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PANEL DISCUSSION No. I

BEYOND DEFUNIS: TESTING THE NATION'S WILL

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BETWEEN DEFUNIS I AND DEFUNIS II
A TIME FOR REFLECTION

Opening Remarks of
Professor Ralph R. Smith

presented at 1974 National Convention
of the Association of American Law Schools
San Francisco, Calif.

The Supreme Court of these United States has heard and disposed of *DeFunis v. Odegaard.* In May 1974 the highest court in the land allowed Marco DeFunis to receive his Juris Doctor degree from the University of Washington—a school which a lower court mandated to accept him as a student despite the objection of its admissions committee, faculty and administration.

Mr. DeFunis is now a member of the bar in the State of Washington. His was not a class action. So it would seem that for all intents and purposes and under ordinary circumstances, the controversy has ended. But these are not ordinary circumstances. The intent and purposes are deceiving, diverse and divisive. And the controversy is far from over. In fact, if anything is clear, it is that *DeFunis v. Odegaard* will not quickly fade into the background. Having occupied center stage for so long, this case seems indelibly etched in the collective consciousness of legal education.

It cannot be doubted that the longevity of *DeFunis* can be credited in part to the Supreme Court's non-decision on the substantive issues presented. Nor can it be disputed that the obvious absence of a concensus among the justices added to the confusion. However, there are far more substantial reasons why *DeFunis* has not and will not go away. And these reasons are found on the merits of the case which even a definitive decision by the Supreme Court would not dispel.

Over the past months, many of the participants and observers of this case have criticized the majority of Supreme Court for choosing to declare the case moot. Despite differences as to desired outcome, they would join the minority in reaching and deciding the substantive issues posed. They argue most persuasively that the Court could have alleviated the existing situation had it acted in a less equivocal fashion. But even the highest tribunal in the land has no magic wand. Those who would rush to judgement gravely underestimate the impact of the litigation and fail to understand the nature and complexity of the issues raised. In other words, they fail to apprehend the very factors which would make even judicial resolution of the substantive issues incapable of any real finality.

First, it must be noted that the disaster has already occurred. The focusing of national attention of the admission policies of law schools with respect to minority students has caused irreparable injury to a whole generation of minority attorneys. That unarticulated but omnipresent presumption of incompetence has been given substance. Already confronted with the traditional obstacles to full-fledged participation in their chosen profession, all minority lawyers and law students—whether admitted to law school via special programs or not—must now each prove that he or she has a "right" to be there in the first place. The allegations of "reverse racism", "favoritism", and "double standard" have called into play the whole welfare-handout syndrome which is by now an American reflex. Moreover, such assertions have raised fears of continued duality and the eventual graduation and admission to the bar of "unqualified" attorneys. The impact on the careers of these young and aspiring attorneys is incalculable. Law firms, law schools and employers in general are now openly challenging the records and achievements of even the better qualified minority applicants.

In the atmosphere of intense national scrutiny and doubt, minority law students, minority lawyers and minority law teachers are expected to fulfill their professional and academic obligations. That this has been made more difficult cannot be over-emphasized.

That much of this is a direct consequence of the Supreme Court's decision not to let well enough alone is a fact that cannot be denied. Having decided (for reason yet inexplicable) to hear the case, the best that may be said for the Court's subsequent action is that it did not compound an already tragic mistake. And that is precisely what would have occurred had the majority of the Court followed Justices Brennan, Douglas, Marshall, and White and almost everyone else involved in the litigation into the morass of a decision on the merits. Having granted certiorari, the court could neither still the debate nor abate the injury.

Second, "DeFunis" is no longer just the name of a white sephardic jewish student who successfully sought to be admitted to law school. It is no longer merely the name of a celebrated case. "DeFunis" is now a generic term encapsulating and signifying the malignant retreat of this country from the hardwon concessions of the 1960s. It signifies the most salient schism in a coalition which has served to the advancing the cause of justice and human dignity. It embodies the tentative conclusions of a national debate regard-

ing the outer limits on any current affirmative action to remedy past discrimination.

This debate will continue unabated for the foreseeable future. And there is little the Supreme Court could have done about it.

One commentator has said:

"Had DeFunis won, all efforts to escalate opportunities for the education and employment of minorities would have been jeopardized. Had the University of Washington prevailed, there would have been little reason for sober judgement or restraint in the formulation of future affirmative-action programs. The result of the Court's action is to submit the question to further public debate, possibly even to legislative solution, and to force those who implement federal law and the commands of the Constitution to weigh the interest of those currently displaced along with those historically deprived."

In another context this concern was expressed as a series of questions.

"Is the alleged tension between meritocracy and affirmative action more apparent than real? Is there a true conflict? Or are we merely shadowboxing? In attempting to answer that question it is important to understand that any prolonged or institutionalized disincentive to individual achievement is to no one's benefit and everyone's detriment. To what extent does the admissions process represent an attempted allocation of a scarce resource? And as collorary questions is the scarcity temporary or permanent? Real or artificial? What additional considerations would scarcity add to the matrix? Are the operative concepts of affirmative action the same in the allocation situation as it would be in an otherwise normal process of de-selection? How should affirmative action in the admissions context be viewed? Should it merely consist of removing from the process those elements designed to have an invidious effect. Should it then require implementation of oversight machinery to prevent a resurgence? Should it be viewed as expanding the class of those historically afforded preferential treatment by expanding the number of factors considered? Should it require a thorough overhaul of the process—a devising of more comprehensive system of neutral criteria—criteria which are neutral not in the superficial sense which merely preserves the status quo. But criteria which will be neutral in the sense of truly reflecting an individual's potential, worth and achievement. Is affirmative action in the context of admissions remedial in nature in that it is invoked by demonstrating present or past discrimination? Or does affirmative action in this context merely look to the future and posit the necessity for a well-rounded citizenry who has not only been exposed to the sciences and the arts, but to each other? Is it true that to the extent affirmative action in general and affirmative action in the context of admissions tend to support the use of race for benign purposes it carries with it the risk of malignancy? Is affirmative action a concept which must practically moral and intellectually be programmed to self-desrtuct?"

These are serious questions and real concerns. They deserve serious consideration. We can no longer assume answers. We must look for them, find them, and state them cogently and clearly. And we must take care that

we are not deterred from our inquiry because those with motives less sincere ask many of the same questions.

It is true that legal decisions are not writ in stone. Many are T.S. Eliot's "decisions and revisions which a minute will reverse." However, the absence of a definitive decision in this area may present an opportunity to conceptualize, formulate, and implement long-range policies. Time may be of the essence, but it is time better used for reflection, not decision.

It is this time for reflection (between the non-decision in DeFunis I and the decision in the inevitable DeFunis II) and the challenge it presents which explain the vitality of *DeFunis v. Odegaard*, justifies its longevity, and prompts our being part of the continuing dialogue.

I have given the panelists a peculiar charge. I indicated to these three gentlemen that most discussions about *DeFunis* generate some heat, but offer no light. I posed this question: "How can we as lawyers and legal educators constructively use the atmosphere created by *DeFunis*?"

It is my hope that their remarks and this discussion will strike a light to guide us all as we move into the period of reflection and "beyond DeFunis."

BELL.

The *DeFunis* issue is dead—long live the *DeFunis* issue. The analogy to the call for continuity that accompanies a change in a monarchy seems appropriate. Just as the throne is more permanent than any individual who wears the crown, the basic issues in the Defunis case are of much broader scope and unfortunately far more permanent than any single piece of litigation in which they are presented. The real issue is less the entitlement of non-white to affirmative treatment than it is the fearful concern of the majority about who is going to pay the cost of the affirmative action. This issue is far older than the instant litigation. It was present though unrecognized in *Brown v. Board of Education.* Its antecedents created problems that bothered both Abraham Lincoln at the time of the Emancipation Proclamation and his colonial New England counterparts three quarters of a century before. In both instances the issue was who would pay the cost. Who would pay the slave owners for the loss of their property?

We know the traditional tests which the Supreme Court may have employed to decide *DeFunis v. Odegaard* on the merits. *First*, the court might have decided that racial classifications are *per se* unconstitutional. Under the test any race-related admissions preference would be unconstitutional regardless of potential beneficial effects. The Court has rejected this argument when advanced by school officials in attacking school desegregation plans which require reassignment of pupils on the basis of race to disestablish dual school systems. In effect, the Court has said that pattern intermittently developed on the basis of race may be remedied by standards which considered race.

Second, the Court might have decided that the "rational basis" standard should control. Under the test there is a presumption of constitutionality and discretion in the use of classifications. It is permissible so long as the

methods are not arbitrary and capricious and there is some minimum policy justification.

Thirdly, the Court might have deemed the classification "constitutionally suspect" and therefore subject to "strict scrutiny." Once the standard is selected it is almost certain that absent some exceptional circumstance, the classification will not pass constitutional muster.

An article appearing in the Summer 1974 issue of the University of Chicago Law Review by Professor John Ely is worthy of note at this point. Professor Ely argues that it cannot be suspect in a constitutional sense for any majority to discriminate against itself. Thus, he says, "strict scrutiny" is not the appropriate standard when white people decide to favor black people at the expense of white people.

This thesis, though interesting, is not likely to be compelling for many whites, on or off the bench. Even so, Professor Ely only touches on truth when he says that the white majority is unlikely to disadvantage itself. It is likewise not likely to be tempted to underestimate the needs and concerns of whites or to overestimate the cost of devising an alternative classification that would extend to certain blacks the advantages generally extended to whites. The fears of the whites are not justified, because in fact it is blacks who will pay most of the price for achieving a change that will then benefit the majority of society more than it does those who sacrificed and made it possible.

This phenomena has occurred frequently during the civil rights era. The generation of struggle over school desegregation sparked by *Brown* has brought the poor quality of public schools generally to light and provided more money and resources to improve their quality than would ever have happened had blacks not made the effort to achieve an equal educational opportunity. Nevertheless, today public schools are improved, but still mainly segregated and unequal. In the area of voting, the federal courts for years refused to interfere with multimember legislative areas that gave inordinate political power to a few, but after blacks broke the Supreme Court's resistance to entering the political thicket, within a few years the one man one vote cases were resolved. In current cases, favor and standards used in those cases tend to favor whites seeking reapportionment more than they do blacks who are seeking the correct disparities in voting district that disadvantage on the basis of race. The hearings available to school students started by the blacks and the civil rights movement again have provided much more help and protection (in terms of due process) to white students than those blacks who are caught in the desegregation process and who have been expelled and suspended in record numbers. The movement toward a similar resolve is already apparent in college minority admissions programs; many of which have been broadened to encompass disadvantaged but promising white applicants. The open admissions program in New York City's university system was pressured through by minorities but it was lower middle class whites who have been its chief beneficiaries. And in their more sensitive area of law school admission, the Defunis case has caused many schools to give greater emphasis to disadvantaged and less to race. Justice Douglas's suggestions for solving the problems have caused even those sup-

porters of Defunis to think better, or think twice about whether or not the present system wasn't better than the one that he suggests. And again, in many instances poor whites are likely to be assigned to seats that initially were set aside for minority students.

This pattern of black sacrifice is not likely to end soon. It is a result of well-fixed beliefs about the relative importance of white and black humanity. The proof of the viability of these beliefs is as discernable today as it was when colonial abolitionists, motivated in part, by the realization that slavery was both dangerous and harmful to the growth of free white labor, enacted laws to gradually emancipate still unborn slaves who would have to work for the better part of their productive lives before they could enjoy the benefits of freedom that they had so dearly paid for. Commenting on this 19th century precedent, Winthrop Jordan the historian said "Freedom was thus conferred upon a future generation and the living were given merely the consolation of a free posterity." It seems to me that the difference in the conditions of slaves in the gradual emancipation stage and black people today is more of degree than of time because then as now, blacks can progress in a society only when that progress is perceived by the white majority as a clear benefit to whites or at least not a serious risk.

Usually this advancement requires a major effort in sacrifice by blacks to change patterns that likely have been oppressive to some whites as well as blacks. When policy changes are accomplished whites will usually prove to be the primary beneficiaries and blacks were paid the major cost. It's not the happiest imaginable prospect, but it is apparently the role which non-white minorities are destined to play in this society. The minority admissions issue in the DeFunis case is thus one more act of a long running drama. Thank you.

REYNOSO.

The basic question is one of fairness and the issue is whether there is agreement about what is fair. In my opinion there can be no fairness until both law schools and the legal profession provide minorities with representations somewhat akin to our proportion of the population. Whether called "goals" or "quotas", this is fairness. It is imperative that we re-examine the role of the law school.

If upon that re-examination, we reach the conclusion that one of the purposes of the law school is not merely the training of lawyers, but the training of an adequate number of lawyers for all segments of the population, we would have come a long way toward assuring fairness.

But it is important to understand that an intellectual analysis of what's going wrong with our society and with our law schools will be of no avail without a moral commitment to the goal of equality and a moral commitment to pay the price of that equality. Without the will, there is no way. This discussion is appropriately subtitled "testing the nation's will." I believe that where there is a will there is a way. And I suspect it is the will which seems lacking as we head into the post-Defunis era.

It has recently been revealed that the rate of increase of minority students in law schools has leveled off. Why? Despite the fact that there is

a lot of writing about how ethnic minorities are turned off to the law because the law has been utilized as an oppressive vehicle, my experience tells me that the desire by minority group members to go to law school is about the same as the majority members of the population. One need only recall the CLEO experience in 1968 in Los Angeles. Many feared that minority students would not want to go to law school for a variety of reasons including the perceived antipathy of the law school. However in a relatively short period—in the two months that CLEO had to advertise its services—it received three to four times as many applicants as the program could accept.

Why then are minorities not adequately represented in the law school community? One reason is a simple one—money. Law school is a costly endeavour and minorities are poorer than whites in this country. Another reason can be attributed to the fact that minorities often are not afforded the best pre-law school education. Thirdly, there is the matter of culture. Blacks, Chicanos and Indians share cultures somewhat different from that which helps the upper middle class Anglo to succeed in law school. Fourth, our testing skills have a long way to go before we can test for native intelligence and thus we now use crude measures such as the LSAT.

LIACOURAS

Let's start with a couple of basic assumptions. First of all, I consider that the major issue is not "preferencial" treatment of minorities but a national disaster area called law school admissions, generally. And, as has been pointed out earlier, Blacks and other minorities have been made scapegoats in the past, have through a series of struggles, made it possible for others to reap the benefit. Essentially the law school admissions test and the admissions criteria generally used, asked the wrong questions. Because they asked the wrong questions, law schools have not been asking the right questions. The right question is this: is that applicant more likely to become a good lawyer and a good community leader than another applicant? Now, that has nothing whatsoever at the outset, to do with race. What do the regular admissions criteria do to measure motivation, judgement, idealism, practicality, tenacity, creativity, character and maturity, integrity, patience, preparation, oral skills, handling clients, perserverance, organization ability and leadership, in sum, the lawyering process? Temple stands ready to put up $10 per student if the other law schools will, to do the fourth phase of the Carlson and Evans validation study now. That phase asks simply, what are the criteria of good lawyering? If we are serious about preferential "post DeFunis", if we are serious about admissions to law school as a national issue which affects people regardless of race, then we will pool our resources and move on this kind of a validation study *now*.

Editor's note: Dean Liacouras' prepared remarks are reprinted in full at Pp. 480-487 infra.