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Prologue

Most of my adult life has been devoted to the University of Michigan. Of all worldly institutions, beside my family and my country, I love this university most. I am a professor of philosophy at Michigan; democracy has been central among my philosophical concerns. I am deeply committed to the principle that in a democratic community all persons should be treated equally, without regard to their race. This commitment has brought me into sharp conflict with my university.

The conflict arose because the University of Michigan, seeking to increase the number of minority students enrolled, gave explicit preference to minority applicants for admission. How they did this I will soon explain. These preferences, although honorably motivated, were a form of racial discrimination, which every decent community should forbid. The Equal Protection Clause of the U.S. Constitution reads: "No state . . . shall deny to any person within its jurisdiction the equal protection of the laws." Discrimination by race is wrong. I have opposed it all my life. In this book I tell the story of my efforts to defend the equal treatment of the races at my university.

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a conflict of principles

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CHAPTER 1

How It All Began

The racial discrimination that has pervaded the University of Michigan for decades did not arise from malice, but from an ardent desire to do good. My opponents in this controversy have been decent people with honorable motives. But good motives do not make wrong actions right. Discrimination by race cannot be justified because good-hearted administrators and professors believe that worthy objectives can be achieved if only we will accept the institutional uses of racial categories.

My involvement in this dispute began far from the university, while I was serving as a member of the National Board of Directors of the American Civil Liberties Union (ACLU) in the early 1970s. As chairman of the Michigan affiliate of the ACLU I had long been active in efforts to eliminate racial discrimination. Long-entrenched racial discrimination in the United States has left minorities painfully underrepresented in our colleges. Responding to this racial imbalance, new programs were devised to increase the number of minorities in the universities. Many of these programs I supported vigorously. I testified before the U.S. House of Representatives Subcommittee on the Judiciary in support of the Equal Opportunity Act of 1995,[1] part of whose purpose was to encourage the active recruitment of minorities in colleges and in private employment.

Some efforts to increase minority enrollments gave deliberate preference to blacks and to Hispanics seeking university admission. Giving such preference was a kind of racism, although nothing like the vicious racism our country had so long endured. The larger ends of these preferential programs were admirable, but those ends cannot justify means that are morally wrong. Deliberate preference by race is most assuredly a moral wrong and also a clear violation of the U.S. Constitution and our laws. As a professor of philosophy at a leading university I thought it

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fitting for me to speak out strongly in opposition to the race preferences promoted at many universities, including my own.

The issues presented by "affirmative action" first reached the Supreme Court of the United States in the case *DeFunis v. Odegaard*,[2] which arose from a preferential program at the University of Washington. At the National Board of Directors meetings of the ACLU we debated this case. Marco DeFunis was a white applicant to the University of Washington Law School whose academic credentials were outstanding. A program in that law school gave substantial preference to black (and other minority) applicants for admission. DeFunis was rejected and went to court. The board of the ACLU discussed the merits of his case at length. I urged my colleagues on the board to defend DeFunis and by so doing to underscore our commitment to equal treatment for all races. I failed to convince them.

The ACLU is a highly principled organization, but our principles sometimes conflict with one another, giving rise to the knottiest of moral controversies. When issues involving racial justice arose, our debates (in those days at the Barbizon Plaza Hotel in New York City, long since demolished) were often intense and lengthy. We fought vigorously over which side the ACLU ought to take in the *DeFunis* case. The board at that time was sharply divided.

On the one hand we understood that increasing minority success in colleges and universities was a critical step in the improvement of minority circumstances generally—a goal we all earnestly shared. On the other hand we were committed to the equal treatment of the races and had long opposed any preferences given to any persons because of their skin color or national origin. In my view, this principle of equal treatment for all is paramount and must govern in such conflicts. I was joined in this effort by one of the most eloquent and learned jurisprudents of our time, William Van Alstyne, then a professor of law at Duke University and also a member of the board. Leading the forces on the other side of this argument was Frank Askin, a good and passionate man, also a professor of law (at Rutgers) who cared deeply about the oppression of blacks and who was prepared (in my view) to sacrifice full equality of treatment for what he thought to be the interests of minorities. We could come to no resolution of our conflicting principles. That fiery argument in the Barbizon Plaza began my involvement in this controversy, which continues to the present day.

The outcome of the *DeFunis* case was peculiar, and it was that peculiarity that led me to publish a controversial essay during the whirlwind

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of this debate. Here is the story: Marco DeFunis had applied for admission to the University of Washington Law School in 1970 and again in 1971; his academic qualifications were superb, but he was rejected both times. The law school was at that time openly giving weighty preferences to applicants of color, and DeFunis learned that many of those who had been accepted by the law school had academic credentials much inferior to his. Had his own skin been black he would certainly have been accepted. DeFunis contended that those preferences, mainly for blacks over whites, given by the University of Washington (whose president was Charles Odegaard, a former dean here at Michigan), had denied him the equal protection of the laws guaranteed by the U.S. Constitution. In my view he was dead right.

He won that suit in the lower state court, which found that the university's differential treatment, quite openly based on race, was a violation of the U.S. Constitution. The court ordered DeFunis's immediate admission to the University of Washington Law School. His legal studies began there in 1971.

As DeFunis continued his legal studies, the university appealed. Eventually the Washington Supreme Court heard the case and reversed the judgment of the trial court, holding that the preferential admissions policy did not violate the Constitution.[3] Although this opinion was reasonable in tone, well constructed, and even persuasive, I was sure that the case had not been decided correctly, that the race preference at the law school was not consistent with the Equal Protection Clause of the Fourteenth Amendment to our Constitution, adopted in 1868. I was troubled and dismayed. DeFunis was by this time in his second year at the law school.

The judgment of the Washington Supreme Court was stayed by Justice William O. Douglas of the U.S. Supreme Court, pending final disposition of the case by the High Court. DeFunis remained in law school and was in the first term of his third and final year when, in the fall of 1973, the U.S. Supreme Court agreed to hear the case. It was argued before the Court in February of 1974.

At that oral argument one of the justices raised this question: If the university were to prevail in this case, what would happen to DeFunis? The university's attorney had anticipated that question and informed the Court that DeFunis had performed well in the law school and was almost certain to graduate at the end of the current term, his last, then in progress. No effort would be made to eject him.

The opinion of the U.S. Supreme Court in *DeFunis v. Odegaard* was

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issued on 23 April 1974. The Court concluded that because the object of DeFunis's suit was admission to the University of Washington Law School, and because he had been admitted to that law school and was now very soon to graduate from it, there was no longer any real controversy to be decided. The justices held the case moot.

The unsigned majority opinion, however, did acknowledge that race preference in university admissions, the central issue in the case, had not been resolved and was almost sure to arise again: "If the admissions procedures of the Law School remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken."[4]

The most liberal member of the Court, William O. Douglas, was plainly angry that the majority had held the case moot. In a sharply worded dissent he pointed out that university preference programs were widespread; their legitimacy was plainly not moot. This was the time, he held, for the Court to speak out clearly, and forcefully, against racially discriminatory admission systems. He went on to say, "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for the Irish. It should be to produce good lawyers for Americans."[5] Later in his dissent he added, "A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, 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."[6]

Justice William Brennan also dissented, observing that the constitutional issues raised by race preference, which the Court avoided, concern vast numbers of people, organizations, and colleges and universities: "Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return . . . to this Court."[7]

I cheered at these dissents, but the case had been held moot, and I was frustrated. The little jackal barks, but the caravan marches on. I feared that many might suppose that the U.S. Supreme Court had authorized race preferences in admissions, because holding the case moot allowed the decision of the Washington Supreme Court to stand without objection. I was determined to present strong objection publicly, and I did so.

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For about a decade I had been an irregular contributor to *The Nation*, a left-leaning weekly journal of opinion, then under the editorship of Carey McWilliams. I was proud to publish there. *The Nation* was (and still is) an intellectually serious periodical in which complicated argument is often presented at length. One of my predecessors in the Department of Philosophy at the University of Michigan, John Dewey, had published essays in *The Nation* many years before. Dewey, a great philosopher, had written: "Philosophy recovers itself when it ceases to be a device for dealing with the problems of philosophers, and becomes a method, cultivated by philosophers, for dealing with the problems of men."[8] I heartily agreed and sought to follow Dewey's example. *The Nation* (unlike most academic periodicals) was a place from which one's philosophical arguments might enter the public arena and might be widely read.

All my essays in *The Nation* addressed civil liberties issues: the protection of privacy, the uses of conscientious objection to military service, civil disobedience, and above all freedom of speech. In an essay in *The Nation* I later defended the right of the U.S. Nazi Party to march in the streets of Skokie, Illinois.[9] The ACLU (on my side in this matter, of course) distributed that essay widely. When the attorney for the Village of Skokie wrote a vigorous response to my defense of the march, McWilliams published that too, along with my rejoinder, in an exchange quite warmly appreciated by readers of *The Nation*.[10]

I hoped to publish my response to the Washington Supreme Court's *DeFunis* decision in *The Nation*. That did not go smoothly, however. Although an honorable man and a fine editor, Carey McWilliams was concerned about the reaction of his readership to the position I had taken. In those years that readership was largely enthusiastic in supporting programs thought to advance minority interests. An attack on university admissions preferences for minorities, therefore, was not going to be received with pleasure by many subscribers. When I told McWilliams that I was preparing a sharp rebuttal to the Washington Supreme Court, he was troubled. He thought of me as one of his regular contributors, and we were friends, but he had a readership to cultivate.

I wrote that essay, quite prepared to publish it elsewhere if McWilliams turned it down. My criticism of the university's race preferences and my rejection of the court's argument defending them were sharp. When McWilliams read the piece he told me, in plain words, that "his people" were not going to like it at all. If he were to publish it, he said, he would take a lot of heat, which he did not need. The decision, of course, was his to make.

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My essay "Race and the Constitution" was published in *The Nation* on 8 February 1975. McWilliams told me he had concluded that my arguments were strong and that, even if I were mistaken, his readers would profit from having those arguments put before them. I had long admired Carey McWilliams, and from that time I admired him yet more. (A few years later *The Nation* was purchased by Victor Navasky, a sophisticated and intelligent ideologue who had no use for professors who would not support minority preferences in admissions.) My time with *The Nation* came to an end. For the many subsequent essays of mine on this subject I was obliged to find other publishers, and I did.

The invitation plainly extended by the U.S. Supreme Court in *DeFunis*, to bring the issue of race preferences in university admissions back to the Court, was sure to be accepted. Indeed, the landmark case with which it was accepted—*Regents of the University of California v. Bakke*[11]—was already brewing while DeFunis was still in law school. The major features of the race preferences at issue in the two cases were quite similar. In the *Bakke* case also I became very much involved, as I will explain, but before that I need to set forth briefly my reasons for finding the position of the Washington Supreme Court[12] in *DeFunis* seriously in error.

To put a complicated matter summarily, the court had framed its argument in the form of answers to three questions; I argued each of those answers was mistaken.

1. Are classifications on the basis of race, for purposes of school admissions and the like, per se unconstitutional? The court's answer was no, holding that there are some cases in which the Equal Protection Clause does not preclude the uses of race. I argued that this was a fundamental error, that the Fourteenth Amendment to the Constitution, which provides, "No state . . . shall deny to any person within its jurisdiction the equal protection of the laws" was formulated to prohibit precisely *all* preferential uses of racial classifications. In that sense our Constitution is and must be color-blind. The principle that a person's race or color is simply not relevant in the application of the laws ought never be sacrificed. Race preferences are not permissible even for the sake of some needed and hoped-for benefits. If I were right in this, the Washington Supreme Court must have been mistaken.

2. But if, for the sake of argument, we suppose that classification on the basis of race is under some circumstances permissible, what standards must be applied to programs like that of the University of Washington? The court said the law school must be prepared to show that its uses of race were necessary for the accomplishment of a compelling state inter-

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est. That much is surely correct, but my position was that more than that is needed. If there are cases in which a state is justified in using racial classifications (say, in giving a specific remedy for a specific racial injury done earlier), it would certainly have to ensure that no one else would be injured simply by virtue of race. This is not possible in the case of race preference at a selective college, where what is given to some by race must be taken from others by race. The Supreme Court of Washington, to its credit, did explicitly recognize that race preferences of the sort in question could not be "benign." Some students are certain to be hurt by them; some persons—like Marco DeFunis in this case—do not get what they would otherwise have received because their skin was the wrong color.[13] Such an outcome, I argued, could not be acceptable under the Equal Protection Clause.

Where the basis for a classification is "suspect" (as race has long been held) the standard for review must be, as the U.S. Supreme Court had written, "exacting." My position was that the Washington Supreme Court's standard was not exacting enough.

3. Suppose the consideration of race is under some circumstances permissible, and (for the sake of argument) that the correct standard is the one the court proposed. Had the law school in this case met that standard in its uses of race? No, I argued, it had not. Even if the policy objectives of the university were worthy, they were not "compelling" in the sense required. However meritorious one might think them, they were certainly not objectives so critically important to the state as to warrant overriding the fundamental principle that all persons, of all races, are equal before the law.

With the publication of this essay my participation in the battles over race preference in university admissions had begun in earnest. I did not foresee the bearing of this outspoken position upon my personal and professional circumstances. I could not have known that the University of Michigan would become the eye of the coming storm surrounding "affirmative action."

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