developed by exposing students to people unlike themselves. Even though school desegregation increases tension in the short run, some people argue that the exposure forces diverse people to accept the fact that they have to live with one another. However, there is no way to judge whether this in fact happens and whether it ultimately will be a good thing for society. JENCKS, *supra* note 38, at 31.

42. Most minority students come from different backgrounds, thus presenting another perspective on legal problems and institutions. They can enrich class discussions if they participate freely by sharing their sensitivities to different social values.

43. [B]ecause of his minority status in the law schools and because of pressures on him from both communities, the black law student is fearful of expressing himself, or of viewing himself, as an individual. And therefore, he feels responsible for the welfare, the ideas, even the image of those around him like himself. . . .

McPherson, *supra* note 31, at 99.

44. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1184-85 (1973).

45. Professor Bickel suggests that "legal action" has two phases: first, the rule of law is announced and accepted in principle, and then the rule must be administered through judicial enforcement and other means. According to this view, all law, and especially constitutional law, requires a consensual basis. Thus, the majority must agree to comply with the rule in order to prevent its delay or even reversal. A sufficiently hostile or well-positioned minority can block its effective implementation. Applied to the school desegregation cases, the period of delay between *Brown* I and *Brown* II established symbolic acceptance of integration as a rule of law before *Brown* II enforced the substance of the earlier decision. By analogy, in the instant case, *DeFunis* may be only the announcement that law schools must seek to integrate their student bodies, and the beginning of the period for enforcement of the rule is yet to come. *See generally*: Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 194 (1964); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1151 (1968-69).

46. Increased minority enrollment in law schools has been directly related to the initiative taken by the institutions to attract and motivate such students toward the legal profession. For example, New York University's black applicants have multiplied sixty-fold since the school began recruiting and offering scholarships to blacks to attend law school. Illinois has had similar success.

In addition to revising current recruiting practices, it has been suggested that law schools must analyze the cultural basis of the legal education offered. That is, there is a need for multi-cultural education, but the current teaching establishment is biased toward the Anglo approach. Furthermore, academic administrators are predominantly white, and they do not question that approach as appropriate for all Americans. *See generally* Gellhorn, *supra* note 22, at 1084-89; McPherson, *supra* note 31, at 94.

47. *See* JENCKS, *supra* 38, at 7.

imination of gross political inequality, will remove the necessity for differential treatment of minority group members.

SHERYL RAMSTAD