IN THE SUPREME COURT OF THE UNITED STATES

MARCO DeFUNIS, et al.,

Petitioners,

v.

CHARLES ODEGAARD, President
of the University of Washington,
et al.,

Respondents.

No. 73-235

Washington, D. C.,

Tuesday, February 26, 1974.

The above-entitled matter came on for argument at 1:35 o'clock, p.m.

BEFORE:

WARREN E. BURGER, *Chief Justice of the United States*
WILLIAM O. DOUGLAS, *Associate Justice*
WILLIAM J. BRENNAN, JR., *Associate Justice*
POTTER STEWART, *Associate Justice*
BYRON R. WHITE, *Associate Justice*
THURGOOD MARSHALL, *Associate Justice*
HARRY A. BLACKMUN, *Associate Justice*
LEWIS F. POWELL, JR., *Associate Justice*
WILLIAM H. REHNQUIST, *Associate Justice*

APPEARANCES:

JOSEF DIAMOND, ESQ., Lycette, Diamond & Sylvester, 400 Hoge Building, Seattle, Washington 98104; for the Petitioners.

SLADE GORTON, ESQ., Attorney General, State of Washington, 112 Administration Building, University of Washington, Seattle, Washington 98195; for the Respondents.

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MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-235, DeFunis against Odegaard.

Mr. Diamond.

ORAL ARGUMENT OF JOSEF DIAMOND, ESQ., ON BEHALF OF THE PETITIONERS

MR. DIAMOND: Mr. Chief Justice, and Members of the Court:

The plaintiffs — petitioners, rather, brought this action for the reason that Marco DeFunis, Jr., was on two occasions wrongfully denied admission to the law school.

Now, we do not contend that mathematical grades alone were the sole admission criteria employed by the law school. But the record is clear that taking all criteria in account, in the law school's own judgment, its minority program resulted in the admission of the minority students less qualified than non-minority students who were rejected.

Particularly because there appears to be some misconception of the facts by many of the amici briefs, and possibly also the respondents', I'd like to discuss a little bit of the background and the factual situation with reference to Marco DeFunis.

At the time we agreed to represent Marco DeFunis, we had not met him and knew very little about him. From the facts related to us, and which we were later able to verify, we were certain that there was something wrong.

Marco attended grade school and high school in Seattle, was graduated from the University of Washington as an honor student in 1970. He received Phi Beta Kappa, Magna Cum Laude, and notwithstanding the fact that he had worked twenty to forty hours a week all the time that he was in college, as manual labor for the Park Department of the city.

He also taught Sunday school. He had a junior-senior grade point average of 3.71 out of a possible 4, as calculated by the law school; or 3.8, when you include nine hours of straight A's he received in Latin in the first quarter of his junior year, in the summer of 1968; which the law school would not, for some reason, consider.

In 1971, after he had been rejected by the law school and advised that if he tried again the following year there might be room for him, he went to graduate school at the same

University of Washington. He took 24 hours of graduate work. Again working thirty to forty hours a week with the Park Department. And he turned in grades of 21 hours of A, and at the time of his application there were three hours of incomplete, because he hadn't got the grade as yet.

He had taken the law school admissions test on three occasions, and received scores of 512, 566 and 568, and had writing scores of 62, 58 and 64.

The law school aptitude test of 668, which is the final one he took, was within the top seven percent of all law school applicants across the nation who had ever taken it in the past several years.

For DeFunis, as well as all other applicants, the junior-senior grade point averages and the LSAT scores were combined, using a formula to arrive at what was referred to as the predicted first-year average. Which, in DeFunis's case, was 76.23. He had little money, and his wife worked as a dental assistant, to help him through school, and he was also helped by his parents.

He didn't know why he was denied admission to the law school. We didn't know what his religion was, nor his race, nor whether he belonged to a so-called minority group, nor what constituted a minority group. We didn't think it mattered what his religion was, or whether he was black or red or white.

It was inconceivable to us that an honor student, with the grades that he had, Phi Beta Kappa, Magna Cum Laude, from the same university, would not be qualified and would be denied admission to the university law school.

To us it wasn't possible that all those who were being admitted were better qualified than DeFunis.

We first met with the dean of the law school, and inquired: what was the basis of denial? He had the chairman of the Admissions Committee. The only answer we could get was that there were other students better qualified than DeFunis.

We told them we couldn't accept that. We had to see something to verify that fact.

The records were confidential, even though we said we weren't interested in names, just records to establish that there were 150 or more better qualified.

No, all that was confidential matter.

We next appeared and met with the Board of Regents. Took his parents with us. I don't think we took the boy.

Again, the Board of Regents listened, said they would let us know. They advised us that, No, they were going to stand by the decision made by the Dean of the Law School and the Admissions Committee, and that there was no room for Marco DeFunis.

We had no alternative, after he had been denied twice, but to bring a lawsuit. And it was only after litigation was started and during pretrial discovery, in the taking of depositions, and in fact only during the trial itself, that we were able to get a court order requiring the university to produce the files and the records of some of those who were being admitted.

And we had to look at them during the noon hour, because the trial was in process, and the court ordered them brought down to the courtroom. But not all 1500, 1600. We settled for about three or four hundred. And during the noon hour we went through those records.

And the record here will show you what we found when we went through them, and we put them in evidence; as to who they were taking into the school.

Now, what the univeristy admissions class really did, they admitted two classes, not one. They took the non-minority group and they looked at their grades and we're not saying they looked only at their grades, but what else was there to look at? There were no personal interviews. They looked at their grades and in the file they had their grades, honors, recommendations, everybody had a recommendation that they produced, the application of the student; and that's about all.

And they determined, the chairman of the committee, that anybody who had a predicted first-year average of 77 would automatically

be admitted, with a few exceptions; most of those came in later, and they actually admitted those, too.

So everyone that had a 77 or higher are automatically admitted.

Then they took the next list, and any of them that were 75 — 74.5, they were automatically eliminated, with the exception of the minorities.

QUESTION: Well, of the returning servicemen.

MR. DIAMOND: Yes, there were some returning servicemen, except those, too; and we're raising no question about the returning servicemen. Most of them had previously been admitted, and they were brought back.

We never at any time raised any issue about that.

QUESTION: Now that I've interrupted you. You said during the noon hour you were able to get three or four hundred out of the sixteen hundred total applications.

MR. DIAMOND: That's correct. To look at them, that's all.

QUESTION: To look at them during the noon hour, at the trial. Were the three or four hundred just randomly chosen, or was — did that represent a particular category of the sixteen hundred?

MR. DIAMOND: We requested all of the minority groups that were brought in, and some of the additional others, they were kind of at random. There were sixteen hundred, we couldn't get them, we knew we wouldn't be able to look at them all.

QUESTION: Right.

MR. DIAMOND: And so we got those that we could look at, and we looked at them in the jury room during the noon hour. And there was markings on the cover with most of them, so we could hurriedly go through them.

QUESTION: Right. And did this three or four hundred include all who had been admitted to the law school?

MR. DIAMOND: Yes, I believe so.

Now, when they divided into two classes, they took the non-minority group and they determined — they were left then between those between 77 and 74.5, with the exception of the minority groups.

Now, the minority groups they took, and the black minority group they gave to one of the admissions members, who was a black student, a freshman in law school, and gave them to him to review.

They took the other non — the other minority groups and gave them to Dean Hunt on the admission group, and had him review that.

QUESTION: Who besides Negroes were in the minority group?

MR. DIAMOND: What was that?

QUESTION: Who besides Negroes were in the minority group?

MR. DIAMOND: In the minority group besides the Negroes, they had the Chicanos, the American Indians, the —

QUESTION: Philippine Americans.

MR. DIAMOND: — Philippine Americans. And I think that's it.

Now, that, too, was just an arbitrary determination. So, out of the total number of minorities that had applied, there were some seventy, and something like forty of those were admitted. Something around 60 or 65, close to 70 percent of all of the minorities that applied were admitted to the law school.

But, on the other hand, there was only something less than ten percent of everyone else that was admitted.

Now, the — as they singled out the minorities, they were not thrown out if they were below 74.5, and we find that minorities were admitted with grades like 69.7, 67.14, compared to DeFunis with 76.23, when 77 would have admitted him.

Now, the — in determining that the black Americans and the Chicanos and the Philippine Americans and American Indians were minority applicants, there wasn't any determined actually what constituted them, and how would you determine that you were a black American or you were a Chicano? It's not always that easy; what's their percentages or whatnot.

Well, you made your own characterization on the application blank, as to what you were, but you weren't required to, and no one told

anyone that if you were one of the minorities you were going to get special treatment.

But you did get special treatment. And they set up two classes.

Now, when they had these two classes, in order to determine how many you're going to allow in from each class, you had to arrive at a ratio. There was no other way. You're going to allow all the minorities in, or not? You couldn't.

Well, the fact of the matter is, they left a great percentage, some 60 percent of the minorities in, and only about ten percent of the whites.

But they had to make a determination, and, call it what you please, it was a quota.

QUESTION: Who were offered admission, not people who actually enrolled, is that true?

MR. DIAMOND: These are the ones that were admitted, that were offered admission, invited. Yes, that's correct.

They invited some 311, and it was later stretched to 330 that were invited, knowing that there were some who would not come into the class and would go elsewhere, who had applied in more than one school; so that they could reduce it down and they would only have approximately 150.

QUESTION: Is there in the Appendix anywhere a copy of the application form, either blank or —

MR. DIAMOND: No. I don't think there is. But there is in the special appendix at page 44, I believe it is, a list of all those and their qualifications as to how they appear.

QUESTION: On the application form there was a blank for filling in the applicant's race or ethnic background?

MR. DIAMOND: On the application —

QUESTION: Was there?

MR. DIAMOND: On the application form you were requested to circle one of the following: the Afro-American, American Indian, Caucasian, Mexican-American, Oriental, or other; specify.

You're asked either to circle or to specify.

QUESTION: Unh-hunh.

MR. DIAMOND: But it worded its law admissions preferences to black Americans, Chicano Americans, American Indians and Philippine Americans.

Now, an applicant couldn't characterize himself as a Philippine American, and although Philippine Americans were granted special admission preferences, an applicant could characterize himself as an Oriental American; but an Oriental wasn't granted any special preference. There was no indication at any time that minorities would be granted some preference. But you were requested to fill that out, and you could do so or not, as you pleased, and you made your own self determination as to where you belonged.

Now, if Marco had been invited as one of the three hundred —

QUESTION: Well, since there were no personal interviews, I suppose if Mr. DeFunis had circled one of these, he would have given —

MR. DIAMOND: We wouldn't be here today.

QUESTION: He would have been admitted.

MR. DIAMOND: We wouldn't have any problem. [Laughter.]

QUESTION: Right.

MR. DIAMOND: None.

Now, as there were 311 and later 330 who were invited to be enrolled, obviously Marco was very anxious to get in. If he had been invited, he would have accepted, and he would have been in.

QUESTION: What is his ethnic background?

MR. DIAMOND: What was that?

QUESTION: What is he? What kind of an American is he?

MR. DIAMOND: Unh-hunh.

[Laughter.]

MR. DIAMOND: Well, he comes of Jewish parents, I don't know at the time we brought this action, I think Sephardic Jew, if I'm not mistaken. His parents lived in Seattle for more than fifty years, whether they were born there or not, I'm not sure; grew up there. He's a middle family, his father, I think, is a furniture salesman. He went to school, as I indicated, worked all the time, got help from his parents, and help from his wife to get through school. And made these grades at the same time.

QUESTION: But his ancestry —

MR. DIAMOND: He was neither underprivileged or disadvantaged. Now, there was no indication that the minorities that were being helped were underprivileged or disadvantaged, or somebody that was poor or needed help. No determination of any kind. If you just fit in this category, why, you got special privilege.

QUESTION: So if you just circled one of those you got special treatment —

MR. DIAMOND: If you circled one of those, yes.

QUESTION: — whether or not you fit. That's your point, isn't it?

MR. DIAMOND: That's correct. They never saw you, they didn't know anything about you.

Now —

QUESTION: Is Mr. DeFunis still in law school?

MR. DIAMOND: Yes, Mr. DeFunis is still in law school.

QUESTION: When does your last quarter or semester begin?

MR. DIAMOND: It begins sometime, I believe, in February. This — now.

QUESTION: So he will graduate this spring?

MR. DIAMOND: Well, I'm hoping that he will graduate.

QUESTION: Presumably.

MR. DIAMOND: DeFunis is in law school. Now, you asked for some briefs on the question of mootness, and we furnished them to you. Mr. DeFunis will graduate in June, and he's doing exceedingly well, provided you do not sustain the Supreme Court.

If you sustain the Supreme Court, he is only in law school at the present time because we have a stay signed by Judge Douglas — Justice Douglas, which prevents the law school, the university from doing anything about him being in the school.

I might go back and say that when the Supreme Court of the State of Washington reversed the lower court, we had a problem. Mr. DeFunis was notified that he better apply to the school, and they would, the admissions committee, and they would determine whether they'd let him back in school or not, or whether he could stay in school.

QUESTION: When was this? I missed that.

MR. DIAMOND: Right after the Supreme Court of the State of Washington entered their remitter, and it came down.

And at that time —

QUESTION: That was during his second year?

MR. DIAMOND: That's right. He was in his second year in school at that time. The slow process — no fault of any party on either side, but the Supreme Court was a little bit slow in coming out with a decision; and Marco was in school all this time.

And when that happened, we got a stay from Judge Douglas, which prevented the university from doing anything about it.

Now, what they would have done, I don't know, but certainly they had the right, and he was, according to the decision of the Supreme Court of our State, illegally in school. And he has been there, in the eyes of his — the faculty and fellow students, illegally there because the Supreme Court has said: You are not rightfully there, but you're there until this decision is made by this Court pursuant to a stay.

QUESTION: Mr. Diamond, somewhere in one of these briefs — hundreds of them — there's a statement, I think by the State, that there's an interval in February within which he must apply for admission to the final semester.

MR. DIAMOND: Yes.

QUESTION: Has he applied within that interval?

MR. DIAMOND: Well, I believe that that application for his last quarter — we run in quarters at our school — is some time this month. And I assume that he has applied, because there's a stay and there's nothing to stop him. I don't know. I think he has applied, and I think if he hasn't, he will apply.

And I might also state, even further: for the first time —

QUESTION: This month ends day after tomorrow.

MR. DIAMOND: That's right. And I think — so he must be — I have not been in touch with

him in the last couple of days. I've been here.

I might state further that for the first time we have something in writing in the brief, respondents' brief, they state that Mr. Marco DeFunis will graduate.

QUESTION: If he makes the application within this interval.

MR. DIAMOND: I think that's right.

QUESTION: Yes.

MR. DIAMOND: But if this Court reverses this decision, and assuming they could do it in the next — some time before June or before he gets his diploma — what have I got to protect Marco DeFunis?

I don't know who is going to be — we've just had a change in the presidency of the university. We can have a change in the faculty. I have nothing but a statement in a brief that says we're going to let him finish, under a court decision that says you are illegally in the school.

I don't think we can rely on that. I think we are entitled — and I think there's something more —

QUESTION: Well, if the university should let him finish, — he's on the Law Review, isn't he?

MR. DIAMOND: I don't know, I can't answer that.

QUESTION: If he should finish, and graduate, what about the question of mootness?

MR. DIAMOND: Well, if this Court —

QUESTION: This is not a class action.

MR. DIAMOND: If this Court keeps — if this Court keeps the decision under wraps until after June, and he gets his diploma and graduates, I don't think, even if you then reverse it or what happens, I don't think anybody will come and take his diploma away from him.

But he — I don't know whether you're going to keep it that long.

I might also say, and we have a brief, there's more than just this one case, now that we've got this far.

QUESTION: But this is not a class action, is it?

MR. DIAMOND: No, it is not a class action, and we're not concerned with that.

But under the authorities which we have submitted to you, and I think you've reviewed before you probably set this — granted certiorari, we did point out that there are other like situations which are going to come up, and that this case ought to be decided.

Now, counsel has not taken the position that this case is moot. We have not take the position that this case is moot. And it is not, as far as we're concerned. We still have a live situation in spite of the statement which appeared just when we got the respondents' brief, which was only about two weeks ago, three weeks ago, where they stated that he would stay in school and finish if he registers; and he probably has registered by now.

QUESTION: Mr. Diamond.

MR. DIAMOND: Yes?

QUESTION: Is it possible for you to find out whether or not he has registered, and what happened if he did try to register, and let us know?

MR. DIAMOND: Oh, I can. But I think you can assume that he either has or he will. I don't think anybody would stop him.

QUESTION: Well, I don't speak for anybody but myself, and I cannot assume anything unless it's in the record.

MR. DIAMOND: Well, first —

MR. CHIEF JUSTICE BURGER: You'll supply that?

MR. DIAMOND: I'll be glad to supply that.

QUESTION: Well, why is it you don't want to?

MR. DIAMOND: I have no hesitancy about it, none whatsoever. No. None whatsoever.

I just don't have the information. Maybe counsel has. I'm assuming that he has, and I'm sure he has, because he was instructed to go ahead and do it; and there's no reason why he shouldn't.

QUESTION: Mr. Diamond, if he does graduate, and if this decision of the Washington Court is affirmed, will he, nevertheless, be eligible to take the Washington bar examination?

Even though your Supreme Court has said he has been illegally in law school?

MR. DIAMOND: I would think so, but I'm not too sure I can answer that question. I believe, in the State of Washington, you can take the bar examination without having a degree.

I think you can, through association with a lawyer, obtain it; and I do believe that he would be permitted to pass the bar.

I think, though, that on the question of mootness, I think we have decided that, or this Court has, prior to this time. I think he is entitled to know and have a degree that he earned, that is legally his, and that he has not got it by default.

And I think in the briefs of the respondents, they say that this question will arise again; and, as a matter of fact, I have in my office two clients, one girl and one man, waiting for the determination of this to see whether they can get into law school.

QUESTION: But nothing in Justice Douglas's stay order required the university to give him passing grades.

MR. DIAMOND: Oh, no; not at all. Not at all. He's earning them.

QUESTION: I don't see how you could call his degree won by default, then, if we held the case were moot.

MR. DIAMOND: No, I am not saying that his degree would be won by default. I am saying that he is in law school illegally.

The fact that he is making his grades, and he is going to get his degree because he has passing grades, and I think he's near the top of his class. So that on that score we will have no problem.

But he is not there, as far as his faculty is concerned, and as far as the other students, he has had a difficult time because he is there only because of the time element involved in getting this question decided. And I think he's entitled to have a decision of this Court, saying that he is rightfully there.

Now, I did want to make sure, because I don't know just how respondents are going to present this matter, but I do want the Court to understand that there is no question in this case but what the minorities were given preferential treatment. And that Mr. DeFunis, if he was black, he would have been admitted and in the school. The lower court found that, the Supreme Court of the State found that.

Now, the only thing they said he was given, in the Supreme Court, he was given preference, he was given special — the blacks were given special treatment, and the minorities; and the only reason that they reversed the lower court was that they said there was overriding public interest.

And I submit, and we've set it forth in the briefs, that there cannot be an overriding public interest on this question to admit those who are not equally qualified into the law school.

And that's the only basis, and the only reason, our Supreme Court allowed a reversal of that case.

I want to be sure that we understand. The testimony of Professor Kummert —

QUESTION: Mr. Diamond, let me interrupt just a minute.

You're not suggestiong that a law school admissions committee has to take the hundred and fifty brightest of the applicants, or the ones who demonstrate the highest scores on a test, are you?

MR. DIAMOND: No, sir. I'm not saying that. I am saying that they have got to treat everybody alike, and they're not going to set up two classes, one minority and one non-minority. They can set up any test they like, and they're going to have to, in my opinion, going to treat them alike and not treat them as two separate classes; as they did here.

You have two separate groups, separate tests, and separate considerations for each of these two groups. And that, I think, is a violation of the Fourteenth Amendment, and a violation of the Civil Rights Act, which we have pointed out, where —

QUESTION: Was it found here, Mr. Diamond, that but for the special consideration given the minority group, he would have been admitted?

QUESTION: Yes.

MR. DIAMOND: That's right. That was found in the lower court, it was also found in

the Supreme Court of our State; and the only reason they did was they found an overriding public interest to try and do something for past discrimination against minority students. Which, of course, DeFunis had nothing to do with.

Now, we have no quarrel with any effort that you can, on the affirmative program, to try and help minorities. We have no quarrel with that. We didn't even know we were in a minority case, when we tried to get Mr. DeFunis into this law school. We have no quarrel.

And there are plenty of affirmative action programs that can be undertaken to get more minorities into the law schools, and we are in favor of that; we are not suggesting for a moment that you shouldn't have it.

But we do not think that you can use race, to keep out one group solely and only because of race. And that's what was done here.

If DeFunis had been black, he would have been in. He was kept out because he was white. The only reason he was kept out. No other reason.

MR. CHIEF JUSTICE BURGER: Mr. Diamond, you're now impinging in your rebuttal time.

MR. DIAMOND: I better save a little time. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF SLADE GORTON, ESQ., ON BEHALF OF THE RESPONDENTS

MR. GORTON: Mr. Chief Justice, and may it please the Court:

I will vary from my opening argument only in connection with one of the questions which obviously bothers this Court, as to the status of the case itself: and that relates to whether or not it is moot.

We think it is not moot, though such a decision on your part, obviously would reinstate the State Supreme Court decision and vindicate our program.

Mr. DeFunis will enter —

QUESTION: That wouldn't follow.

MR. GORTON: It will at least as far as this group of students is concerned.

QUESTION: Why?

MR. GORTON: Subject to some further challenge.

QUESTION: If we find it moot, I expect we'd vacate it and send it back for reconsideration.

MR. GORTON: If you found it moot on the grounds that he was already graduated, Mr. Justice Brennan? Or about to graduate.

QUESTION: Well, what do you do in your State about a case when it becomes moot, before it's final?

MR. GORTON: I suppose the original action might simply be to dismiss.

QUESTION: Well?

QUESTION: Well.

[Laughter.]

MR. GORTON: That would validate —

QUESTION: Your Supreme Court might do that if we found it moot.

MR. GORTON: It might very well.

QUESTION: If we sent it back to them; that's right.

MR. GORTON: That would validate our program in any event.

QUESTION: It would what?

QUESTION: Why would it?

QUESTION: It would validate it for the past.

MR. GORTON: For the past.

QUESTION: Yes.

MR. GORTON: Until someone else brought another challenge and came back here, probably under the same circumstances, which is the principal ground on which we

regard the case, not as being moot.

As far as Mr. DeFunis is concerned, the time for registration for the final quarter of his law school began on February 20th, it ends on March 1st, the day after tomorrow.

On Thursday, when we left, he had picked up his application forms; he may or may not, Mr. Justice Marshall, have filed them. He certainly will have by Friday.

He would — even if he had been required to ask readmission, he would have been granted that readmission, assuming that he was acceptably performing his law school studies; which he is.

He is not Law Review, Mr. Justice Rehnquist, he's roughly in the middle of his class.

Once he has registered on the — no later than the 1st of March, there will be — he will then complete his law school studies, assuming he passes his courses in the last semester.

The only discretion which would then remain in the law school would be if he failed the course in his last semester, and requested special permission to come back in the fall to make up for it, in which case, of course, he'd be in exactly the same position as any other student who had failed would be.

QUESTION: What if a decision of this Court came down, say, on May 1st, affirming the judgment of the Supreme Court of Washington, what would the board of Regents do with the petitioner?

MR. GORTON: Nothing. He would — assuming he passes his courses, he would receive his degree, and he would take his bar examination.

It is not correct to characterize the State Supreme Court's decision as saying he was illegally in law school. The State Supreme Court decision said that the program of admissions adopted by the law school was valid, and that he was not deprived of equal protection.

It did not order us to take him out of law school.

QUESTION: How about the others who had 76.4, would they have an equal protection claim, not having been given a special dispensation here?

MR. GORTON: I suspect that they have probably rested on their rights too long at this point, Mr. Chief Justice.

The University of Washington Law School has selected its limited number of students from a large pool of clearly qualified candidates. The considerations employed in the difficult but necessary choice between applicants have included, among several other factors, that of the race of those applicants.

One goal of that policy has been to improve the quality of the education of all law students by better preparing them to practice law in a pluralistic society.

Twenty-four years ago this Court said: the law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts.

Our related goal has been the improvement of the entire legal profession, by helping it better to reflect and to understand and to represent all elements in the pluralistic society in which the bar plays so important a role.

This system of law school admissions is not unique or isolated to the University of Washington. With minor variations, it is the system used by a wide range of American law schools, many of whom have joined in briefs in its defense.

QUESTION: Does the State of Washington have a pro rata system for admission of minorities to practice law?

MR. GORTON: It does not, Mr. Justice Douglas.

QUESTION: Is the race disclosed on the examination papers?

MR. GORTON: It is not. The bar examination in the State of Washington is entirely anonymous as to every person who takes it, and entirely neutral as to race.

I can say, however, that ten of the thirteen members of these four minority groups who were in the Class of 1973 in the law school passed the July 1973 bar examination. So they were obviously qualified without any regard to race whatsoever.

Although I suspect their so-called predicted averages were much lower than many others.

QUESTION: Really, that in and of itself doesn't prove that. What is the percentage of the others?

MR. GORTON: The percentage of all last year was extraordinary, Mr. Justice Blackmun. It was 92 percent. So that the percentage of the minority students was slightly lower. But it still was very highly successful.

QUESTION: Well, three out of thirteen is —

MR. GORTON: Twenty — twenty-one percent, something like that.

QUESTION: — substantially lower than 92 percent.

MR. GORTON: The difference between 92 and 79; it still is quite a high success rate. And of course you get more than one crack at the bar examination there.

QUESTION: Is this the — this policy at the university, the outcome of increasing demand for minority lawyers?

MR. GORTON: A tremendous —

QUESTION: I mean among the public at large.

MR. GORTON: It is in the sense that the law school and the university itself has recognized their almost total exclusion from the bar in society as a whole, and in the State of Washington.

One of the major elements in the record in this case, of course, is Dr. Odegaard's testimony to exactly that extent.

Actually, here, in the name of equal protection, this petitioner asks you to return us to a system of law school student selection which, at the University of Washington, which has never engaged in racial discrimination by force of law, only produced twelve black graduates out of 3812 between 1902 and 1969.

QUESTION: Perhaps that was because they didn't apply. Do you have anything in the record on that?

MR. GORTON: I don't believe we do, Your Honor.

QUESTION: Well, then, does that help us?

MR. GORTON: They applied in very small numbers, there's no question about that. I think it is probable, but I can't prove it, that they applied in somewhat larger numbers than they were admitted.

Because in this particular case, if you followed the guidelines which the petitioner has asked you to follow, we would have had an absolutely white law school.

QUESTION: Aren't some of the most prominent members of your bench in the Seattle-Tacoma area blacks?

MR. GORTON: There is a black judge of the Court of Appeals. There is a black judge of the Superior Court, who was appointed just last month in Seattle. Those are all, in courts of record; there are also justice court judges.

QUESTION: Just two?

MR. GORTON: Yes, just two. In the State.

QUESTION: Your record somewhere indicates, I think a Negro population, or at least one of the minority group populations of 2.2 or some such figure. Would you think it would be appropriate for the State of Washington to say that, we will admit 2.2 percent to the law school of a particular minority that was, that had a 2.2 membership in the total population of the State?

MR. GORTON: I do not, Mr. Chief Justice Burger, feel that way. Your statistic is accurate, and it is matched in connection with the Chicano population of the State. And I do not, for three reasons:

First, the University of Washington is a national law school. It is not limited to the State of Washington.

Second, the goal of this policy was an educational goal. It wished to have a sufficient variety of students in the law school, so that their own educational experience, which, as you well know, is largely, at least, in discussions among students would be broadened. And so that the outlook of the white students as well as of the minority students would be more understanding. Its goal was also to see to it that the bar had that same advantage, of representing all classes and groups in society in the State of Washington.

And simply to pick some kind of quota bas-

ed precisely on State population would meet neither of those goals.

QUESTION: Mr. Attorney General, is this policy limited to the law school by the university?

MR. GORTON: No. There are similar policies in other schools in the university; but I cannot describe them in the detail which I can describe the ones in the law school.

QUESTION: As you probably know, in India they have, under their constitution and laws, a preservation of so many seats for the untouchables.

Are you promoting that here?

MR. GORTON: I am not, Mr. Justice Douglas.

I am promoting here equal opportunity on the basis of —

QUESTION: What we call the pro rata system, and we've had it in other cases.

MR. GORTON: Right. But we are not, we do not operate such a system, and we are not asking you to validate such a system.

What we are saying is that the statistical judgments, or the statistical scores, which are used in connection with law school admissions, are not invariable and totally accurate predicters of success, nor do they solve the problem of ending the effects of racial discrimination.

In this particular case, we're dealing with a student who was only marginally qualified when he was compared with all of the people who were admitted into the school. There were 1601 applications. Most of them were qualified people. Three hundred and thirty were eventually given letters or notices of admission. On predicted first-year averages, Mr. DeFunis ranked about 290th in that group of 330.

A number of people above him were denied admission, a number of people below him were given admission.

Had we picked the top 330 students, simply on the basis of predicted first-year average, one minority person would have been among it, and he didn't enter the school. And we would have had a little white school; we might have been subject to a challenge on the basis that we were — that we were deliberately discriminatory.

We did give notice to these students that other matters except for law school admissions test scores and grades were counted in connection with law school.

You have it on page 8 of our brief.

Each student, before he applied, received a notification, three paragraphs of which are quoted on page 8, which says in the last paragraph:

"We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions."

This is precisely what the law school did.

QUESTION: Does it really make any difference to the basic issues in this case whether he was No. 1 or No. 290?

MR. GORTON: No. It does not, Your Honor. I think it was a matter of considerable interest here, and I think it may have been somewhat misstated by petitioner; but it does not.

What matters here is whether or not the law school admissions policy was based on appropriate educational judgments on the part of the law school itself.

Obviously neither Mr. DeFunis nor any other individual had a constitutional right to enter the University of Washington Law School. That was impossible.

QUESTION: Well, do you think past discrimination, either in Washington or elsewhere, is an educational consideration?

MR. GORTON: I think that it is — I think that it is, Mr. Justice White, as long as it is relatively narrowly conceived.

Remember, to gain —

QUESTION: I understand. I understand your argument about educational considerations otherwise; but I don't quite understand that one. I'm not saying it isn't a valid qualification; I just wonder why you call it educational, or why you even think you have to.

MR. GORTON: All right. Let me answer the

question more precisely.

We feel that in connection with these particular minorities, the fact of discrimination against and in our society over literally hundreds of years has had a very real effect. It means that fewer of them actually graduate from college, by percentage, than other groups in our society. It means those who do frequently have lower grade points, and certainly have shown up with lower law school admissions test scores.

So that if we used only these mathematical determinants of admission for law school, we would continue to exclude them.

We didn't admit any of them who were not qualified. I think this is vitally important. Even on a statistical basis, coupled with other background items not related to race at all, they were qualified, and they've shown themselves to be qualified to handle law students.

QUESTION: When you say "qualified", Mr. Gorton, really by the time you've diluted that phrase as much as you have in your approach to admissions, it doesn't mean a whole lot; does it? When you consider the minority applicants separately, and really don't have any base, any cutoff point on the predicted first-year average.

MR. GORTON: Neither of those assumptions are correct, Mr. Justice Rehnquist. They were not considered separately, except on the same kind of preliminary basis that everyone was considered separately. All of the people, other than those who were of such high intellectual attainments that they received almost immediate admission after their applications came in, were considered by an individual member —

QUESTION: But these were the only groups that weren't automatically excluded if they were below 74.

MR. GORTON: That is not true either, Mr. Justice White.

QUESTION: Except for veterans. You're right.

MR. GORTON: No, even beyond veterans. There were — there was the ability on the part of the Dean of Admissions to say that he felt that there were factors involved in a particular application of a white non-veteran, with a PFYA of below 74.5, which would cause him to be considered by the entire Admissions Committee.

QUESTION: But it took the Dean's intervention to do that with a white person, and it did not —

MR. GORTON: It did — it did that, Mr. Justice Rehnquist.

QUESTION: And that was — so that that was a difference in treatment, was it not?

MR. GORTON: That was clearly a difference in treatment, but it was a difference in treatment which was required by the Admissions policy, which of course was based on the particular educational and professional goals which the university adopted.

However, remember that large numbers of the members of these minority groups were in fact excluded from law school.

There was — they had to have a predicted first-year average, either alone or coupled with other precise academic qualifications, which would indicate that they could successfully complete a law school education. If, for example, one of them came in with a PFYA of 59, where the lowest passing grade in law school is 68, he would not have been admitted. Very few were admitted below 68, and only in those cases when something else indicated that they could actually attain a 68 or better average.

Now, we were faced with a situation, all of society was faced with a situation in connection with particular minorities, who have been the subject of discrimination in the past, which could not be cured by a simple application of a number of statistical formulae.

If we were to continue the old system, we would have continued the old method of not having these minority groups represented in law school.

Moreover, this particular program is, in effect, self-liquidating. As the effects of discrimination lessen or cease, presumably more of these minorities will graduate from college, they will get better test scores, they will have better grades, and in precisely — to precisely

that extent the preference itself will disappear.

This Court has never — has never — declared invalid or even subject to strict judicial scrutiny a program which was directed at benefiting minorities who were the subjects of previous racial discrimination.

QUESTION: Mr. Attorney General —

QUESTION: What do you do with the findings that there were minority people below this man? Inferior to him — I've forgotten what the phrase was.

MR. GROTON: What we do with those findings is to admit that on the statistical basis of predicted first-year averages they were below. But that the law school was not simply looking for the 150 persons with the highest predicted first-year averages. That it had other valid social values.

These people who were below Mr. DeFunis in predicted first-year average were, nevertheless, qualified to do law school work, and were determined by the law school Admissions Committee to be ready and able and, as a matter of fact, that they would contribute more, given the nature of the whole class, first to the law school and to the educational experience of every student within it: white, black, Chicano, the whole works. And that they could contribute more to the bar, which obviously is the goal of law school. Which, of course, is only intermediate, itself.

QUESTION: Mr. Attorney General, when I was teaching law many years ago, I discovered to my consternation that these tests, these so-called tests had built-in racial bias. Is there any finding in this record as to your test?

MR. GORTON: There is no finding in this record, Mr. Justice Douglas, because neither party wished to bring that subject up.

Obviously Mr. DeFunis would not make that claim, and the University of Washington did not attempt in court to prove that it engaged in previous racial discrimination.

I think, however, that you are perfectly capable of looking, for example, at the Single Appendix in this case, seeing —

QUESTION: No, even when I was teaching, I couldn't find out how they did it; but it was very subtle, built-in system to see that certain minorities didn't get into the school.

MR. GORTON: Mr. Justice Douglas, I don't think that there has ever been, at least in this school, any kind of such deliberate attempt. I think because of the difference, because of the effects of racial discrimination, that happens in fact, even with what you called, in the *Griggs* case, for example, a test which is neutral on its surface. And you might very well, in a proper case, find that the predicted first-year average had a built-in racial bias.

But that is not included in particular findings or particular charges in this case.

What we have done, you see, is to try to — is to say that the Court, this Court has now for twenty years said there is a very tremendously high value in an integrated society.

We don't think this Court says: You can only get to an integrated society as a result of orders of this Court; that you can only walk, not run, to the nearest exit from discrimination.

We have engaged in a voluntary program, very precise in its outlook. Racial discrimination was the problem, therefore race had to be the criterion for solving that problem. We are precisely within Mr. Justice Burger's holding for this entire Court in *Swann v. Charlotte,* remedial judicial authority does not put judges in the shoes of school authorities, whose powers are plenary. School authorities are traditionally charged with broad power to formulate and implement educational policy, and might well conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students, reflecting the proportion of the district as a whole.

To do this as an educational policy is within the broad discretionary powers of school authorities.

QUESTION: Is there anything in that context that would keep anyone out of any school, however?

MR. GORTON: There is not, Your Honor, but lots of people are kept out of the University of Washington Law School. Only if one

characterizes Mr. DeFunis's constitutional entitlement to be to a State-financed law school education does that become a relevant question.

In the *Swann* case, parents who expected, in good faith, to be able to choose their children's school by the choice of their residence, teachers who, in good faith, felt that they could choose their assignments, were told that they could not because integration, the end of segregation, was a more important social goal.

What Mr. DeFunis was entitled to here was essentially the same thing. He was entitled to a policy, not a narrow policy which says the highest grades get all the positions, but a policy which took into account valid educational and professional grounds, which include the effects of discrimination in the world as a whole, outside of the halls of this law school. And under those circumstances—

QUESTION: But the university —

MR. GORTON: — he was in exactly the same position as the school children in *Swann.*

QUESTION: Did the university or the law school conduct any sort of generalized study to determine whether grades had a direct correlation with success and effectiveness in the practice of law?

[Laughter.]

MR. GORTON: The university did not do so in connection with this particular program, Mr. Chief Justice. But the amici, many of the briefs of friends of the court here have indicated that the statistics, both grades in college — for that matter grades in law school frequently — together with the law school admissions test do not make such predictions. At the very best, the statistics which Mr. Diamond uses predict your first-year average in law school; they predict nothing about the contribution you will make to the bar, the contribution you will make to the law school, how much income you will make in the bar, what kind of legal career you will seek.

So the University of Washington was saying that we have a responsibility to do more than to predict or to pick those students who will get the highest first-year law school grades. We have a duty to pick people who will serve their nation, their society. We have a duty to see to it that the effects of an exclusionary policy, which may not have been required by law, will be ended, not only in our school but in our society as a whole.

We were doing, I submit, precisely what you said we had the discretion to do when you wrote the opinion for the entire Court in the *Swann* case.

QUESTION: But you haven't pointed out how that would exclude anyone, as Mr. DeFunis would have been excluded.

MR. GORTON: It is clear that at the primary school and the secondary school level no one is excluded, but whether or not that is a greater or a lesser rate than we are concerned with here, is really a question, a distinction without a difference.

Everyone goes to school through high school, or is at least entitled to. No one is entitled to a law school education at the expense of the State.

Thirteen hundred people were excluded from this class of the University of Washington Law School. Some of one race, some of the very races who were the beneficiaries of this special program.

The point is that what the children and their parents and the teachers lost in *Swann* was every bit as vital a right, or every bit as vital a privilege as the privilege which Mr. DeFunis lost here.

He wasn't entitled to admission. He was entitled to an appropriate judicial, or an appropriate admissions process. But that he is telling you that process must be limited, it must be — it must be without any regard to its effects on society as a whole. He got not only a proper consideration of his application, he got the best possible consideration of his application, and his law school career is much improved now, today, because it includes in it eighteen members of these minority groups. This will help him in his law school career, it will help him in his practice.

But he would have you deny them a position in law school by the use of mechanical criteria, not in some theoretical possible

model, but in exactly the same system which we always used before, and which did in fact result in the exclusion of minority students to the law school.

QUESTION: Mr. Attorney General, I think you haven't told us who has formulated this precise policy. Is it the Board of Regents of the university?

MR. GORTON: No, sir. It is the law school itself. Our — the statute creating the university and creating the Board —

QUESTION: But when you say the law school itself, you mean the Dean or the Admissions Committee or the faculty; who?

MR. GORTON: The Dean, the faculty, and the Admissions Committee.

QUESTION: Yes.

MR. GORTON: The governing body of the law school, in effect the policy setting body of the law school is the entire faculty, when they meet together. They do operate under broad guidelines from the Board of Regents, though.

QUESTION: Now, how many are on the Admissions Committee?

MR. GORTON: I think it was — at this particular time it was five faculty and two students.

QUESTION: Two students?

MR. GORTON: Yes.

QUESTION: So you do have some who are not members of the faculty; although just now you said it was the faculty that set the policy for the school.

MR. GORTON: The — I think that under those circumstances, in that narrow sense, I would have to say the Admissions Committee didn't set the policy, it executed the policy.

QUESTION: And these students, how far along in their law school careers, second-year students?

MR. GORTON: Each of these students were first-year law students.

QUESTION: First year? So they're passing on the admission of the next succeeding class?

MR. GORTON: of the next succeeding class, that's right. But they're not — they're passing on it only in the sense that they are a minority of the members of the Admissions Committee. No person was admitted without the approval of the entire committee, though almost every particular application was viewed initially by one or one or two of the members of the committee, and his recommendation is passed on.

QUESTION: So that one denial vote on the committee would keep a person out?

MR. GORTON: No. That is not true. That is not true, Your Honor.

QUESTION: You just said that no one was admitted without the approval of all the members of the committee.

MR. GORTON: A few people were denied admission without everyone reviewing it. Most of those persons, whose predicted first-year averages were below 74.5 and whom the Dean didn't feel should get some extra kind of consideration.

However, no one was admitted without the entire committee viewing it. And often the recommendation of the individual person who first viewed the file was overruled. The Appendix to our brief deals with —

QUESTION: Now, you're speaking in terms of viewing it. One can view it and they vote negatively.

MR. GORTON: That's right. One can —

QUESTION: What I'm trying to find out is how is a person denied admission, by vote?

MR. GORTON: A person was denied admission in one of two fashions. Either if his predicted first-year average was below 74.5, and he did not fall in one of three categories, the minority —

QUESTION: Yes, I understand.

MR. GORTON: the minority split and so on, including some of the — including some of the white students.

Or, alternatively, by action of the entire committee.

QUESTION: A majority vote?

MR. GORTON: Majority vote, I believe. Yes.

QUESTION: So that the students do vote —

MR. GORTON: The students —

QUESTION: — on their successors in the next class.

MR. GORTON: The students did vote on their successors, all of their successors, white as well as minority.

QUESTION: Mr. Gorton, you said the Admissions Committee just executed the policy, it didn't formulate it. Who did formulate it? The faculty as a whole?

MR. GORTON: The faculty of the law school, and I am sure that it went through the Board of Regents, and was generally approved by the Board of Regents.

Yes. It is one of the earlier questions asked, whether this was general university policy and applied in other schools as well; and the answer to that question is yes.

QUESTION: How many other State law schools are there in Washington?

MR. GORTON: There are none. There is — there are now, although there weren't when Mr. DeFunis started, two private law schools in the State of Washington; there was one at that time.

QUESTION: Rather more expensive than the State school?

MR. GORTON: They are more expensive than the State law school.

QUESTION: So Mr. DeFunis would have had rather a *Hobson*'s choice, wouldn't he?

MR. GORTON: Some students would have had a *Hobson*'s choice, Mr. Justice Brennan. Whether Mr. DeFunis falls into this category, I don't know, and the record doesn't indicate. All of the law schools, of course, have scholarship programs, so does the University of Washington.

QUESTION: Yes.

QUESTION: You made the statement a while ago that the law school was a national law school. Do you charge non-residents more tuititon than Washington residents?

MR. GORTON: We do.

QUESTION: So, to that extent, it is something less than a national law school?

MR. GORTON: Oh, to that extent, Michigan is something less than a national law school, I suppose, too. I believe that every State university law school probably has a majority or at least a plurality of its students from its own State, and the University of Washington is certainly that. It has attempted to be a national law school, and it has many students from other States.

QUESTION: Well, it certainly discourages non-residents from coming, doesn't it?

MR. GORTON: It is an element with the number of law school applications; however, I think it's probably a relatively small element today.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Diamond, you have about six minutes remaining.

REBUTTAL ARGUMENT OF JOSEF DIAMOND, ESQ., ON BEHALF OF THE PETITIONERS.

MR. DIAMOND: Thank you.

Counsel has stated that a number of minority students — or a number of non-minority students, that had grades below 74.5, were accepted.

I call the Court's attention to Schedule A in the Single Appendix, at page 37, and there it lists all of those who were admitted to the class as of August 1st, 1971. And you will find that not a single non-minority student was accepted with grades anywhere near as low as those that were accepted for the minority. They are all spelled out, and there isn't one.

I also want to call the Court's attention to the fact that we do not contend that the applicants were accepted on grades alone, and, as a matter of fact, the testimony of the witnesses was not that they accepted students with lower grades alone, they accepted students with lower grades and qualifications. They examined the entire record on all the students, the minorities and the non-minorities; and they accepted those with lower grades.

The same question answers the other one as to who set up this policy. The question which is in the record was asked of the president of

the law school, Mr. Odegaard, in connection with the new policy with reference to minorities, that you have approved —

QUESTION: The president of the law school? You mean the president of the university, don't you?

MR. DIAMOND: The president of the university, I'm sorry. Excuse me. President of the law school.

If the new policy —

[Laughter.]

MR. DIAMOND: — with reference to minorities — university, I'm sorry — that you have approved and the Regents have approved or adopted, whether that policy permits the law school admissions to admit minority students with lower grades and qualifications that the other students.

And his answer was: I think it does.

And the same thing with reference to Dean Roddis, the dean of the law school, he testified to the same thing. And the court found, the lower court found, and the Supreme Court found that they were allowing students in with lower grades and qualifications. We're not just talking about mechanical grades.

The question was asked, and counsel made the statement —

QUESTION: What are the qualifications you're talking about?

MR. DIAMOND: What was that?

QUESTION: What are the qualifications you're talking about?

MR. DIAMOND: The qualifications are what were in their application file, filled out by them, the recommendations that they furnished, their grades, their honors, the courses that they took are listed along with their grades that were submitted, and their work habits, as was shown in there —

QUESTION: And the record shows that you or the court or somebody went through all of them and you found that out?

MR. DIAMOND: No, sir. The record shows that that's all that the admissions committee had to look at.

QUESTION: Well, how do you know that there were some with lower qualifications?

MR. DIAMOND: How do we know what?

QUESTION: That there were some minority people with lower qualifications, not lower averages.

MR. DIAMOND: Because the university in their testimony stated so. The president said so, Dean Roddis said so, the chairman, Professor Kummert, said so; that they were exceptions —

QUESTION: With less qualifications?

MR. DIAMOND: Yes, without qualifications. They testified that students with lower qualifications and lower grades were accepted. They did.

And they said that they were reaching out to —

QUESTION: And you understand that what they meant by qualifications was just what you said?

QUESTION: They had nothing else to go on, it couldn't be anything else. All they had was the same thing that they had with reference to Mr. DeFunis.

One other thing —

QUESTION: Well, as I understand it, the phrase was in the interrogator's question, and the answer was yes.

MR. DIAMOND: In some cases, and that one I read; but in others it was not. It was — in Dean Roddis, it was not; he testified to it himself.

The other question was asked—

QUESTION: In terms of the university — in terms of the law school's policy, these people were fully qualified?

MR. DIAMOND: Well, that's a relative matter. The university testified that they were qualified for the law school, but it's a relative matter. They set up these two classes. If they took those that had better qualifications, as they admitted, they wouldn't have had room for these. So they had to set up a ratio between them.

If they — they did say and they did testify that any of the 1600 they thought could have just maintained themselves in school, and would have passed. But you've got a relative situation, you can't take 1600; so they should be taking, we assume, the better qualified, not necessarily with the better grades.

QUESTION: Yes, but perhaps by old standards the — perhaps by the standards that part of the people were judged by, these people were unqualified. But in terms of the overall policy, admissions policy of the school, the school did pick people who were best qualified for their purposes.

I think if you look at the record, and you look at the findings of the court, you'll find that they did not.

QUESTION: Yes, but in terms of their goals, in terms of their —

MR. DIAMOND: University goals?

QUESTION: In terms of the law school's goals and their policies, they chose the people who would satisfy those policies.

MR. DIAMOND: Well, let me — let me answer that —

QUESTION: And the question really is whether they — the law school may have these priorities and these preferences.

MR. DIAMOND: I think if they use the same test for everyone, they would have that right. But let me answer you on that with this notation —

QUESTION: Well, what test? You keep saying test, what test? Aren't you really banking on the test — isn't test and qualification, to use —

MR. DIAMOND: Whatever they used. When you have 1600 people making application, you only have room for 150, you're going to have to make some determination of which are the best qualified.

QUESTION: Well, —

MR. DIAMOND: Now, the only thing we've got here is the president of the university, the dean of the law school, the chairman of the Admissions Committee, telling us that they did not select the best qualified students. I can't give you any more than that.

QUESTION: I submit that's not all you have. You have —

MR. DIAMOND: Let me —

QUESTION: — all the discovery. You had all the discovery you could use, if you wanted to use it.

MR. DIAMOND: We got enough.

QUESTION: Well, I want you to show me exactly what any of these witnesses meant by the word "qualifications"; in the record.

MR. DIAMOND: Well, there — let me cover this one for just a moment.

On January 9th, 1974 —

QUESTION: When you get through, will you cover mine?

MR. DIAMOND: Sir?

QUESTION: When you get through, will you cover mine? When you get through.

MR. DIAMOND: Yes, I will endeavor to.

On January 9th, 1974, I requested and received a letter from the Attorney General with reference to the 19 specially admitted students, and this is what they tell me:

Of the 19 specially admitted in the class commencing September 1971, ten of whom are black, three Chicano, three Asian-Americans, three native American, fifteen are currently enrolled in the law school. Seven of whom are black, three Chicano, three Asian Americans, and two native Americans.

Now, out of the nineteen, then, we have fifteen remaining today in the law school. If my mathematics are correct, there's 22 percent that are no longer in the law school. I don't know why they're not there, but they are not there.

And counsel would have you believe that they were maintaining their percentage.

This does not establish that. And I submit it does not.

Now, may I answer your question — I don't remember exactly what it was, Mr. Justice.

[Laughter.]

QUESTION: You may forget it.

MR. DIAMOND: What was that?

QUESTION: You have my permission to forget it.

MR. DIAMOND: Thank you.

QUESTION: May I ask a question?

MR. DIAMOND: Yes.

QUESTION: The guide for applicants that you have referred to does not suggest that race is a controlling criteria. It suggests a number of factors, in addition to the college boards and the cumulative grade scores; it refers to extracurricula and community activities, to

employment record, to general background, and then states that one factor in our general attempt to convert formal credentials into realistic predictions is racial or ethnic backgrounds.

Is it your position that only the formal scores may be considered, or do you agree that admissions committees have broad discretion and may consider these factors that are in this policy guide?

MR. DIAMOND: Yes, I think they can. They apply them to everyone on the same basis.

QUESTION: So you think — is it your position that if the guide had been followed, you wouldn't be here today?

MR. DIAMOND: There's no question about that.

QUESTION: In other words, you're claiming that the guide promulgated by the authorities was not in fact applied?

MR. DIAMOND: That is correct, it was not.

QUESTION: Mr. Diamond —

MR. DIAMOND: Yes?

QUESTION: — if the Chief Justice will permit me, with the red light on — let me get away from this racial aspect a little bit. Let's speak of our sister profession of medicine, with which I have a little familiarity in the past.

There's been a great deal of talk about the need for general practitioners, and the need for newly trained physicians to get out into small communities.

Suppose in the University of Washington Medical School there were some applicants who said, I would like to go into the mountains or into the desert, or wherever it is, and I'm not desirous to specialize in orthopedics or neurosurgery. I just want to be a general practitioner.

And yet his qualifications, his undergraduate work, gradewise, was less than a number of others who wanted to specialize. Do you think this factor, whether it's valid or not, as a matter of medical concern, but today it is assumed to be, I think — do you think this factor of the need for general practitioners and the desire for general practitioners would be something that the Admissions Committee of the medical school could validly take into consideration?

MR. DIAMOND: Not at that level. I think an affirmative action program, and I think that's what you're talking about, I think is good, valid, and I'm all for it, whether it's for law students or whether it's for medical. And I think it should be based not on race, it should be based on the disadvantaged, the underprivileged, the undercultured, those that need help, the poor; and I think that what you should do is go out and recruit them, give them some special training, some special service, set up a special category, make lawyers and make doctors out of the people that want to do the things that you want to do, but not on the basis of race, not on the basis of anything except the —

QUESTION: Well, you see, my question was an attempt to get away from race, it was an attempt to focus on the need of a community, not on the qualifications particularly of the applicant.

I take it you feel that they could not take this into consideration.

MR. DIAMOND: I'm not ready to subscribe to the theory that minority clients are looking for minority lawyers or doctors. I think they are looking for the best qualified doctors and lawyers to look after their needs, and I submit that they better look for the best qualified, and not one that matches their own skin or color.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:47 o'clock, p.m., the case in the above-entitled matter was submitted.]