

University of Michigan Law School
University of Michigan Law School Scholarship Repository

Res Gestae

Law School History and Publications

1973

June 14, 1973

University of Michigan Law School

Follow this and additional works at: http://repository.law.umich.edu/res_gestae

 Part of the [Legal Education Commons](#)

Recommended Citation

University of Michigan Law School, "June 14, 1973" (1973). *Res Gestae*. Paper 1082.
http://repository.law.umich.edu/res_gestae/1082

This Article is brought to you for free and open access by the Law School History and Publications at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Res Gestae by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

R4

THE LAW SCHOOL WEEKLY REGESTAE U of MICHIGAN ANN ARBOR JUNE 14, 1973

Washington Court Upholds Reverse Discrimination

LIBRARY
JUN 20 1973

UNIV. OF MICH.

From our sister newspaper in California, the Stanford Law Journal, RG reprints this April 19, 1973 case note.

By MARSHALL TANICK
News Analysis

Remember Jeffrey Wong?

He was the hypothetical native-born U.S. citizen of Chinese ancestry whose being denied admission to law school on racial grounds formed the basis of the Stanford Moot Court Board's 20th annual Marion Rice Kirkwood problem last year.

Now, his real-life counterpart has similarly been rebuffed, at least in principle.

That was the outcome of a recent precedent-making (perhaps precedent-shattering) decision of the Supreme Court of the State of Washington. As a result of its upholding the constitutionality of the state university law school's minority admissions program, Jeffrey Wong would have met the same unfavorable fate there as he did in the Kirkwood's mythical state of Magnolia.

Wong Not Admitted

Based on his undergraduate college grade point average (GPA) and Law School Admissions Test (LSAT) score, the hypothetical Wong normally would have been admitted to the state-supported University of Magnolia School of Law, in the 1972 Kirkwood scenario. But the school's newly-installed program granting special admissions preferences to certain minority applicants (Blacks, Chicanos, and American Indians only) resulted in his being precluded from entry.

This gave rise to his civil suit, *Wong v. Ferguson*, challenging the program as being violative of the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. The hypothetical case questioned whether the existence of this preference policy or its failure to encompass Orientals (and other minorities) was unconstitutional.

Although fictional, the case was patterned after the then-pending Washington litigation. On March 8 of this year, that state's highest court rendered a

7-2 decision (two justices not participating) in *Defuntis v. Odegar* reversing a lower court's enjoining the University of Washington School of Law from admitting students for the 1971-1972 school year in an amount that would preclude the entry of the plaintiff, Marco DeFuntis, Jr.

3.62 GPA

The real "Jeffrey Wong," DeFuntis was a U.S. citizen and Washington resident who had a University of Washington undergraduate GPA of 3.62 (out of a possible 4.0) and 582 average on three tries at the LSAT (including a 668 in his third attempt, a score that placed him in the top seven percentile).

Based on the GPA and LSAT, the two principal criteria for admission to the Washington school and to most other law schools in this country, DeFuntis was on the borderline of admission.

In the lowest quartile on the school's waiting list, he was notified a month before September, 1971 classes commenced that he would not be admitted. About 25 percent of the 275 admittees for a class of about 145-150 first-year students) had lower GPAs and LSATs than did DeFuntis. (Twenty-nine with higher credentials also were denied entry.)

Special Preference to Minority
Thirty-six of these with lower quantitative credentials than DeFuntis were members of the four minority groups that were given special admissions preference—Blacks, Chicanos, American Indians, and Philippine Americans.

Applicants from these four groups whose GPAs and LSATs placed them in the lower echelons of applicants were given special consideration based on their racial or ethnic background. This was in line with what the school termed an "attempt to convert formal credentials into realistic predictions" of ability to contribute to law school classes and to the community at large.

It also conformed with a similar University-wide preference policy geared to obtaining a "reasonable representation" of minority groups and to increase participation from groups "historically denied access to... (and) grossly under-represented within the legal system," according to the Court.

Less Weight to GPAs & LSATs

Under this policy, less weight was given to the GPAs and LSATs of applicants from the four designated minority groups. Instead, special consideration was given to other factors, including recommendations, extra-curricular activities, and employment experiences.

Some of the minority admittees would not have been admitted if they were white; some of them were admitted over the higher quantitative credentials of DeFuntis. There was, however, no way of knowing if DeFuntis would have been admitted had the preference policy not existed. Nevertheless, the Court found that he had sufficient "personal stake in the outcome of the controversy" for legal standing.

The facts on the *DeFuntis* case differed slightly from the hypothetical Wong case. Unlike last year's Kirkwood, economic factors were not central to the preference program. Additionally, in the Washington litigation the question of underinclusiveness of the program was not a major issue because DeFuntis apparently was not himself a member of an

(continued next page)



(continued from page one)
under-represented, historically deprived minority racial or ethnic group.

Lack of Preference to Residents

But the Washington case had a major issue that did not appear in the Wong case. DeFuntis' challenge also was predicated on the lack of preference accorded to state residents. This was highlighted by the 127 non-Washington residents who were among the 275 admitted to the class (32 of whom were among 165 enrollees).

Ironically, the Washington Supreme Court was, in effect, dealing with a hypothetical case itself since DeFuntis actually was admitted in September, 1971 and still is attending the law school. Nevertheless, the Court considered the case not to be moot because of the conditions surrounding his admission and "the great public interest in the continuing issues" involved therein.

The significance and topicality of the issues are beyond dispute. Admissions policies approximating those at Washington's law school are in use at Stanford and a number of other leading law schools, as well as a large number of undergraduate schools. It also has corollaries in other limited-entry situations ranging from public housing to public and private employment.

Important precedent

The *DeFuntis* case is one of the few reported ones of its kind and may be important legal precedent for "reverse discrimination." The Court addressed itself to three issues in resolving the ultimate question of the constitutionality of accepting minority applicants with lower quantitative credentials than others and who but for race (or ethnic background) would not have been accepted.

Justice Marshall A. Neill's four-man plurality opinion first held that it is not per se unconstitutional to use race as "a factor" in public school admissions policy. In so doing, it rebuked the lower court's exclusive reliance on *Brown v. Board of Education*, 347 U.S. 483 (1954) as determinative of per se unconstitutionality of racial considerations.

Rather, the Court said, *Brown's* prohibition of racial segregation in public schools applied only to "invidious" discrimination, defined as classifications that "stigmatize a racial group with the swap of inferiority."

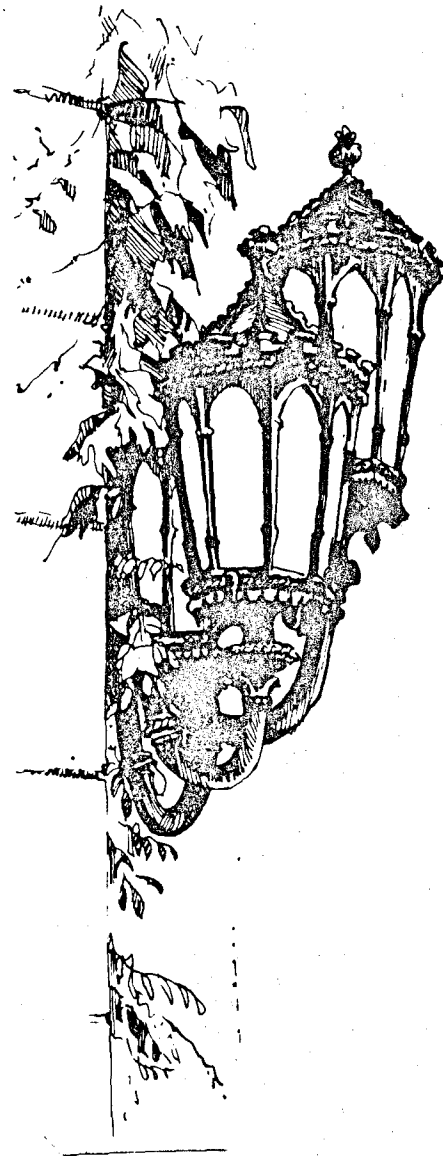
Goal: to Bring Races Together

Since the goal of the Washington program was "not to separate the races, but to bring them together," it was not per se unconstitutional. The Court also cited numerous post-*Brown* cases, dealing mainly with disestablishment of de jure school segregation, as to the permissibility or compulsion of racial classifications when their aim is to bring about racial balance.

Passing next to the appropriate standard of review, the Court applied a heavy burden of justification. This strict standard is customarily invoked when "fundamental interests" or "suspect" classifications are involved. But the Court said a lesser

standard of rationality was not appropriate, notwithstanding the beneficent purposes of the program.

Preferential treatment along racial lines, the Court said, is "not benign with respect to nonminority students who are displaced by it." Therefore, the Court tested the policy against the standard of whether it is "necessary to the accomplishment of a compelling state interest."



Policy Passed

The preferential policy managed to pass both prongs of the test. Based primarily on the gross numerical under-representation of the four minority groups in law schools and the legal profession in Washington and throughout the nation, the Court found the augmenting of minority law students to be of sufficiently compelling state interest.

In so doing, it passed over the question of alleged "inherent cultural bias" in traditional admissions criteria, notably grades and test scores. Rather, it asserted that it is immaterial whether the causation for the under-representation was de facto or de jure.

This was predicated on the Court's position that there is "no reason why the state interest in eradicating the continuing effects of past racial discrimination is less merely because the law school itself may have previously been neutral in the matter."

The Court lightly passed over the necessity issue by noting that despite 18 years having passed since *Brown v. Board of Education*, racial minorities remain "grossly under-represented" in the legal system.

Challenges Brushed Aside

The Court brushed aside other challenges. It said the policy was not fatally underinclusive because piecemeal approaches are permissible and the school was confining its program to the "most serious examples of racial imbalance." It also noted the flexibility of the program, avoiding fixed quotas and merely pegged to "reasonable representation." The Court did not consider how far preferential admissions could go before becoming "unreasonable."

Furthermore, the Court said that individual inquiry as to personal deprivations of each minority admittee was not required. "Psychological" harm was assumed for all members of the four included minorities.

Need for Minority Lawyers

The Court also said there was a need for more minority lawyers be they rich or poor. In this portion of its opinion, the Court cited a prominent law review article, O'Neil, "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education," 80 *Yale L.J.* 699 (1971). This article was relied on heavily through the 43-page opinion.

Lastly, the Court rejected state constitutional and statutory arguments for preferential treatment of Washington residents vis-a-vis non-residents.

A three-judge concurring opinion coupled an aversion to law school admission based on "purely mathematical factors" with a call for "more complete published standards for admission."

Dissent

In dissent, the chief justice of the Court urged complete "color blindness" in admissions policies and rebuked the exaltation of "political rights of one group

or class over that of another." In response to the plurality's emphasizing the benevolent integration purposes of the policy, he warned that "the road to perdition is paved with good intentions." He also severely criticized the "invidious" discrimination against Washington residents practiced by the school in its attempt to become a "national" law school.

Another justice concurred in this dissent and issued his own cryptic disapproval of the plurality's opinion.

It is not known if the decision will be appealed, but in view of DeFuntis being more than half-way through his legal education, further prosecution of this case

(see REVERSE page four)

DÉJA VU

TRAVELS WITH GULLIVER

Marooned on the island of a superior race, the Houyhnhnms, Gulliver is questioned about the state of Eighteenth Century England and its jurisprudence.

He added, that he had heard too much upon the subject of war, both in this and some former discourses. There was another point which a little perplexed him at present. I had said, that some of our crew left their country on account of being ruined by *law*; that I had already explained the meaning of the word; but he was at a loss how it should come to pass, that the *law* which was intended for every man's preservation, should be any man's ruin. Therefore he desired to be farther satisfied what I meant by *law*, and the dependers thereof according to the present practice in my own country; because he thought nature and reason were sufficient guides for a reasonable animal, as we pretended to be, in showing us what we ought to do, and what to avoid.

I assured his Honour, that law was a science wherein I had not much conversed, further than by employing advocates in vain, upon some injustices that had been done me. However, I would give him all the satisfaction I was able.

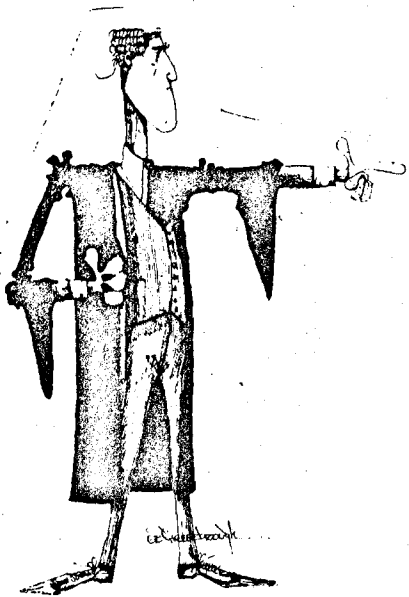
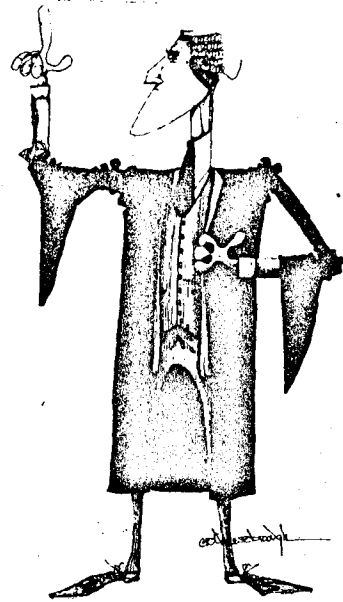
I said there was a society of men among us, bred up from their youth in the art of proving by words multiplied for the purpose, that white is black, and black is white, according as they are paid. To this society all the rest of the people are slaves.

For example, if my neighbour hath a mind to my cow, he hires a lawyer to prove that he ought to have my cow from me.

I must then hire another to defend my right, it being against all rules of law that any man should be allowed to speak for himself. Now in this case, I who am the true owner lie under two great disadvantages. First, my lawyer, being practiced almost from his cradle in defending falsehood, is quite out of his element when he would be an advocate for justice, which as an office unnatural, he always attempts with great awkwardness, if not with ill will. The second disadvantage is, that my lawyer must proceed with great caution, or else he will be reprimanded by the judges, and abhorred by his brethren, as one who would lessen the practice of the law. And therefore I have but two methods to preserve my cow. The first is to gain over my adversary's lawyer with a double fee, who will then betray his client by insinuating that he hath justice on his side. The second way is for my lawyer to make my cause appear as unjust as he can, by allowing the cow to belong to my adversary; and this if it be skilfully done will certainly bespeak the favour of the bench.

Now, your Honour is to know that these judges are persons appointed to decide all controversies of property, as well as for the trial of criminals, and picked out from the most dextrous lawyers who are grown old or lazy, and having been biassed all their lives against truth and equity, lie under such a fatal necessity of favouring fraud, perjury, and oppression, that I have known several of them refuse a large bribe from the side where justice lay, rather than injure the faculty by doing any thing unbecoming their nature or their office.

It is a maxim among these lawyers, that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of *precedents*, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of decreeing accordingly. (see GULLIVER next page)



(GULLIVER continued from page three)

In pleading, they studiously avoid entering into the merits of the cause, but are loud, violent, and tedious in dwelling upon all circumstances which are not to the purpose. For instance, in the case already mentioned; they never desire to know what claim or title my adversary hath to my cow, but whether the said cow were red or black, her horns long or short; whether the field I graze her in be round or square, whether she was milked at home or abroad, what diseases she is subject to, and the like; after which they consult precedents, adjourn the cause from time to time, and in ten, twenty, or thirty years come to an issue.

It is likewise to be observed that this society hath a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong; so that it will take thirty years to decide whether the field left me by my ancestors for six generations belongs to me or to a stranger three hundred miles off.

In the trial of persons accused for crimes against the state the method is much more short and commendable: the judge first sends to sound the disposition of those in power, after which he can easily hang or save the criminal, strictly preserving all due forms of law.

Here my master, interposing, said it was a pity, that creatures endowed with such prodigious abilities of mind as these lawyers, by the description I gave of them, must certainly be, were not rather encouraged to be instructors of others in wisdom and knowledge. In answer to which I assured his Honour, that in all points out of their own trade they were usually the most ignorant and stupid generation among us, the most despicable in common conversation, avowed enemies to all knowledge and learning, and equally disposed to pervert the general reason of mankind in every other subject of discourse, as in that of their own profession.

(REVERSE continued from page two)

is doubtful. These issues, however, undoubtedly will arise in future litigation, not necessarily confined to law school or college settings.

The Washington decision is sprinkled with broad statements that could be invoked to justify many kinds of minority preference policies. But it also is flavored with considerations peculiar to education in general and law schools in particular.

For the time being, however, it provides a welcome port for law schools being stormed by complaints about special admissions preferences given to minority applicants. It simultaneously poses a substantial hurdle to the Jeffrey Wongs of this world, who have had the misfortune of not being born of a deprived minority race.

Help!

In case you missed last week's pitch, RES GESTAE is looking for writers to cover planned topics and people this summer, and welcomes any notes or comments as long as the author's name accompanies the material. Apparently you didn't believe that it really does pay.

