Honorable Ends, Unsavory Means

Carl Cohen

Civil libertarians must perennially combat the efforts of well-intentioned persons to achieve honorable ends through unsavory means. Stopping illicit traffic in hard drugs does not justify wiretapping or no-knock searches; military intelligence needs do not justify a little torture; national security does not justify political surveillance or the suppression of "dangerous" opinions. Generally—and rightly—we insist that in a healthy polity certain instruments are precluded by fundamental principles, political and moral. Some of these principles are specifically embedded in our Constitution.

Sometimes, civil libertarians themselves chafe at these restrictions. Our purposes are so decent, our ends so worthy, that for us (it is suggested) a little bending of constitutional principles may be forgiven. Our objectives, unlike those of lesser folk, are compelling.

So the argument runs in defense of some varieties of compensatory affirmative action, when civil libertarians support flat preference on the basis of race. Most forms of affirmative action, entirely wholesome and justifiable, require no compromise with principle. But the compensatory objective is so painfully pressing that when it appears more conveniently attainable through preference by race, some of us defend the resort even to that unhappy instrument. Our end is justice, after all; to achieve it (the argument goes) a mild form of reverse racial preference, though intrinsically distasteful, of course, may in this context be tolerated, even condoned.

This position is deeply wrong; it is unwitting betrayal both of constitutional principles and of civil libertarian commitments. Its wrongness can be seen clearly in the recent, controversial case of *DeFunis* v. *Odegaard*.[1]

The American Civil Liberties Union entered the *DeFunis* case, as a "friend of the court," on the wrong side. Our counsel argued that, in admission to professional programs, preference by race is an acceptable form of affirmative action. In that case (simplifying greatly for brevity) the University of Washington Law School maintained two rosters in determining admission: the regular one and another for minority-group students. Minority-group students competed only against each other for an imprecise number of slots (it turned out to be 16% of the number admitted), which would provide, in the words of the law school, "reasonable proportionality" in the entering class. A double standard for admission was admittedly used; some minority-group students were accepted who, all agree, would have been summarily rejected but for their race; some students in the majority group (very probably, but not certainly, including DeFunis himself) were rejected who certainly would have been admitted if their race had been of the preferred category. This variety of racial preference, the ACLU argued, "does not violate the constitutional rights of nonminority-group students" who were rejected.

The Supreme Court of Washington (referred to hereafter simply as the court) agreed with the ACLU and the law school, reasoning as follows:

1. Racial classifications, though inherently suspect, are constitutional and permissible when their purpose is "to prevent the perpetuation of discrimination and to undo the effects of past discrimination."

2. The burden of any institution using racial classification (e.g., the law school) is to show that its consideration of race in admitting students "is necessary to the accomplishment of a compelling state interest."

3. The interest of the state in this circumstance is compelling, and the racial classification used to accomplish it is necessary.

Hence the law school is upheld.

The court's elaboration of this argument is thoughtful and eloquent, the most convincing statement of that position extant; but it is deeply unsound. Note that the argument depends upon the solidity of each of three links; should any one fail, the whole does. In fact, upon close scrutiny, all three fail.

1. Racial classifications in the distribution of benefits and preferences under law are not permissible—not morally and not constitutionally. Here lies the nub of the means-end problem in this sphere. The court argued that our recent history in rejecting racial classification, as in *Brown* v. *Board of Education* and subsequent civil rights cases, was a rejection not of racial classification per se, but of racial classification improperly used. *Brown* and its progeny, said the court, established that racial classification is unconstitutional only when

"Preference by race is malign. Its malignity has no clearer or more fitting name than racism."

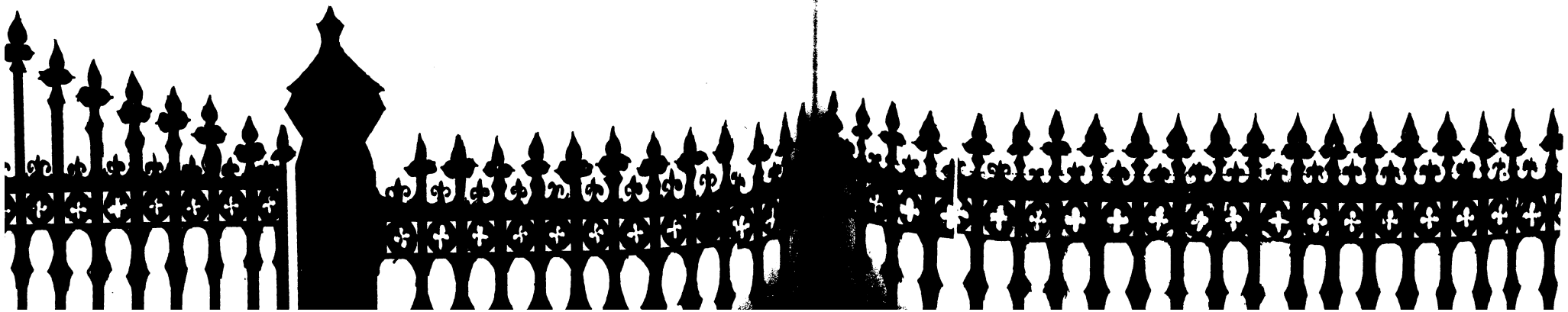
invidious, when used to stigmatize. But the aim of the law school is honorable; it is to achieve equality in the long run. Having this end, racial classification and preference based upon it are permissible means.

They are not. Such classification and preference are permissible under no circumstances, however honorable the end. They are not permissible because race and ethnic origin are attributes wholly out of the control of the persons manifesting them, adventitious characteristics of persons without bearing upon entitlement to benefits under the laws. The fact that Marco DeFunis would surely have been admitted to the law school had his skin been black or brown proves that he was, indeed, denied what the Fourteenth Amendment to our Constitution guarantees: the equal protection of the laws. If that guarantee does not insure that skin color will be irrelevant to one's entitlements under law, it insures very little indeed. Civil libertarians are well-advised to be cautious in belittling the force of the equal protection clause when it serves their purposes to do so. Others, whose purposes are as compelling to them as ours are to us, will find that practice very convenient, to our distress.

Expediency here has not even the support of sound reasoning. Racial classification was rejected in *Brown* and a host of subsequent cases not

because it was improperly used but because it is intrinsically unwholesome. The court dodges the sharpest bite of the *Brown* decision: racial classifications in the distribution of preferences and benefits are always invidious. Invidious classifications are those tending to excite ill will and envy, which is precisely what racial preference on the law school model does. Invidious classifications are those likely to be commonly viewed as unfair; race taken as the basis for preference in highly competitive admissions contexts is, for a plain person, the paradigm of unfairness. If this isn't an invidious classification, there are none.

"Some such invidiousness," the advocate may respond, "is admittedly unavoidable. But it is the *stigmatizing* effect of racial classification that is chiefly objectionable. That is what *Brown*, and like decisions, really condemned." But the change of phrase provides no rescue. To stigmatize is to brand or label, generally with disgrace—and that is exactly what is done by racial classification when it is put to the service of preferential admission Indeed, such classification is doubly stigmatizing: it marks the majority r group as formally to be handicapped, its members burdened specifically virtue of their race; for the majority-group applicant, earned personal qualifications will not be enough. Persons in the minority racial category to be officially treated as though unable to compete for the good in questi an equal basis; by physical characteristic the minority applicant is mark as in need of special help. On both sides morale is subverted, accomplish clouded. On the one side, all carry the handicap regardless of their past or capacity to bear it; on the other, all are received with the supposition o inferiority, regardless of their personal attainments or hatred of condesc For everyone, the stigmata are visually prominent and permanent. William O. Douglas, in dissenting from the U.S. Supreme Court's hol mootness in *DeFunis*, put this bluntly: "A segregated admissions pr creates suggestions of stigma and caste no less than a segregated classr



and in the end it may produce that result despite its contrary intentions .... that Blacks or Browns cannot make it on their individual merit .... is a stamp of inferiority that a State is not permitted to place on any lawyer."[2] I conclude that the first and fundamental step of the Washington State court's argument cannot be justly taken. Racial classifications in the distribution of benefits under the laws are always invidious, always stigmatizing. That is why they are, per se, unconstitutional.

How, then, do we explain the fact that in three recent school desegregation cases, *Green, Swann,* and *Keyes,*[3] the Supreme Court recognized the need to take race into account for the sake of justice? Needing some illustrations of the reasonable use of race, but having only the first two of these available for analogy, the Washington court made much of them in *DeFunis,* while carefully avoiding mention of the fundamental difference between the remedies approved in these cases and the policy at issue in *DeFunis.* It is true that in these school desegregation cases the courts look to race and racial mix. But it is not true that such attention involves, or permits, classification by race to determine the allocation of benefits, which is what preferential admission entails. The very reverse, in fact: these desegregation cases have as their main thrust absolute equality of treatment, equality of benefit under the law. Clearly, if that equality has been systematically denied by a school board or other agency through the segregation of races, effective remedy must look to the desegregation of races, and that was done. But no racial classification for the distribution of benefits is there even entertained. Indeed, it is precisely the use of such classification that, *through* such cases, we are having now to undo. To use the need of that sort of remedy as a justification for the introduction of another disorder of the very kind that remedy was designed to cure is reasoning both convoluted and dangerous.[4]

The first Justice Harlan insisted (ironically, in his memorable dissent to the Supreme Courts approval of the "separate but equal" doctrine in *Plessy* v. *Ferguson,* 1896) that "Our Constitution is color blind, and neither knows nor tolerates classes among citizens." In reaffirming that principle, we do not suppose that courts may not attend to the special character of past wrongs done. Rather, we emphasize that in providing remedy the courts and all institutions must scrupulously avoid and prohibit the use of a person's race as, in itself, a qualification or a disqualification for school admission or any like benefit.

Preferential admission procedures do result in the discriminatory apportionment of benefits on the basis of race or ethnicity. When a resource is in short supply, and some by virtue of their race are given more of it, others by virtue of their race get less. If that resource be seats in a law school or medical school, procedures that assure preference to certain racial groups in allotting these seats necessarily produce a correlative denial of access to those not in the preferred categories. This plain consequence must not be lost sight of. Whether the numbers be fixed or flexible, whether quotas be established and called benign,[5] whether the objective be "reasonable proportionality" or "appropriate representation," the setting of "benefit floors" for some groups in this context inescapably entails "benefit ceilings" for others.

Preference by race is malign. Its malignity has no clearer or more fitting name than racism. Such well-intentioned racism is now widespread, and civil libertarians, however anguished by racial injustice, must not support it. To preclude such racism in striving for racial justice is not to question the need

"Systems of preferential admission do not integrate, they disintegrate. No prescription for long-term disharmony among races could be surer of success."

for unrelenting, vigorous, affirmative action to right past wrongs. But affirmative action has many species. Some of them, in discriminating by race flatly, infect the wound that they would heal.

2. Suppose, despite all that is said above, that racial classification for this purpose were sometimes permissible. What standard would have to govern its use? The standard invoked by the court, though more rigorous than that for ordinary classifications because of the admittedly suspect character of racial classification, is not nearly rigorous enough. The court held that the user must show that the consideration of race is necessary for the accomplishment of a compelling state interest. That much, surely, would be required. But much more, I submit, would be essential. The use of that racial classification must also be shown not to have the consequence of penalizing any person simply by virtue of his race. This restriction is critical.

Consider: Suppose it is concluded (incorrectly, I maintain) that the school desegregation cases discussed above, *Green, Swann, Keyes,* are illustrations of the just use of racial classification in apportioning benefits. In fact, race is not a basis for benefit in these cases. But if it be thought so, then, at least, it is very clear that in these cases no person's racial classification is taken as grounds for penalty or any adversity. No one, under these decisions, gets less than another because of his race. In a desegregated school system there is no competition for admission. Just here, in the matter of scarcity, lies a critical difference between the context of college admissions and that of public school desegregation.[6] In the latter all students are treated as equals, the educational resources distributed fairly without ethnic preferences. Attention to race, in these cases, is precisely to insure the absence of racial preference. In *DeFunis,* the consideration of race is introduced into the distribution of a necessarily scarce resource deliberately to effect reward and penalty on that basis. When rewards and penalties are based sheerly upon race, the equal protection of the laws is unquestionably denied.

If racial classifications are ever to be used, I conclude, they must pass a far more protective and exacting test than that used by the Washington court. The user must show that consideration of race is necessary to the accomplishment of a compelling state interest *and* that such consideration does not have adverse consequences for any person simply on grounds of race or ethnic origin. It is admitted by the court in *DeFunis* that one result of preferential policies is the denial to some persons, simply because of their race, of what in every other respect they are entitled to and would have received were they of the preferred skin color. It is therefore manifest that on this more protective standard no policy of preferential admission by race is permissible.

3. Both of the first two links of the court's argument crumble. The third does also, but showing that requires an examination of the purposes of these preferential programs and of other possible instruments having some of the

same objectives.[7] Space does not permit the needed detail here, but this much can be pointed out: The purposes of such programs are manifold; that portion of their purpose which is rightly called "compelling" pertains to redress, compensation for past injury. If the appropriate compensatory measures include special consideration in college admissions, such compensation must be provided for all who have suffered the injury specified, whatever their race or ethnicity. If the injury be social oppression, then all who have been so oppressed, whatever their religion or color, must be compensated. If the injury be social ostracism and humiliation, then all those in subgroups defined by foreign language or sexual preference, of all races, who have known those pains are entitled to equal redress. If the injury be impoverishment and the cultural deprivation that goes with it, then, whatever the compensatory relief awarded, the desperately poor of every ethnic category deserve it equally. Compensation based sheerly on race must prove *underinclusive* in a cruelly unjust way.

On the other hand, compensatory preference for injury suffered ought not be given to those who, whatever their color, have not suffered the injury being compensated for. Simply being of a given race or color is not injury. It is not blackness or brownness for which compensation might be given, but the damage done to blacks and browns. Not all members of these minority groups have been so injured. And for those among them who have not been deprived of family, and schooling, and means, compensatory relief is not in order. Compensation based on race, therefore, is also unjustly *overinclusive*.

"That Blacks or Browns cannot make it on their individual merit . . . is a stamp of inferiority that a State is not permitted to place on any lawyer."

—Justice William O. Douglas in DeFunis opinion

Compensation justly made is made to individuals, not to racial or ethnic groups. It is individuals who are hurt, and who deserve redress for the hurts done them. And the Fourteenth Amendment, in which the principle receives its constitutional formulation, is very specific in its requirement: that no state may deny the equal protection of the laws *"to any person"* [emphasis added] within its jurisdiction. Therefore, compensatory devices, whatever their principle or design, must operate (in Justice Douglas's underscored phrase) "in a racially neutral way."

It follows that preferential programs relying crudely upon racial or ethnic categories must fail badly *even by the Washington court's own standard.* By grouping races separately and applying different standards to the different racial groups, an admissions office will award benefits to some who have not been injured, and thereby *does what is not necessary* to meet the requirements of compensatory justice. More painfully, that office must refuse those benefits to many who have been injured in the way specified, and thereby *fails to do what is necessary* to meet those requirements. Not only is racial preference unjustifiable in principle (as shown above), it is, in practice, an instrument

intolerably blunt, ill-designed to achieve the redress for past wrongs which its advocates urge. For our truly compelling social objectives, preference based on race is not necssary, and is not even sufficient.

Note that the rejection of such programs is wholly neutral with respect to other controversies concerning wise or appropriate standards for admission to college programs. Whether meritocratic or community-oriented standards should be used; whether the Law School Admissions Tests should be relied upon, or revised, or eliminated; whether any other changes in admissions principles should be made—this much all should insist upon: standards, adjustments, compensations, whatever they may be, must be applied—I repeat as Justice Douglas does—in a racially neutral way.

I conclude with some brief notes on the counterproductivity of racial preference.

i) Systems of preferential admission do not integrate, they disintegrate the races. However much advocates of such systems may hope for ultimate integration (though some may not share that ideal), the consequence of such systems in practice is ever greater attention to race, agitation about race. The invidious consideration of ethnicity in inappropriate contexts results in rewards and penalties generally thought to be unfair, undeserved. And all with focus on race. No prescription for long-term disharmony among races could be surer of success.

ii) Achieving racial proportionality in the professions through the consideration of race in professional school admission, even where intellectual and other pertinent considerations are counterindicative, must result in the tendency, at least statistical, to yield minority group professionals less well-qualified, less respected, less trusted than their counterparts in the majority. That is a great disservice to minority groups, stigmatizing their members in a most unfortunate way. "I wouldn't hit a dog with some of the minority students I've seen," says Dr. Charles DeLeon, a black psychiatrist at Case Western Reserve University Hospital, "and I have an idea that you honkies are taking in these dummies so that eight years from now you'll be able to turn around and say, 'Look how bad they all turned out.' "[8]

iii) One consequence of preferential admissions programs is certain. Fully qualified minority-group professionals come to be viewed by many, of all races, as having gained their professional positions through favor by virtue of their race. No matter their excellence; it is suspected that their credentials were received on a double, lower standard. It is a cruel result. "The actual harm done by quotas," writes a black professor of economics at the University of California, "is far greater than having a few incompetent people here and there—and the harm that will actually be done will be harm primarily to the *black* population. What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it,* and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs that may result from this strategy. Those black people who are already competent, and who could be instrumental in producing more competence among the rising generation, will be completely undermined, as black becomes synonymous—in the minds

of black and white alike—with incompetence, and black achievement becomes synonymous with charity or payoffs."[9]

Most of us, even those who think the end in this case justifies the means, recognize the ugliness of preference by race. How much we should like not to be driven to it! But if the instrument is ugly, we must expect the product to share that ugliness; the qualities of the means invariably penetrate the ends. Using unsavory means, we should not be surprised to find the consequences unwholesome.

Footnotes

1. *DeFunis* v. *Odegaard,* Wash. 507 P. 2d 1169.
2. 40 L. Ed. 2d 184.
3. *Green* v. *New Kent County,* 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971); *Keyes* v. *District No. 1, Denver, Colorado,* 413 U.S. 189 (1973).
4. Precisely to undo the results of racial categorizing has been the purpose of much federal civil rights legislation. When, under that legislation, discriminatory preference for minority races was attempted and tested in court, a unanimous Supreme Court in *Griggs* v. *Duke Power Co.* (401 U.S. 430, 1971) spoke firmly to the meaning of this legislation: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."
5. Even the Washington court recognized that the law school's admission policy "is certainly not benign with respect to nonminority students who are displaced by it."
6. See Owen Fiss, "School Desegregation: The Uncertain Path of the Law," *Philosophy and Public Affairs,* Fall, 1974, p. 8.
7. For a more extended treatment of this and related issues, see: Carl Cohen, "Race and the Constitution," *The Nation,* Feb. 8, 1975, pp. 135-145.
8. *N.Y. Times,* 7 April 1974, p. 48.
9. Thomas Sowell, *Black Education, Myths and Tragedies,* David McKay, 1972.

Rebuttal

FRANK ASKIN: We have learned from Justice Oliver Wendell Holmes, Jr., that the life of the law is not logic, but experience. Concrete problems are seldom solved by abstract principles wrapped up into logical syllogisms; in every situation we must examine not only the scope of the principle being urged, but also what it is intended to accomplish and how that purpose will be served by applying the principle. My adversary insists that we must apply principles designed to produce justice and equality even when they may produce injustice and inequality.

Carl Cohen attempts to bolster his ends-can't-justify-the-means argument by insisting that racial preferences don't produce justice or equality; they