

# Book Review: Discriminating Against Discrimination: Preferential Admissions and the Defunis Case, by Robert M. O'Neil

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Book Review

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DISCRIMINATING AGAINST DISCRIMINATION: PREFERENTIAL ADMISSIONS AND THE *DEFUNIS* CASE, ROBERT M. O'NEIL, Bloomington, Ind.: Indiana University Press, 1975. Pp. 271. \$8.95 (hard cover).

The issues discussed in this book are evidently of urgent concern to Americans: the *DeFunis*<sup>1</sup> case elicited 26 *amicus curiae* briefs on its arrival at the United States Supreme Court in 1974. But the issue of discrimination, whether positive or negative, because of race, sex or age in admission to professional faculties is not limited to the United States. The heavy reliance on standardized tests (e.g. LSAT, GMAT, DAT) and other numerical criteria may overrank some students, particularly for medical school, and under-rank others along racial or ethnic lines. The high mathematical or exact science scores of some immigrant Oriental students do not fully reflect their level in other skills, such as communication, that are necessary in medical practice. The cultural biases of the standardized tests may lead to underranking of the achievement potential of other racial, ethnic or even economic

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<sup>1</sup> *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P. Rep. 2d 1171 (1973); dismissed as moot, 416 U.S. 312, 945 S. Ct. 1704 (1974).

When Marco DeFunis applied for admission to the University of Washington Law School, a state supported institution, in 1971, he was placed in the bottom quartile of the waiting list, and eventually was refused entrance. Admission criteria were based on college grades, Law School Admission Test scores (which were combined into a "Predicted First Year Average" — PFYA), and "ability to make significant contributions to law school classes and to the community at large" [507 P. Rep. 2d 1171 (1973) at 1173]. There were 150 first year students admitted, 18 of whom were members of minority racial groups (Black American, Chicano American, Philippine American, and American Indian). The minority students were selected on a different basis from the white students in that their applications were read by a separate committee and only compared to each other, not to the racial majority's applications. Less weight was given to their PFYA's, and the 18 minority students admitted had lower PFYA's than DeFunis. DeFunis alleged that he had been wrongfully denied admission since people had been admitted with lesser qualifications, and that the University had discriminated against him by not according him equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution.

The trial court, applying *Brown v. Board of Education* [347 U.S. 483 (1954)], held that racial classification was *per se* unconstitutional and that all races must be treated alike. It ordered that DeFunis be admitted to the first year law class, which he was. The University appealed to the Supreme Court of Washington, which, in a 3-2 *en banc* decision, overruled the Superior Court and held that in some circumstances racial criteria may, or even must, be used to bring about racial balance. The court applied the "strict scrutiny" test to the admissions committee's classification and found that the state had an "overriding interest in promoting integration in public education," (at 1182) and that the admissions policy met the test of necessity.

DeFunis was then in his second year of law school, and petitioned the United States Supreme Court for a writ of *certiorari*. Mr. Justice Douglas, as Circuit Justice, stayed the Washington Supreme Court's judgment until the case was heard by the Supreme Court. The case reached the Court in Feb., 1974, when DeFunis was in his last quarter of law school. Whatever the decision, DeFunis would receive his degree. Since DeFunis had filed suit only on his own behalf, and not as a class action, the Court held the case to be moot. Mr. Justice Douglas delivered a thoughtful dissent on the merits of the case, concluding that the admissions procedure did not violate the Equal Protection Clause of the Fourteenth Amendment. Brennan, Douglas, White, and Marshall JJ. dissented on the point of the case's mootness, all holding that the merits of the case should be heard and decided.

groups. Not only can we not ignore the likelihood of academic discrimination against our increasing immigrant population in Canada, but we need to increase access to professional training for the native peoples who have been handicapped by historical segregation or cultural alienation. By virtue of its composition, O'Neil's book is a rich collection of the arguments down to principles on all sides of the question for any jurisdiction where "equal opportunity" is enshrined in statute or precedent.

The author is an attorney, a university vice-president, and sometime officer of legal education organizations closely involved with special pre-legal training or preferential admissions policies as methods of recruiting more legal students from racial minorities. He devotes only three-fifths of the book to his own argument, admittedly slanted (p. x) in favour of preferential admissions policies. His brief is well-organized and includes chapters of objection and rebuttal, so that a large part of the reasoning on both sides of the debate shows up even in this section of the book.

The legal question of course has a negative form, given the buildup of legislation and judicial interpretation prohibiting racial discrimination over the last century and this one (in which Canada, it must be said, has been tardy by comparison with the United States, not only in the last century, but with regard to the Japanese who were citizens of either country in the Second World War).<sup>2</sup> The problem is whether *favoured* treatment of racial minorities in professional school admissions is not prohibited by law.<sup>3</sup>

After initial chapters on the two stages of the *DeFunis* case (in the State of Washington and in the United States Supreme Court) and on the historical background, with statistics on minority students in American law schools both before and after the introduction of preferential admissions by some of those schools, O'Neil takes up the question of the legality of the practice by American constitutional standards in Chapter 4. By testing various premises from which the law would require race to be ignored absolutely or would permit the blindfold to be removed and the race of an individual to be noticed within certain limits, he concludes that a ground can be found for permitting preferential admissions in the notion of an overriding state or governmental interest. The analogy is with those cases where race is attended to in order to correct racial segregation or discrimination, as with the integration of public elementary or secondary schools. The author admits that this reasoning has its difficulties. The general public interest was the ground for displacing and relocating American citizens of Japanese descent during the Second World War (p. 89); and the provision of equal education in public

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<sup>2</sup> See K. Adachi, *The Enemy That Never Was: A History of the Japanese Canadians* (Toronto: McClelland & Stewart, 1976) at 295, 304, 321.

<sup>3</sup> In the fall of 1977 the United States Supreme Court will be hearing oral argument on *Bakke v. Regents of the University of California*, 553 P.2d 1152; 18 Cal. 3d 34; 132 Cal. Rptr. 680 (1976). The California Supreme Court has ruled that the preferential admissions policy of the medical school of the University of California at Davis violates the equal protection clause of the Fourteenth Amendment. The case should thus decide the question of the validity of preferential admissions policies that was declared moot in *DeFunis*.

school systems does not exclude or deprive any child of such an education on the basis of race: a result which is nevertheless inevitable when places are limited, as in the professional schools of a state university (pp. 137, 153 ff.).

The positive arguments for preferential admissions presented in the next chapter are all "sociological," in the double sense that they are based on the historic economic and educational deprivation of various racial groups that leads to their underrepresentation in higher education, and that they picture these groups as competing fragments of the general society, each with legitimate claims for access to the same set of privileges. The minorities are regarded chiefly as adversary subjects in the public sphere, each group ideally able to become a copy of the society at large.

O'Neil does not think that more basic attempts to correct inequalities in wealth and early education are adequate as alternatives to preferential admissions (Ch. 6), although he admits that these fundamental measures of social reform must be pursued at the same time (Ch. 8, pp. 148, 158). The difficulty he sees in relying on them alone is the amount of time they would take to have their effect; the argument here is filled with a sense of urgency about the reconstruction of society according to an unexamined ideal. Although his criticisms of numerical admissions criteria are well taken (pp. 99-106), and he carries the principle over into a criticism of preferential admissions systems based on numerical quotas (pp. 132-33), there are difficulties in his recommendation that the professional school work instead with a flexible set of goals, adapted to regional population features (pp. 150-54). These will still be the "goals" fixed by the establishments of higher education in their view of the ideal social structure, goals that may be rejected by the minorities even if more basic structural injustices be eliminated.

In developing the case against preferential admissions (Ch. 7), the author concentrates on the rights and benefits of the groups not favoured, some of whom end up very much in the position of racial minorities discriminated against. He gives little weight to the objections that might be based on the need for professional standards, or on the necessary freedom of a self-regulatory professional body from political manipulation. The presence of objective standards is, of course, more obvious in engineering and medicine than it is in law; and it may be that O'Neil thinks the question of standards has become irrelevant now that the typical number of law school applicants has risen to five and ten times the number of places available (pp. 6-8). He does concede that one may do more harm than good by throwing minority students in over their heads or by insulting the group with "special programs" and streaming (pp. 142-44); but this, too, is an adversary argument, based on legal relations rather than policy considerations (p. 44). What of the entire community's need (and that of all its parts) for standards of service? As regards the autonomy of the professional schools, he tends to point out that their freedom is exercised as things stand in a somewhat arbitrary manner (pp. 47 ff., 139).

In any case, the language about self-regulatory professional bodies does not wash so well in the United States, in connection with what are originally and quite visibly state universities. There, at least, the courts themselves have

hesitated to interfere with and redirect the admissions process (pp. 146, 177), on the grounds that educators have an expertise and a public commission that the judiciary cannot supplant. Perhaps the best feature of O'Neil's book is that two-fifths of its pages reprint the opinions of both the Washington State Supreme Court and the U.S. Supreme Court in the *DeFunis* case (the latter finding the case moot as it stood), together with the accompanying dissents. Public concern for professional standards looms large in the dissenting opinions of Judge Hale (Washington) and Justice Douglas (United States), who embarks on a good critique of the reliance on LSAT scores (pp. 234-38). Unfortunately, Judge Hale takes a "provincial" view of the State University (p. 199); and he nastily remarks that the majority's disposition suggests that the faculty should also reconstitute itself on ethnic lines (p. 203). That is not surprising: in the bewildering reversal of conventional political alliances that this issue has produced, the opponent of preferential admissions will also find Spiro Agnew and Sidney Hook among his bedfellows (pp. 4, 131). The best text in this section is the perceptive, learned, and humane dissent by Justice Douglas.

The author renders the mine of materials complete with a short legal and professional bibliography including citations of articles by legal academics who disagree with him (pp. 261, 263).

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