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PANEL: Defunis and its Impact

Daniel Steiner, Moderator

Arthur Hertzberg

Robert M. O'Neil

Chester M. Pierce

Albert J. Rosenthal

STEINER: Good morning, I am Daniel Steiner. I am going to be moderating the panel to discuss the case of *DeFunis v. Odegaard*.¹ It is fair to say that few cases in recent years have aroused such a wide interest, certainly in educational circles and in many others. As I will state later, and as our panelists will discuss when one considers the issues involved it is not surprising the amount of interest that this case has generated.

Marco DeFunis applied to the law school of the University of Washington and was turned down for admission. He went off and did some graduate work and came back and applied the next year and was again turned down. He brought suit against the University of Washington, and his basic allegation was that the procedures of the law school in determining admissions took into account the race and ethnic status of candidates and gave favorable weight to that status, and that this was in violation of the Equal Protection clause of the U.S. Constitution. The trial court in the State of Washington found in Mr. DeFunis' favor and ordered the University of Washington to admit him to law school. In fact he was admitted on the basis of that court order. The case was then appealed by the State of Washington to the Supreme Court of the State of Washington and the decision of the trial court was reversed, the Supreme Court finding in Washington that there was no constitutional violation.

A petition for *certiorari* was filed by Marco DeFunis to ask the Supreme Court of the United States to review that decision. At that point, Marco DeFunis also applied to Justice Douglas for a stay of the order of the Supreme Court of Washington so that he could continue in law school pending the outcome of his case. Justice Douglas granted that stay. So Mr. DeFunis remained in law school. This point became rather important later. When the Supreme Court received the petitions for *certiorari* it realized that there was a question of mootness. What that means, very simply, is that since Marco DeFunis at that point was finishing his second or entering his third year of law school, his admission was no longer in issue because he himself was going to be able to graduate from law school.

The Supreme Court, flagging this issue, asked each of the sides in the case to file a special memorandum on the mootness issue and both sides did file such a memorandum and both sides took the position that the case was not moot. The Supreme Court thereafter granted the petition of *certiorari*. At that point wheels started turning all over the country because of the unusual nature of this case, and many organizations—labor unions, civic

1. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

organizations, universities, educational associations, the American Bar Association—filed briefs on one side or another in this case as friends of the court, including as Mr. Bok may have mentioned this morning, Harvard University, filing on the side of the state of Washington. The case was then argued and the great anti-climax occurred in a 5-4 decision—the Supreme Court ruled that in fact the case was moot. They did not go into the merits of the case. Some of our panelists may later comment on that aspect of the Supreme Court's action.

Justice Douglas also issued a separate opinion² going to the merits of the case and expressing his views in a rather lengthy discussion of what the case was all about and which way it should be decided. Some of us feel there was not great clarity in that opinion, we still have in considering the case, the possible impact on practices around the country by the very existence of the *DeFunis* case. Some readers of the opinion feel that the Supreme Court in one sense was inviting another case in this area. As a practical matter it is very possible that another case directly analogous to the *DeFunis* case will work its way up through the courts in the near future. So the issues of *DeFunis* as a legal matter and as a social matter are very much with us today.

When one considers the issues involved in the case it is not surprising that there is this wide degree of interest in it. The narrowest issue in a sense was: Can a state institution, consistent with the 14th Amendment, take race or ethnic status into account in deciding admissions? More broadly, a decision in the *DeFunis* case, certainly on the side of DeFunis, was likely to affect a wide range of educational practices by private institutions also. There is some question as to whether private institutions, because of the amount of federal aid, might not themselves be subject to the 14th Amendment. There also is Title VI of the Civil Rights Act, which governs recipients of federal funds, and a decision in the *DeFunis* case in favor of DeFunis might have affected interpretations there. There would also have been a moral factor if the Supreme Court had found that a certain practice was sufficiently invidious to be in violation of the 14th Amendment, whether private institutions even if they weren't legally bound, would feel free to continue with that same practice.

Thirdly, there was the effect on other affirmative action efforts. I don't think you can separate the kind of issues involved with *DeFunis* in admissions to an educational institution from other affirmative action efforts such as those in the area of employment. There was likely to be a spill-over no matter how the case was decided.

Lastly, on the broadest level, and I think some of our speakers will be addressing this, there were very fundamental social issues raised by the *DeFunis* case. Sometimes they got expressed in terms of catch-words, but I would hope today we could discuss them not in terms of catch-words but as the very serious social and philosophical questions raised by what is going on in our society today and what we are trying to accomplish with affirmative action programs.

I would like now to turn to our first speaker. We have four today. Each

2. *Id.* at 320.

of them will speak approximately 10-15 minutes which should leave us ample time for questions at the end. Our first speaker is Rabbi Hertzberg, the President of the American Jewish Congress.

HERTZBERG: Mr. Chairman and colleagues, let me begin since the subject is *DeFunis*, with one statement of fact and two disclaimers. The statement of fact is certainly one that is certainly very widely known in as sophisticated and knowledgeable a room as this. That is that on *DeFunis* when the innumerable briefs were being filed, *amicus curiae*, in the Supreme Court after *certiorari* was finally granted, the overwhelming bulk of the Jewish establishment found itself in one way or another on the other side from Harvard. That is, the Jewish establishment filed a series of briefs which were on the side of *DeFunis* and not on the side of the State of Washington. Those briefs had varying kinds of reasons. There was indeed one brief out of the Jewish community which was not on the *DeFunis* side. Therefore, it is fair to say that there was some division of opinion. But it is equally correct to say, that if you ask for Jewish opinion in the United States of America, at least in terms of organized Jewish community, the views that I am going to express are probably at the left end of the establishment, about as far out as anybody inside the American Jewish establishment is at this moment in time, or any segment of American Jewish establishment is at this moment in time on the issues—the very basic social issues that are raised by *DeFunis*. That is the fact. Now the disclaimers.

The first is that I am very well aware that by 1:00 this afternoon, there will be a number of people who will rise in this room and say, "I am Jewish and I do not agree". I make no pretense to speak for anyone but myself personally, and for the sense of those people, a goodly number though not all, who regard themselves as Jews in America, who are within the structure of American Jewish organizational life.

Now, I am not going to deal with *DeFunis* except to make one observation about it. And that is, its fatal defect in the eyes of those Jewish organizations which filed against it—my own included—is that admittedly, it was Mr. DeFunis was excluded or not excluded from the law school of the State of Washington because those who admitted people to the law school of the State of Washington had two pools of applicants. They had made up their minds that they were going to admit *X* factor of minority students and they were going to find within *X* factor the best qualified that they could find. There are no ifs, ands, or buts about this, this was stipulated by the State of Washington in its defense brief and it was against that point that the American Jewish Congress, of which I happen to be the president, filed. And let there be no mistake, will file again. Because that is something which we regard as totally inadmissible, a fighting word and there are no ifs, ands, and buts about it.

Let me now explain to you from within, the policy reason for it. Because it seems to me that the one function that I should perform speaking here not as the expert on any of this, but as the man who is charged by election with the responsibilities for seeing through the policies of the most liberal of the organized Jewish groups, certainly *one* of the most liberal of the organized Jewish groups, let me tell you why as a policy decision, we

are where we are. In the first place, the totality of modern Jewish experience makes us allergic to quotas. We began modern Jewish history—I happen to teach it at that university which Mr. Rosenthal and I both inhabit, he full time and myself a couple of days a week—we began in modern Jewish experience with having those who made the French Revolution tell the Jews we are going to ask you to report to the police quite regularly what you are doing with your lives in order to make quite sure that you distribute yourself within the economy in proportion to your numbers exactly, on an exact percentage basis.

When Napoleon in 1807 dealt with the question of the Jews, he wanted the Jews to promise him in return for continuing their equality that every third marriage would be an inter-marriage and that they would so report to the police. That was the third question that he asked of the Sanhedrin that he convoked. And lest you think this is in Jewish consciousness something that antiquarians or semi-antiquarians remember, those of us who deal with what is happening today know that the real cutting edge of why Russian Jewery is such a bitter issue before the consciousness and the conscience of Jews, and we hope the consciousness and the conscience of the world, is that the children of Russian Jews who themselves went to universities, are not being allowed in. I keep having in my office, academics out of the Soviet Union - I will mention a name, Leonid Cosmin who was in to see me three days ago. He was professor in the language institute at Moscow and I asked him why did you get out and he said because my children couldn't get into a decent university. And I asked him why and he said because it is present Russian policy that Jews are going to be allowed higher academic degrees to their numbers in the population and the Russian government is trying to get rid of the notion that there are four and a half thousand Doctorates of Sciences held by Jews in Russia as over against 18,000 held by Russians. That is going to be ended in the next generation. It is not accidental that so large a proportion of those who want out of Russia are academics because they are people whose children are mechanically being subjected to a quota.

The second issue before Jewish consciousness is precisely the university. The university is the place where we, the Jews, fought the battle of the quota. Do you know—or does anyone remember anymore why the quotas in the Ivy Leagues went falling down when in this very place? In the 1920's Mr. Bok's predecessor, Mr. Lowell, stood and said we can have only X percentage of Jews at Harvard because beyond that what was it then, 10%?

STEINER: It was a policy never implemented.

HERTZBERG: It was a policy never implemented but it was a policy desired and a policy which aroused an awful lot of fury, an awful lot of fury. My predecessor, Stephen Wise, in 1946 threatened Columbia University with a suit on its tax exemption because of its quotas on Jews. Now those quotas were based on some notion that Jews ought to represent some proportion of the whole, flexible, 6%, 8%, 10%, but something of that order. If the university is indeed the escalator or the place, like the church before it, within which those who are outside the main stream of the social action get into it, then the university is a very precious place. It is a very

precious place to all kinds of people whose stake in society is vast because they were very recently not in it at all. And therefore, tinkering with the rules in something to which Jews are very clearly sensitive. This leads me now to my last consideration.

Out of the totality of Jewish experience, both the inner nature of our tradition, and our experience in modernity, we distrust subjectivity. We distrust it. We like objective standards. Tell us what the rules are and we will all play by them. Let these rules be the same for everybody. The moment the standard becomes subjective, the moment it is a standard that can be administered by somebody in terms of his sense of social engineering—my ancestors have been engineered out of too many places too many times for the good of society. I distrust the guy who says, "I know what is good for society, and I will in good conscience do it". Let him produce some measurable set of standards, not meritorious, not numbers, but something which can be administered by someone other than himself and come out to a comparable result. At that point one can live with it.

This leads me now to the last consideration that goes into Jewish policies. There are some Jewish opinions which would stop right where I stopped and which produced the brief that certainly the panelists have read that my friend and colleague Alex Bickel wrote for a number of the Jewish organizations. We refused in American Jewish Congress to co-sign that brief and wrote our own. Because we refused to argue simply on mechanical standards of merit. We agree as a policy matter—we feel very keenly that American society, and for that matter Jews, require a non-polarized society within which a decent social progress is being made. We certainly know that social tinder in the form of unsatisfied desires to advance is bad for everybody and we are certainly aware of the meaning of past deprivation. We know something about past deprivation and we are certainly totally sympathetic to it.

Where, therefore, does this lead us? This leads me at least and without being terribly technical, I express the view of the organization that I head and I think that it is pretty well the straight down the middle view within the American Jewish community, that past deprivation is indeed a standard that ought to be applied. That merit ideas ought to be far more flexible, far less exclusionist, that they ought to be applied to individuals, not to X percent of women or Y percent of Chicanos or Z percent of Blacks and that they ought to be applied in terms of individual deprivation. I cannot for the life of me see why the children of most of the people in the conference white or Black, are more deprived or less deprived than my children and I think that color is thus irrelevant. I think what is relevant is that the deprivation of the Appalachian white, or the Hasidic white from Williamsburg is a very real deprivation. My own deprivation when I came to the United States at the age of 5, speaking only Yiddish and not being able to ask my kindergarden teacher at the school at the foot of Toynt Street, how to go to the bathroom and thus sent home to my grandmother in disgrace on the second day of school was a very real deprivation. And I understand very well why that school should have been bilingual a long time ago. But it should have been bilingual a long time ago in terms of a plurality of concerns, in terms of a very wide-ranging sense of bringing all kinds of people forward.

Our second view is that we are for all kinds of preparatory trainings that bring people forward, that make up for the lacks that environment has imposed upon them. We are certainly for an evolving and changing society. But there is an issue on which no responsible Jewish leader will yield and I certainly will not. Let me state it clearly, flatly and unmistakably, the racial quota will be fought in every court in the land. Thank you very much.

STEINER: Thank you Rabbi Hertzberg. Our next speaker is Professor Robert M. O'Neil who is the Executive Vice President for Academic Affairs at the University of Cincinnati. Professor O'Neil.

O'NEIL: Thank you, Mr. Steiner. Rabbi, I hope this isn't a self-fulfilling prophecy—it isn't exactly the one you contemplated. I was going to say that my wife is Jewish, in fact, granddaughter of a Rabbi who came to this country from Russia, and she disagrees, but it is possible that I have brainwashed her on this issue. I am not sure where she would be on her own although I think she would come as I do, on the other side. Let me just—without getting into the merits of these terribly difficult policy questions, at this point—let me just indicate one reason why I think we do come out a bit differently, looking at the problem, at least as she does, as the problem which profoundly affects the welfare of the Jewish community through higher education. It is our impression, which has not yet been documented, and probably can't be for some time, that those who are harmed, to the extent that any other group is harmed, by preferential policies and programs in higher education, are not Jewish, and that in fact, the percentage of Jewish students in institutions with preferential and special minority programs would not have suffered during this period. Rather those who will have been, to the extent that anyone is displaced, will be groups for example, at the University of Washington of Scandinavian ancestry who comprise the bulk of the population in the area anyway. I wish it were possible to document that so that the situation could be presented to the American Jewish community with the kind of statistical data on the impact of minority programs and preferences which we do not yet have. It is my belief and my hope that the data would so demonstrate and I wish we could have a study to follow that up.

Before getting to the *DeFunis* issue, let me make one comment which harks back to our first session this morning. As I listened to the questions and the discussion following the panel presentation, I was troubled by a feeling that everyone who commented had missed what to me is the most disturbing feature of that discussion. It is the suggestion by Mr. Holmes that we are living in a dream world if we think the present issue is the adequate enforcement or non-existent legislation and administrative regulations. The issue rather, as Mr. Holmes put it to us, is whether those regulations and statutes will continue to exist or whether they will be undermined and their enforcement crippled by a kind of Congressional backlash which is now well under way. The Amendments proposed by Representative O'Hara last spring would have read out of operation virtually every existing special minority group program in any way related to federal HEW support. Fortunately those amendments were not adopted, but the current hearings are directed very much to the possibility that such an amendment will be

adopted and if it is then the kinds of issues that we were discussing earlier this morning will become genuinely, and not in the *DeFunis* sense, moot. There is also a possibility to which Bernice Sandler alluded in her comments this morning, that Title IX may be changed in such a way as to make it virtually meaningless. There is certainly a possibility that if the Holt Amendment survives in the U. S. Senate, we will lack the kind of data base, in the form of institutionally required surveys of enrollment and employment on the basis of race or sex, which are absolutely essential to any meaningful enforcement program. I would hope that perhaps out of this conference might come some plan for a more meaningful and effective response from American higher education than seems to have surfaced so far, at least as Mr. Holmes has given us his perspective on the response or lack of it in the O'Hara committee or subcommittee hearings. This is just by way of background. Let me now do what I was supposed to do and offer a few thoughts on *DeFunis*.

The *DeFunis* case adds a new maxim to our jurisprudence: If hard cases make bad law, then *very* hard cases may make no law. Clearly the case was not genuinely moot last April when the Court declared it so. In other contexts the Court has been more than willing to decide an issue of great public importance after the immediate dispute abated. Only two weeks earlier the Justices passed upon the eligibility of striking workers for welfare benefits though the strike had already been settled.³ The reason being that the issue might return again and had considerable public importance. One has the feeling that the Court grasped this slender procedural reed to escape a quagmire into which it has unwittingly wandered. What explains the Court's need to find an escape route after having willingly—almost eagerly—agreed to review the case?

One possible answer lies in the unhappy condition of the record. Marco DeFunis was hardly the ideal champion for the claims of allegedly aggrieved White Anglo applicants. There are several facts that might bear mentioning. His first score on the LSAT was in fact slightly below the average test scores of the average minority student preferentially admitted to that class. He had been placed so far down on the rank list that even if no minority students had been preferentially admitted, it is almost certain that he himself would not have been admitted, a fact which raises some question of his standing to raise the issue, but that's a question that the courts on the way up were able to overcome. The record also lacked any substantial evidence of the "compelling state interest" which the Washington Supreme Court required in order to validate a racial classification. The particular admissions policies and procedures also left something to be desired, though the University of Washington had cleaned its own house considerably while the case was pending. Clearly this was not the best possible test case. Yet all these defects, as well as the possible mootness were well known to the Court many months earlier. Thus it is hard to attribute the dismissal to any of these circumstances and we are thus led to seek the explanation in other causes.

Several other and more plausible explanations come to mind. Usually

3. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974).

the Supreme Court prefers to have the lower courts wrestle with such divisive issues for a while before making any national pronouncement. So it was that the Court sent back the first miscegenation case⁴ on a technicality in 1957 and waited seven years for the issue to return. Even more clearly, the Court has been biding its time in the interim on the constitutionality of Northern and Western school segregation; despite clear splits among federal and state courts, even the Denver⁵ and Detroit⁶ cases have given us no clear guidance. Such an approach would have made eminently good sense here; the wonder is that the Court agreed to review *DeFunis* in the first place.

Perhaps the Justices originally thought they could isolate the issue of preferential admission from other forms of so-called reverse discrimination. As the amicus curiae briefs rolled into the clerk's office last winter, it became increasingly clear that the admissions question could not be so quarantined. The City of Seattle on one side and the national AFL-CIO on the other gave the Court clear warning that it could not avoid deciding about quota hiring (in both a public and private employment) along with graduate school admission. Other extremely sensitive questions were also inevitably implicated.

The welter of "friend of the court" briefs of which Rabbi Hertzberg spoke earlier, also revealed the unbelievably divisive nature of racial preference. It was novel to see the National Association of Manufacturers and the AFL-CIO together on one side. But it was tragic and dismaying to see the split between Jewish groups which had until now made common cause in aiding minority group rights. The role of the white ethnic groups contributed to the uneasiness about the implications of a decision either way on the merits. Not only the basic positions taken, but the strength of the language, may have given the Court pause.

If one needs confirmation of the whole Court's dilemma, one need only look at the paradoxes and inconsistency of Mr. Justice Douglas' separate tortured opinion.⁷ He alone spoke to the merits of preferential admission. But as Mr. Steiner said earlier, it is very hard to know just *what* he said. He is apparently against consideration of race or ethnic status in the admissions process, but he believes that minorities have been disadvantaged by current admission practices. Therefore standardized tests should be suspended or even abandoned. While race may not be considered as such, the admissions judgment may take account of an applicant's ghetto or barrio background and his effort to overcome it. Participation and performance in special preparatory programs may be considered, even if such programs are open only to minorities. And so it goes. After reading what Mr. Justice Douglas had to say on the subject, one is relieved that other members of the Court did not also attempt to articulate their views.

Since the Supreme Court has offered no guidance, where are we? For some time to come, we may be dependent on lower federal and state court

4. *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749 (1955), remanded, 350 U.S. 891 (1955), *aff'd*, 197 Va. 734, 90 S.E.2d 819 (1956), appeal dismissed, 350 U.S. 985 (1956).

5. *Keyes v. Schools Dist.*, 413 U.S. 189 (1973).

6. *Milliken v. Bradley*, — U.S. —, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974).

7. See note 2 *supra*.

decisions. Before long, some tribunal will decide the other way—indeed, incompatible judgments already exist. Those who seek an excuse to avoid the responsibilities of minority recruitment and education will increasingly find it in such conflicting decisions and legal cross-currents. Until the Supreme Court speaks finally and firmly on this subject, anyone—at least outside the state of Washington—can plead that the law is unclear, and that preferential policies may be unconstitutional. Meanwhile, Representative James O'Hara will shortly resume hearings in Congress which may lend substantial support to the anti-preferential position.

What are we to do until the Supreme Court does speak to the merits? Let me suggest several steps that may help in this uneasy interim period. First, any institution that practices preferential admission should articulate clearly and explain fully to its faculty, students and relevant members of the general community, as the University of Washington Law School has now done, what it is doing and why. The elements of preference and the eligible groups should be described in some detail. Ratification of such policies by the president and the governing board of the institution would be highly desirable, and might enhance public understanding (if not acceptance).

Second, we must be cautious in our use of standardized admission tests. Various ETS units are constantly seeking to improve the predictive value of their tests for minority as well as majority students. Much more work needs to be done along these lines. Meanwhile, every university that relies heavily on tests which exclude disproportionate numbers of minority applicants must know that its admission decisions are vulnerable. What the courts have said in the employment context—*Griggs*⁸ and its progeny⁹—will undoubtedly carry over to higher education before very long. (Indeed, several of the cases on classification of minority pupils as “educationally mentally retarded” presage such a transfer.)

Third, eligibility for special programs should be extended to all relevant disadvantaged groups—a point on which I immediately concur with Rabbi Hertzberg—including economically and educationally deprived whites from Appalachia and, I would say as a native Bostonian, maybe from South Boston as well. Disadvantage must, however, be defined in group terms and not on an individual basis: every Black, Chicano, Native American or Puerto Rican should be eligible regardless of individual circumstances, even though many such persons will not in fact need any special consideration.

Fourth, a real and not merely verbal distinction must be maintained between quotas and goals. The difference, properly perceived, is substantial—despite the efforts of Professor Lester¹⁰ and other recent writers to assimilate and confuse the terms. If a goal is set and the number of qualified minority applicants falls short in a given year, then a smaller number should be accepted. If a larger number apply the next year, then the target figure

8. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

9. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Johnson v. Goodyear Tire and Rubber Co. Synthetic Rubber Plant*, 491 F.2d 1364 (5th Cir. 1974); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Boston Chapter, NAACP, Inc. v. Beecher*, 371 F. Supp. 507 (1974); *Wade v. Mississippi Cooperative Extension Service*, 372 F. Supp. 126 (1974); *Moody v. Albemarle Paper Co.*, 474 F.2d 124 (4th Cir. 1973); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

10. R. LESTER, *ANTIBIAS REGULATION OF UNIVERSITIES* (1974).

might be exceeded. (Incidentally, the term "qualified" must be defined more broadly than Lester and others are inclined to do. Particularly in professional fields like law that involve extensive human interaction and public service, a good deal more than test scores and grades are involved in predicting potential.)

Finally, any preferential policies and special programs should continue only as long as, and reach only as far as, absolutely necessary to meet a critical national problem. The goal is not to give minorities a special or preferred status, but simply to overcome past disadvantage and equalize opportunity. Even that will take some years, given the discrimination and deprivation of the past. But the need for such programs and their proper scope should be reexamined frequently and carefully. And when the time comes that a particular admission preference or special program is no longer necessary, it should cease. Special programs and preferences can be justified only if such a limitation is implied. Who knows? If the Supreme Court really waits long enough, the whole issue may be genuinely moot before there is a final decision.

STEINER: Thank you. Professor O'Neil. Proceeding alphabetically, our next speaker is Dr. Chester M. Pierce who is a professor of education and psychiatry on two of the faculties at Harvard University.

PIERCE: Mr. Leonard provoked concern and dismay when he invited me to comment on a legal controversy. The rage and emotion surrounding *DeFunis* rendered the task even more awesome. As apology before the fact, I must recite an intellectual bias that inclines me toward the belief in the superiority of the heterogeneous group over the homogeneous group and of the cosmopolite society over the provincial society. To my way of thinking the inclusions of Blacks in graduate schools moves the community toward the heterogeneous and cosmopolite condition and thus dilutes the possibility of xenophobia and prejudice. Therefore I have little objectivity in regard to the overall issue.

Already the literature on the *DeFunis* case has brought forth penetrating analyses about such substantive issues as quotas versus goals and about the impossibility of correlating any set of indices with career success. Nor does one have to resort to fruitless arguments about mental tests as a basis for selection to professional school. The state of the art is so slender that medical school admissions have been shown to select candidates who share only one trait: they are taller than candidates not selected.

With these prefatory remarks I will now attempt to enter the arena of *DeFunis* by submitting certain concepts born out of the clinical experience of psychiatry. In order to develop these concepts it is necessary to discuss on the one hand, what is the law; on the other hand discussion is required about what is a lawyer. When pursuing the former question from the lay viewpoint of a psychiatrist, it will be necessary to define racism and look at how law and racism are intertwined. When pursuing the latter question from the special viewpoint of a layman, it will be necessary to contemplate the meaning of operating within a hazardous occupation. From the pursuit of these twin concerns several concepts will be elaborated.

What is the law?

The law is the enlightened revision of custom which guides, bounds and supports the society. In order to effect a coherent re-interpretation of custom, i.e., to continue enlightenment, the law has used the evolving and hopefully better knowledge that humans obtain in the court of their cumulative experience. Thus in court experts have been used in many ways from identifying the culprit insect in a case of despoiled fruit to estimating a likely instrument of death.

Today, in my opinion, the law should recognize that racism is an infectious disease. It should be treated as any other contagious illness which threatens virtually the entire population. Further the stress occasioned by racism is of such magnitude that it contributes to the dis-ease of the entire population and probably abbreviates the length of life of both oppressed and oppressing segments of the society. Doubtlessly, in the 20th century, when humans still kill each other over the putative superiority of skin color, the quality of life shrinks for everyone.

We are dealing with a madness, which afflicts millions of people and which can be shown by an abundance of anecdotal, clinical and experimental studies, to be a contagion characterized by the delusion that white skin color confers overall and undeniable superiority.

It is chastening to consider what outcry would be heard if a manufacturer *deliberately* transferred botulism organisms to the general public. The law would be swift and sure in dealing with such a monster. For the "enlightened revision of custom" would not stop with demands for equal protection or cries for freedom to pursue life and liberty. The populace would consider such a monstrous manufacturer to be beyond the standards of decency and a practitioner of cruel and unusual punishment.

The concept germane to *DeFunis* is that law schools which do not take vigorous action to locate and train Black youth to become lawyers are acting in equally monstrous fashion and help to both permit and sustain an infectious disease which plagues the populace and diminishes the quantity and quality of life for all citizens. This seems incontestably a mental derangement in which persuasive reasons of self-interest, as well as humanitarian concern, are ignored in order to do harm to the total community.

An audience such as this knows well the ramifications of this contribution to the infectious disease in the commercial and legal worlds. You have all seen countless examples in which the skin color differences of client and lawyer played a significant role in how justice was conveyed. You have all seen examples of well qualified lawyers stymied or inhibited in their performance by virtue of skin color. To perpetuate knowingly this type of problem is to intensify as well as disseminate an illness. To do so must be seen *by those in command of legal resources*, to be as cruel and indecent as a manufacturer who knowingly negotiated lethal canned goods. This means that law school admissions offices, in their contribution to the elimination of a public health illness, must take measures to augment markedly the number of Black lawyers. A critical mass of Black lawyers must be present to expedite needed social change.

But what is a lawyer?

I'm not presumptuous enough to define something that the relevant persons themselves might not easily define. The special issues to be raised here are two: 1) how valuable is legal training and 2) are there special hazards in being a Black with legal training?

Throughout Graeco-Roman times training in the law was considered the basic background for the literate and couth citizen. The law as a discipline has been thought always to give a special view and special advantage to anyone who embraced the discipline. Today, trained lawyers work in a plethora of situations in both business and government. The generic training in the discipline seems still able to be an excellent preparation and entry port for limitless vocational and personal opportunities.

It has been underemphasized in the *DeFunis* discussions how versatile the legal training is in providing talent for all manner of endeavor. So often the arguments seem narrowly conceived in terms of the need for young Black lawyers who will be restricted only to the practice of law or perhaps legal scholarship. In terms of societal needs, there may be even more pressing reason to train Blacks in law, so that they can enter and perform creditably in a wide array of other areas, using legal training as their approach to problem solution.

However, if such a happy day arrives that proportionately as many Blacks find these extra-legal careers as have whites from classic antiquity to the present day, we might consider that such Blacks will continue to be under extreme duress. For all through their lives Blacks are subjected to incessant abuse, degradation and minimization. The attainment of the law degree in some ways is equivalent to the arrival of a person into an even more hazardous and hostile environment. In fact the attainment of the degree represents only one definite milestone in the journey of a person who has been obliged to roam in a hazardous, hostile environment. The special privileges conferred by the degree will bring with it special risks that a white peer won't suffer.

There is considerable knowledge about how to select and train individuals to survive in hazardous situations. The concept relevant to *DeFunis* in this regard is that the selection of quality candidates demands individual scrutiny of each man's motivation for the task before him. His previous background in the successful resolution of near comparable stressful situations is weighed heavily. Thus it is contended that law school admissions committees must project the societal needs and attempt to anticipate and dilute ugly problems, while helping to shape and form a better life for all citizens. To do this demands careful but definite selection of those who can and will adapt to unusual hazards.

Ugly community issues will be unresolved and aggravated unless there is informed and dedicated input by all classes of citizens, including those capable of changing unwanted and unneeded hazardous conditions. Further to continue having a class of disenfranchised citizens means that the society must continue to have a strong police mentality in order to enforce the disenfranchisement. In such a situation the question to be asked is whether

indeed a society can have a partial police state anymore than an organism can have partial cancer or partial pregnancy. The majority population thus must come to see it in its own interest to eliminate those conditions which insist that there be a police state.

If the undesirability of nurturing young minds to live in a police state is of concern to the majority population then efforts to insure wide participation in all educational institutions should be approved and applauded. States desirous of continuing serfdom and slavery, such as the United States of the 18th and 19th century, make stringent laws to keep oppressed groups from ever having access to learning. Legal complexities such as *DeFunis* appear to carry this tradition into modern times.

Black student lawyers are and have been under greater jeopardy and hazard as they enter and complete their studies. Like all Black professionals the jeopardy will increase in terms of any comparative index with a white peer. That is the Black will have less income, worse health, poorer housing, decreased policy making impact. Yet these hazards, despite the toll they take, only reflect the more subtle, stunning and continuous dangers and stresses that the Black encounters due to the microaggression from whites in his daily life, including his professional activity. Thus a Black may work longer hours than a peer because he is fractionated and made to serve in extra capacities, etc. These frustrations occasioned by special hazards, accumulate with the constant insult from gratuitous unnecessary subtleties. For instance a Black at a company dinner is asked to set up the chairs when his peers are about to assemble. Or a Black lawyer is overwhelmed because the bail process is more elusive for his Black client because they both have Black skin.

For these reasons the Black lawyer operates under more duress and strain than his white colleague. Hence his selection may require somewhat different (not less rigorous) standards.

For people interested in equal opportunity, I believe *DeFunis* discussions can be generalized to the need to defend the precious but slim gains that have been made in the past decade.

From the viewpoint of a psychiatrist the law as a revision of custom must move toward seeing racism as an infectious disease. Then any person or institution spreading this disease with forethought is malicious, cruel and indecent. Ideally in such a situation, the society will decide it is alien to the interests of the whole community. Thus law schools, for their part, as a responsible moulder of institutions, must seek out, admit and graduate lawyers, who as a group can have a disproportionately large influence on how the society will evolve and how the society can eliminate a dangerous and infectious disease.

These lawyers will be citizens who will have to conduct their personal and professional lives under unusual stress relative to whites. It would seem compatible with the best knowledge of selecting persons for hazardous duty that the candidate for the law degree who is Black need not be judged on the identical criteria even though, of course, he must be able to complete as demanding an education.

Finally, the law is conservative, as it must and should be since it

reflects the revision of custom. Yet it is organic and changing. The law student is taught to consider what the reasonable man would do in this organic process, just as the medical student standardizes his thinking on the seventy kilogram man.

I submit that we all might standardize our thinking on the all embracing human hearted man of the Chinese philosopher. The human hearted man would not say that *DeFunis*, as a representative of a category, should be excluded. Indeed, conservative pressures will and should see that such a category is protected. However, the law in its organic component modifies things and the human hearted man would insist that a category be included which has the potential to ameliorate some of the most gross social ills.

STEINER: Thank you Dr. Pierce. We move back to the law now for our last speaker before questions, Professor Albert Rosenthal from the Columbia University Law School.

ROSENTHAL: Thank you. I share with Rabbi Hertzberg a common Jewish heritage, and I was about to say I share with Mr. O'Neil a Jewish wife—not the same one. I probably would go to Synagogue more often if I would have an opportunity to get up and express disagreement after the Rabbi has concluded his sermon. Again, I am grateful at this chance.

I had not thought of this primarily as a Jewish issue and I want to get off that aspect of it as soon as I can. I think that it is an issue for everybody in this country and I think, as Mr. O'Neil quite properly pointed out, to the extent that majority members—majority meaning those who are not members of groups that are beneficiaries of what I would call benevolent discrimination—of the majority group, the impact upon Jews is really negligible. So I think we ought to think of this as a national problem, a white person's problem, a problem of where America ought to be going. That is a different issue. I am concerned about the notion of their being a Jewish establishment and spokesmen for it. There are a number of jokes that any Jews in the audience are very familiar with—they may be novel to the rest of you, that seem somewhat apropos. One of them might be that any time you get three Jews together you will get four points of view. Another one is the only thing any two Jews can agree upon is what a third Jew ought to give to the United Jewish Appeal. It's very hard to find any common view point and while all Jews can certainly feel an apprehension about anything that suggests a revival of the sort of discriminations that were encountered in this country in the past in educational institutions, of the sort that Rabbi Hertzberg referred to and are existing in many other countries, notoriously the Soviet Union today. We tend to be paranoid about these things and if we are, other people will just have to be sympathetic and forgiving. But that still doesn't mean that necessarily the benevolent discrimination for Blacks, Chicanos, Puerto Ricans, American Indians and possibly some other racial minorities, constitutes any significant threat to Jews or to white people in this country as a whole.

I think you have to be realistic in terms of treating inclusion and exclusion as two different things. Any proposition carried to an ultimate conclusion may very well result in something that seems horrible. And if we are to carry the notion, say that favorable discrimination by which I mean

somebody who is Black or Chicano, etc., with equal credentials will have a better chance of being admitted to a given educational institution than if he were not a member of one of those minority groups—that, if you carried that to the conclusion of providing similar treatment for each ethnic group in the nation, eventually you would end up with this kind of formula which says that every group must be represented by precisely that portion in academic institutions that it bears to the population as a whole. If and when that happens, or anything approaching that happens, I think we have something very serious to worry about and I don't think any groups in our society would welcome that kind of eventuality.

But we are not talking about that. We are talking about perhaps 10, 12 or 15% of the enrollment in a given educational institution being, not earmarked, not a quota, but at least an effort being made to have some such percentage represented in the student body. This means in effect that 85, or 88 or 90% of the student body will continue to be selected from the majority of the population. I just don't see that the slight diminution of the mathematical chance of a majority member getting admitted can be equated with a quota system or an exclusionary system that means in effect that a member of a given group has very slight chance of admission. We are torn—at least as a lawyer, I feel that the law and the courts are torn and I suppose society is torn—between two different corollaries of the 14th Amendment, of the whole notion of racial equality in this country. There are really two possible implications of what the country has done that are reflected both in terms of our value judgments and also in terms of where the law is and where it may be going.

One is the notion that all of these measures—particularly the 14th Amendment but some of the anti-discrimination legislation like Title VI and like state and local anti-discrimination legislation—one interpretation of it is that it is to make everything color-blind. The other interpretation is that it is to protect disadvantaged minorities and particularly Blacks from discrimination. For most of the history of the country, these two objectives coincided because the only kind of discrimination anybody engaged in was against Blacks and against other groups that have been similarly mistreated. But the problem of benevolent discrimination, of compensatory treatment with favoring groups of that kind, has surfaced only very recently. And so it is only now that these two possible meanings of a single constitutional provision or of a single legal doctrine have suddenly come into conflict with each other. It gives rise to something that we have to wrestle with and it is not too easy.

The *DeFunis* case certainly has answered nothing. If the holding were that benevolent discrimination—again using this as a kind of a catch phrase to save a few syllables—even assuming the courts were to rule that it is a violation of the 14th Amendment it doesn't automatically follow that it should be applicable to private universities, which I gather are more heavily represented here than state universities in your group. In the brief that Mr. Steiner, our chairman and Professor Archibald Cox write, in the *amicus* brief before the Supreme Court on behalf of Harvard, they stated, and I don't do them justice in paraphrasing it much less elegantly than they had

written it, that in effect that if the Supreme Court were to hold that the kind of practice that the University of Washington had engaged in was so unreasonable or unfair that it violated the 14th Amendment, private universities would certainly have to take then a fresh look at their policies and ask themselves, can we continue to do things even without any compulsion of law one way or the other, can we continue to do something which the Supreme Court says a state university is forbidden to do? It's a very real question. I have my own personal answer to that, and that is, "By God, yes." Until the court says we can't do it also. But that's a personal viewpoint and many would feel otherwise. I would go a step further and say if by chance the law were to develop to a point where state universities could not do what I feel is necessary for society be done for giving opportunities to minority members, then the private universities unless and until they are under similar legal restraints ought to redouble their efforts to make up for the inability of the state universities to do it. But that's a private credo and not necessarily one that would be shared by many others.

I think that when it comes to the ethical issues involved we ought to regard the problem of race in this country as *sui generis*. There is no other problem in our current life or in the history of the nation that I think is in any sense in the same class. With all due consideration to the sufferings of Jews in the United States and elsewhere, I think that in terms of American society, the problem of Blacks has been one of infinitely greater dimension and the disadvantages that have flowed from it cannot be eradicated by applying color-blind policies. I share Mr. O'Neil's hope that given enough time these disadvantages in early training that are the product of discrimination will be sufficiently well wiped out that we can forget about all this and the issue as he so well put it, will genuinely become moot. But until then, we have got a very serious problem and I think it is particularly troublesome to me as a lawyer to have in mind the fact that for the history of this nation, or even before it became a nation, until very recently and indeed right through the present time that Blacks have been the victims of continued and persistent and vicious discrimination. That for almost all of that period, this discrimination has been sanctioned and in many respects, actually compelled by the law. And now finally, in the last decade we have taken a few feeble, paltry, faltering steps to try and do a little something in the other direction to remedy some of the consequences of that and immediately, we are met with the argument it violates the 14th Amendment, we have got to be color blind, you can't take race into consideration. After centuries of taking race into consideration, to relegate Blacks to a thoroughly second class status in every possible sense, suddenly, when an effort is made to redress the balance slightly, we immediately are faced with this difficulty. I just don't think we can look at it that way or can say that an affirmative effort to include a given number of Blacks in an educational institution's student body should be regarded as the moral, the legal or the ethical equivalent or anything else of the kind of practice that has limited Jews to a certain percentage in a student body a few decades ago.

I think that we ought to consider a couple of other aspects and I don't want to take too much time at the expense of a question and answer period.

But, there are other parts of this too. Again, referring to the brief that I thought was the best of the whole bunch of briefs that were written in the *DeFunis* case, and again was the one that Mr. Steiner and Professor Cox shared, a very careful evaluation was made as to the admissions policy for Harvard College about the importance of having a cross-section in the student body; the need for not necessarily picking the students with the best credentials and having the class that appears to be the brightest; that the education given to everybody would be enriched if the university were freer to pick among people of different sorts of backgrounds. Certainly until we become a truly integrated society, racial differences mean significant differences in background, probably greater in terms of the different cultural assets that can be brought to a class, the different contributions that can be made by different people. A university ought to be free to tap all segments of the society. We are not talking about admitting unqualified people. We are talking about a pool of applicants much larger than can possibly be accommodated in a given educational institution, all of whom are concededly qualified and the question is do you mechanically have to pick the very best ones in terms of background credentials, or may you pick a group that enables you to give everybody better quality education.

Another aspect of the same problem, is the question of what you are going to do about the disparity in income in the nation between Blacks and whites, and that is that roughly, the last census figures show that the typical Black family had about 60% of the income of the typical white family. If you take the subject of entrances into the professions with 11 or 15% of the population Black, less than 1% of the lawyers are Black and I assume the same is true for most of the other professions. And the higher the average income of the profession the truer it probably is which suggests that in the medical profession, since they are much more affluent than the legal profession, the disparity is probably even worse. In any event, it seems to me that heroic measures are needed to break that up—and entry into colleges is one form of entry into opportunities for better paying jobs, entry into professional schools is a second channel to the same thing. I just don't think we can close our eyes to the disparities existing in our society and our economy and blindly apply a color-blind policy for in effect the consequence will be perpetuation of a very unsatisfactory status quo.

STEINER: Thank you all. Before we proceed to questions if I could have one point of personal privilege as moderator, to correct one thing Professor Rosenthal said, I was willing to allow one flattering reference to the Harvard brief which Professor Cox and I had produced, but two I can't quite let go like that. The participation in that by me and two other fellows with Professor Cox was somewhat akin to if I went out and dug a large hole and planted a tree and put all the dirt back in. Then my son came along and said, "May I put on the last bit of dirt?" and I said yes, in the sense that the two of us would have planted that tree, that was the sense in which Professor Cox and the others of us did that brief. It was mainly his effort for which he deserves most of the credit. I can't compare it with all of the other briefs that were done but I thought it was a very, very good brief that we put in. We can now have about 20 minutes for discussion and questions. I see one question there.

QUESTION: I am the Director of Higher Education for the Office for Civil Rights, I work with Mr. Holmes and I would agree with Professor Rosenthal that this probably is the basic question facing higher education and society today. In fact it is such a critical question and I knew it was coming before the Supreme Court, that plus the *Adams* case almost kept me from taking this job. I wasn't sure that I was either mentally or emotionally equipped with the requirements to deal with those hard decisions. Having said that, let me say that there is a mood in HEW and I somewhat hope that Professor O'Neil was right that we will have some time before the cases come back before the Supreme Court, but I am not confident of that. Therefore, we have moved from the Office for Civil Rights to ask the Secretary of HEW to convene an inter-agency task force to study this question. I am chairman of that task force. I would like to discuss many of the philosophical issues and I hope all of you here appreciate what an outstanding panel you have, because I have read and read on this subject and they have certainly summarized the issues today. But I would like to say to Rabbi Hertzberg as I have said to Mr. Goldfarb that I just don't think that the comparability of the Jewish experience to the Black experience in the United States is there because as I have studied the history of the Western society, excluding totalitarian systems, it has been the Jewish culture that has produced so many of our scholars, and that Blacks have not had that opportunity. And I would have to agree with you that I oppose racial quotas but quotas are there, as Walter Leonard said this morning, otherwise, why are we still not producing female and Black dentists? Why aren't they getting into veterinarian schools if we say there are no quotas and those deans will tell you there are no written policies against it, but somehow they are still not getting in?

I listened to all of you talk about the admissions process and I have some real problems about that as an academic. Is it the federal government's role to decide in what areas and what disciplines that we should have these special kinds of admissions programs? I don't know. But I want help from you. I really don't want a philosophic discussion. I would love to hear in, I would like to say 25 words or less, but at least a statement from you.

I am going to be meeting again with the American Jewish Congress and the NAACP, and the Urban League and all the rest, as to what their positions are in this. What is the solution? I don't want to have to wait as a member of this society, for the time that it has taken Jews in America to overcome the barriers to overcome what we know is going on against other ethnic groups today.

So what should the rules be? How can we at HEW find an answer to this admissions question? Not only on the undergraduate level but very especially in the professional schools? What should we do? This is more than a civil rights question, it constitutes the financial aid. To continue a pluralistic society we've got to have the funds in order to bring those people in. I would like concrete examples of how we can come up with a policy that would not be in any way a discriminatory policy, an exclusionary policy, but would overcome the past injustices?

STEINER: Would anyone like to comment on that?

HERTZBERG: I have in front of me I think the answer. Interestingly enough it's a letter, circular letter that Mr. Rosenthal sent the other members of the panel in which he said, and the document is in front of me, that he can't out-guess what the courts will decide, it will probably decide somewhere in the middle between the two alternatives and he says therefore, if so, then the following procedures might prove to be the least likely to be vulnerable to attack and I read *ipsissima verba*. "A. Applicants should be treated as individuals with all qualifications including minority status weighed together rather than separately on a racial basis. Separate lists, separate cut-off scores, etc., should not be employed." It seems to me that that is not at all different from the position that I was espousing. The only variation is in his point B in which he says "goals rather than quotas should be useful if numerical treatment is found necessary." Now I would say, speaking personally, that somewhere within this very generalized formulation there is probably some livable room. That is my short answer to your question. I remain profoundly convinced that and I am not comparing Jewish experience to Black experience. Quite on the contrary, I am saying that out of Jewish experience one simple thing, I am afraid of a society which starts playing the game of *X* numbers in *Y* positions. I want Professor Pierce's open society. I want the non-homogenized, non-paranoid one, and therefore, I would hope that even now we would find modalities of making social progress which deal with individuals in terms of where they are at, including their ghetto minority background, indeed very much including that, but deal with them as individuals. I come out where I began, the original sin of *DeFunis* was two pools of applicants. Once we get past that original sin it would seem to me that all of the other things that you are saying and the rest of the panel have been saying are quite possible.

COMMENT: Cut-off scores are based on tests and we know that there is statistical data that minorities and women do not do as well on these. Incidentally, we have included in Title VII women as well as minorities so that this is not a racial matter only.

STEINER: When you ask for the role of HEW, I may be incorrect, but I think affirmative action in admissions in educational institutions did not stem from HEW requirements. This is something where I think to the extent that they have succeeded, and if I had to pick one area of university activity where I think universities have been more successful, far from perfect, but more successful, it is in the area of admissions. This stems from individual initiatives, if you will of different institutions in a pluralistic society. In the present state of uncertainty over the law and the fact that the pluralism seems to be having some success in developing different techniques for different areas and different problems for different institutions, maybe this is not an area where HEW need speak definitively at this point. It also may offer some notion as to the proper role of HEW in certain areas with regard to educational institutions. The facts that you mentioned such as the predictive value of test scores, and disparate effect of tests on different groups of our population known to our institutions today.

COMMENT: As a member of the American Jewish Congress, as well as B'Nai Brith and the American Jewish Committee, and also the current

president, and having worked with the NAACP for almost 43 years and for Jewish causes for 50 years, I as a member of those three Jewish organizations, disagree completely with the actions that they took on this case. I was one responsible for getting the Union of American People Congregation to take the opposite side and bring this case into court. I think that we forget that we Jews have been out of slavery for over 5,000 years and the Black people just a little over 100 years, and there are a lot of disadvantages that they have had that we haven't had and that the three speakers after Rabbi Hertzberg I think have pointed out, and for me to repeat them would be a waste of everybody's time because their facts spoke for themselves. I think that the vast majority of Jews that have gone along with the Congress and the Committee have really not understood the basic philosophy of it, they have been sort of swept into it. But when you talk to people and explain what these three gentlemen did and get down to basic facts, you can change their minds and get them to understand that there are two sides to this and that this is not just a one-sided thing, and that this is the proper procedure.

QUESTION: I would like to address an impression to Mr. Steiner and also the rest of the panel emphasizing what just has been asked by HEW. Women are not in the minority numerically speaking, they are 51%, perhaps more than that, of the population. Women have been educated for quite a long time. They are in every strata of society as wives, as workers, as specialists. Why is it and can you find a logical explanation why even today there are practically no full professors at Harvard that are women, why there are no women administrators, why is it that women are under-represented in all decision-making positions? They have acquired the education by the university. How is it possible to lift up the women if they are not in a position of either Blacks or the Jewish community or any minority that has been outlined? What is going on in your institution that this could be so?

STEINER: I guess it's difficult for me to turn to the other panelists and ask them to answer a question about Harvard. So I guess I am stuck with that one. One, there is . . .

QUESTION: And what can be done about it?

STEINER: Well in 25 words or less in keeping with that earlier mandate . . . When I think that there are some overstatements involved in what you are saying, I think the very presence in this room of some women administrators who are holding appointments of some importance at Harvard would tend to discount that. The progress on tenured professors within the faculty of Arts and Sciences which is our very largest faculty here, has been slow, primarily because the turnover in any tenured faculty is very slow. We make about 15 appointments a year of a tenured nature in the faculty of Arts and Sciences, those are distributed among 35 or 40 different departments. In each case one has to look to see who is the most qualified person within that particular field and sub-field. I don't offer this as a defense, I offer it as an explanation. As for the fact that there has been discrimination against women in Harvard and other universities in our

society in the past, there is no doubt that that is true to my mind. We have developed what we hope will be successful procedures and processes to try to improve the number of women faculty at Harvard; the number of assistant professors has gone up quite a bit—the beginning of the academic ladder—and I think this is the only way that we know how to go about it. We have developed what we think, and I know there are others who disagree, what we think is an effective affirmative action plan which we are trying to follow. I know that you disagree, you wouldn't have asked the question if you hadn't. But we are trying to do what we can in the way of appointments at a faculty level and at an administrative level to improve the picture of the employment of women and of minorities at Harvard. We have made some progress, it is not as fast as others would wish. It is not as fast as I would wish. But we are doing what we can with it. It is a long and complex story, and that is a short answer to your question.

QUESTION: Would you not then suggest at Harvard that women be given reverse discrimination in being tenured? If it works elsewhere, why doesn't it work here? Let women be tenured at a higher rate. Let women be exceptionally tenured.

STEINER: Would anyone like to comment on any possible . . .

HERTZBERG: I would think, it seems to me, that it follows, from the logic that everybody else has been using on this panel except me. It would suit me. I have two daughters on their way into academic life, one of them here seated.

ROSENTHAL: I think one could draw a distinction. I am saying that that should not be done, but I don't think the issue is quite the same as that of race because in a sense with the segregated society we have today, members of minority races themselves share a different kind of experience and are subjected to a kind of deprivation of opportunity that women don't share since they are members of the same family groups as men. I don't mean to say, I am not at all downgrading the importance of doing things for women, but I don't regard the issue as really a comparable one.

O'NEIL: Let me just add a comment on the same question. I think we all recognize that there have been barriers and obstacles typically subtler than in the case of racial obstacles which have impeded the progress of women above the baccalaureate level. It is the baccalaureate degree that is the last stage in higher education at which women appear with anything like equality. Thus, it seems to me that certain measures, perhaps fairly drastic measures, are needed in the next five to 10 years to overcome the effects of those obstacles. But I don't think they are the same kinds of measures that are appropriate to overcome the racial barriers. I think what we need is a lot more development of part-time tenurable appointments, for example, something that is much talked about. But every time you do a survey, you discover that the number of institutions that have any meaningful number of women on these part-time tenurable appointments is really very small. The progress being made in areas like that is much less than I think it should be, so that I would say, the problem is in some ways common, but the remedies have got to be different.

QUESTION: As an administrator of a small college where the majority of the deans are women, and where the tenured faculty has almost equality in terms of male and female, I must point out that there is a misconception of this whole issue. There is not, as far as I can make out, from my own experiences, there is no affirmative discrimination against women in higher education going up the ladder, it's a matter of choice on the part of many women who are . . . giving up their faculty status to accompany their husbands, moving to other professions to other parts of the country, but go home and have families. They are not discriminated against, excluded, it's their own free choice, they wish to start a family and have children, take care of their children and then come back to the profession again. I think this is a fact of life that we have to deal with. I don't believe there is any comparison between discrimination against minorities and the so-called non-discrimination against females.

COMMENT: I am Winnie Barad. I am an Assistant Dean at Harvard Divinity School so I am one of those Harvard administrators you identified. It is difficult being a female in administration. This is essentially a male university. But it is true that there are some of us here. At the Divinity School the racial issue and sexual issue have been interesting enough perhaps moreso than in the other schools because some of the women and the minorities who have been very active for a number of years particularly who have been at the Divinity School for long years, longer than at some of the other schools, have questioned the inherent racism and sexism in the established church and this has broadened into the general society. We have been wrestling with these questions for a long time.

Very recently one of our very revered and learned professors came back from Poland from spending a sabbatical there. Granted this is a Communist country, but he came back and reported to us at a faculty luncheon that the prayer books in the churches in Poland still carry the statement that Jews are Christ killers, that anti-Semitism is as rampant in Poland today as it ever was, and that Jews there still suffer enormous prejudice and enormous indignities. Now I simply wish to say that it has pained me, not only during the years I have been here at Harvard, working actively in EEO work, in my time at the Divinity School, to listen to the battle between Jews and Blacks, on who has suffered more. I would like to suggest that our experiences show that racism toward Blacks, and racism towards Jews is still very much alive in the world today, and the paranoia which both of these groups suffer is justified. I would like to hope that the ways they find to battle that paranoia in this country should be respected as self-motivation, not as anti-Blackism or as anti-Judaism and this seems to be what we are learning at the Divinity School in questioning the attempts of the church relative to sexism and racism. I am sorry I didn't ask a question but if someone wants to challenge the basic tenets of the church, I would be glad to respond.

COMMENT: I would like to call to the attention of those present that Dr. Alvin Pouissant, a member of your Harvard Medical School faculty in the July issue of EBONY has written a wonderful article on Blacks and Jews, and if there are those that haven't read it, I think should read it.

STEINER: If I could close by doing two things—one, thanking our panelists very very much because I think it is an extremely difficult topic to talk about as concisely as this group has done. A lot was covered in a very very short time. Secondly, if I could depart from the normal role of a moderator, since I have been involved in this issue, and reemphasize one point which I think is demonstrably valid. This is not an issue that concerns only Blacks and Jews. The problem has much deeper roots in our society than just Blacks and Jews, and I think a number of people have made this point, but I think it is a crucial point to remember in this discussion. Thirdly, I would like to close this session with one other observation on the *DeFunis* case to show you that there are different perspectives. This is a fairly reliable story about Matthew Troy who is a very powerful county leader with the Democratic Party in New York, who supposedly was sitting in the club house one night listening to a discussion of the *DeFunis* case, maybe somewhat comparable to what we heard today, about some of the philosophical, social and legal issues involved. He finally stood up and said, "Well, I don't know what the problem was, but if the kid wanted to get into law school, why didn't he see his county leader." Thank you all.