JUSTICE AND LEGAL REASONING

WILLIAM T. BLACKSTONE*

This Article analyzes the requisite structure of proper judicial reasoning and the freedoms allowed in judicial decision-making within that structure. The primary emphasis is on "hard" cases, with the sorts of issues and the mode of reasoning in complex appellate court decisions. Simplistic formal or mechanical decisions in which a clear cut rule of law is applied to a given case pose no great philosophical problems for jurisprudential reasoning; hard cases can pose such problems. They go beyond simple mechanical decision-making procedures and involve conflicts of rights and principles, interpretations of rights and principles, and decisions on priorities of rights and principles. They go not only to fundamental issues of constitutional interpretation but to fundamental moral issues as well.

This Article will develop an account of judicial reasoning that both explains some of the inherent complexities of that reasoning and points to criteria to which such reasoning should conform.¹ In Section I, I will discuss these complexities and some criteria will be formulated. In Section II, DeFunis v. Odegaard² will be examined as a point of reference for further analysis of those complexities and criteria. In Section III, some conclusions on criteria of adequacy for judicial reasoning will be drawn.³

I. CRITERIA OF ADEQUACY FOR LEGAL REASONING

The quest for criteria to which legal reasoning should conform should be understandable, given the power and pervasive influence of laws and legal institutions. If Ralf Dahrendorf is correct, and I believe he is, the law is the basic factor that determines the sorts of social stratification or class structures that exist in different soci-

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* B.A., Elon College; M.A., Ph.D., Duke University. Research Professor of Philosophy and Chairman, Division of Social Sciences, University of Georgia.

1. This Article is not concerned with the psychology of judicial decision making, what causes judges to decide a particular way. Nor is the Article concerned with simply explicating or describing the sorts of considerations to which judges appeal in making decisions, though such an explication is important to understanding the judicial process.


3. The overall discussion assumes a division of powers characteristic of the United States. Different functions or roles might be proper to a judiciary under a different form of government.

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ties. If the law embodies irrelevant criteria or if it legitimizes arbitrary discriminations or if it permits such discrimination, then the law is an instrument of social injustice. We would like to believe that all legal decisions are rationally justified and that they are proper uses of state power, but we know that they are not. We are all aware that some laws, judicial decisions, and prevailing social conditions are irrational and unjust. We are made acutely aware of this when there is a radical alteration in the law, for example, when an important precedent is overruled. The Supreme Court's decision in *Brown v. Board of Education*, which overruled *Plessy v. Ferguson*, is an example of such a radical alteration in judicial reasoning. Such cases set new precedents and offer new guidelines for future legal decisions and lead us to ask why acts or conditions that previously were seen as legal and just now are seen as illegal and unjust. The answer to this question will vary according to context. Some considerations, however, are context-independent criteria that any adequate judicial decision must meet.

First, logical consistency in decisions is a criterion that is necessary but by no means sufficient for an adequate judicial decision. If there are two cases under consideration by a judge and those cases in all relevant respects are indistinguishable, and if a judge or court decides one case in one way and the other case differently, then something basic to the judicial process is wrong. Such decisions are arbitrary and capricious. To use the language of both Herbert Wechsler and R.M. Hare, they are unprincipled. Consistency or the principled nature of judicial decisions does not mean, however, that all cases arising after a given precedent has been made must be decided identically. This would be required only if (a) there were no relevant differences between the cases and (b) if the legal precedent itself covered all relevant grounds for differentiation and was based on relevant grounds. These two conditions require detailed examination.

(a) Few would deny that stare decisis is essential to judicial decision-making. Without attention to precedents and the effort to

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6. 163 U.S. 537 (1896).
8. R. Hare, *The Language of Morals* (1952) (especially Chapter 4).
make legal decisions consistent, judicial decisions would be based on the immediate results of a decision and on the moral and political commitments of the judge. But within the commitment to stare decisis, judges have considerable room for movement and creativity. This is so not merely because there are contradictory precedents but because changing conditions of human life and new knowledge make certain factors relevant that were not relevant or were not seen as relevant at an earlier time. The object of judicial reasoning is justice and equity, and judges must attend to all considerations relevant to just and equitable decisions. This means that they must be prepared not merely to apply a given law mechanically in the light of certain precedents but to extend those laws and precedents creatively to cover considerations now relevant to just decisions, and to assure equity in individual cases when the facts do not precisely fit the mold of precedents. In this sense the judiciary is an extension of the legislature.

For example, until quite recently judicial decisions bearing on the disposal of wastes by industries have been made largely on the basis of the right to private property and old "public nuisance" law. Such decisions perhaps were adequate during an era of abundant clean natural resources, but under current conditions, with the growth of industry and technology and the devastating effect of uncontrolled pollutant disposal on the environment and on the quality of human life, many argue that they are no longer adequate. If judges simply create new law by formulating what they think public policy ought to be on pollutant disposal, for instance, they would intrude on legislative prerogatives. Of course, in the past five years, legislative bodies have acted in this area. Literally thousands of new environmental laws have appeared. I am suggesting, however, that a judge might extend creatively the application of old laws to new and changing conditions, even without new legislation, as occurred with the Refuse Act of 1899.9 This forward-looking extension of existing law is a fulfillment, not a violation, of the judge's role.10

In the context of moral philosophy, Hare makes this point of the proper extension of principles very well: "[W]e are always setting precedents for ourselves. It is not a case of the principle settling everything down to a certain point, and decision dealing with every-

10. This sort of forward-looking extension should not be confused with the use of some sort of utilitarian calculus as a guide.
thing below that point. Rather, decision and principles interact throughout the whole field." Judicial reasoning would seem to conform to this principle. Legal principles and precedents are modified constantly by judicial decisions, and unquestionably, just as the interaction of decision and principle is necessary for the growth of morality and the adequacy of moral decisions, so also is the interaction of decision, principle, and precedents in the realm of legal reasoning required for the growth and vitality of law and the adequacy of legal decisions. In both areas, however, we must be able to offer justified reasons for the extension of a principle or rule, or for permitting a certain case or type of case to be an exception to the rule, and we must be willing to apply the extended or altered principle to all similar cases to avoid an unprincipled decision.

(b) Judges must be prepared not only to extend principles to apply to new conditions, but also to recognize that established legal principles or rules may be based on irrelevant or arbitrary criteria for the differential treatment of persons or groups. The principled application of such rules results in grave injustice. This, of course, is the whole point of those who cry for justice rather than mere law and order or uniform treatment. Laws that discriminate or permit discrimination on the basis of race, sex, or age when these criteria are irrelevant are examples of principled but unjust order. The relevance of criteria, however, cannot always be spelled out in advance. New empirical knowledge of factors causally related to certain ends or purposes properly force reconsideration of laws or precedents that distribute goods and services on grounds that did not take this knowledge into account. Plessy v. Ferguson is a case in point. That decision was predicated on the assumption that separate but equal schooling facilities for whites and blacks was possible. The sociological and psychological data uncovered by Kenneth Clark and others, which was an important empirical premise in the overturning of Plessy, showed that the mere separation by race, even with comparable school facilities and faculties, precluded

11. Hare, supra note 8, at 65.
12. 163 U.S. at 544-45.
equality of educational opportunity, in direct contradiction to the rationale of Plessy.

What constitutes justified reasons for exceptions and extensions of principles? There is no simple answer to this question. It surely depends on the context and circumstances within which the principle or law operates; on the purpose of the law and whether its application is accomplishing that purpose; on the precedents set; on the uncovering of new empirical data; on whether the law conflicts with other laws; on the interpretation of broad constitutional rights and values; on the hierarchy of principles adopted when there is such conflict. In difficult cases judges can and do diverge in their decisions because of disagreement at any one or more of these levels. These disagreements are manifest in those areas of judicial discretion which judges are permitted to exercise. Although a judge’s decision must be consistent with procedural and substantive law, that law permits a wide range of choice both “horizontally,” in terms of different statutes and precedents, and “vertically,” in terms of the variety of constitutional rights and principles. In any given case, the judge must decide first by classifying the case under a certain legal category, which may already indicate the statutes and precedents he deems relevant, and at the trial level, by operating on the basis of certain rules concerning the admissibility of evidence. These moves restrict the boundaries within which his judgment will be formulated. For example, as Iredell Jenkins points out, the decision to classify a case as one of “contributory negligence,” or “failure to take due care,” or “assumption of risk,” or “of extra hazardous use,” sets the framework for decision. In any given case, which of the similarities among the elements of the cases is the essential one? The choice of legal categories for the resolution of the case, for example, depends on the answer to this question. Once that choice is made, however, the judge has wide room for movement both horizontally and vertically. His role as judge restricts the grounds for his decision to the legal framework of his society. His decision must follow logically from the laws and precedents of that system, but, as indicated, this leaves room for a great deal of judi-


15. For a discussion of these types of choices see G. GOTTIEB, THE LOGIC OF CHOICE 134 (1968).

crial creativeness (or, as some say, "judicial legislation"). This ex-
pection of judicial creativeness within the circumscribed bounds
of the legal system raises the question of what is embraced by that
system. What types of rules or principles or considerations are seen
as properly constitutive of the legal framework within which the
judge is to make his decisions? That issue will be discussed moment-
tarily, for it is central to the object of explicating criteria of ade-
quacy for judicial reasoning. First, a discussion of judicial creativ-
erness or what some call judicial legislation is apposite.

Justice or a just decision often requires judicial creativeness—the
extension of legal categories and perhaps the creation of new catego-
ries of judicial relevance. If justice is to be served, new conditions
of human life, and new information about those conditions bearing
on the quality of human life and the just distribution of goods and
services require legal innovation and new interpretations and appli-
cations of established laws and principles. In this sense judicial
"legislation" is required of judges. As Sam Shuman has pointed
out, however, this is legislation of a certain type, and is not to be
confused with the role of the political legislator. The political legis-
lator is not bound by the doctrine of stare decisis; the judge is. The
political legislator is directly accountable to the people. His ade-
quacy as a legislator is assessed in terms of the immediate social
consequences of the laws for which he is responsible. Also, the
political legislator legitimately can favor his own political constitu-
ents; indeed, he is expected to do so. On the other hand, the judge
has no political constituents whom he is expected or entitled to
favor. The adequacy of his decisions is not tested solely by their
immediate social consequences; nor, generally, is the judge directly
accountable to the people. These differences are important. The
role of the judge is circumscribed in this way in our system because
we think it is required for impartial, just decisions. This seems to
be correct; justice is not likely to result from a straightforward polit-
ical advocate. If so-called judicial "legislation" is seen for what it
is, as the creative extension of laws and principles to assure justice
under changing conditions of human life and proper attention to the
unique circumstances of individual cases, we certainly should not

17. Shuman, Judicial Legislation or In What Way Is Relevance Relevant to Judicial
Decision-Making, in LEGAL REASONING: PROCEEDINGS OF THE WORLD CONGRESS FOR LEGAL AND
SOCIAL PHILOSOPHY 390-91 (1971).
18. For a discussion of other important differences between the judge as legislator and the
political legislator see id. at 390.
have a negative attitude toward it, for it is proper to the role of a judge. A simple mechanical application of laws without the creative extension and interpretation of those laws results in injustice and vitiates a basic raison d'être of the judge.

Some distinctions by Ronald Dworkin are useful in the criteriological quest. In arguing against legal positivism, even in the sophisticated form held by H.L.A. Hart, Dworkin notes:

When lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. Positivism, I shall argue, is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules.

What does Dworkin mean by a legal rule? How does a rule differ from a legal principle or a policy? Though Dworkin admits that it is sometimes difficult to distinguish rules and principles because they sometimes play the same role, nonetheless there is a logical distinction between them. “Rules are applicable in an all-or-nothing-fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.” For example, it is a rule that a will is invalid unless it is signed by three witnesses. If this rule is valid, any will signed by only two witnesses is invalid unless there are specified exceptions which themselves are part of the rule.

A principle, on the other hand, is not an all-or-nothing sort of thing. It “does not even purport to set out conditions that make its application necessary.” It does not require a particular decision but is a consideration “which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.” Dworkin cites several examples of principles. In Riggs v.

21. In some cases, according to Dworkin, “the difference between them is almost a matter of form alone.” Id. at 28.
22. Id. at 25.
23. Id.
24. Id. at 26.
25. Id.
Palmer, the court had to decide whether a person who had murdered his grandfather could inherit the wealth left him in his grandfather's will. The court recognized that the

"statutes regulating the making, proof and effect of wills . . . if literally construed . . . give this property to the murderer". But the court continued to note that "all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."

This principle overrode the rule and the murderer was not permitted to inherit under the will.

Another example of a principle cited by Dworkin is the decision in Henningsen v. Bloomfield Motors, Inc., a landmark case in products liability. Henningsen signed a contract limiting the automobile manufacturer's liability to "making good" defective parts. After an accident caused by a defective part, he sued the manufacturer for medical costs and other expenses of those injured. A simple appeal to legal rules would have permitted the manufacturer to stand on the contract, but the court held for Henningsen, citing principles such as, "'the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other,'" and "'[i]n a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars.'" Again the principles overrode the rule. The defendant had to pay for medical costs although this conclusion was not necessitated by the principle.

Dworkin defines a principle as "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of

26. 115 N.Y. 506, 22 N.E. 188 (1889).
29. Id. at ----, 161 A.2d. at 86, quoting United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting).
30. Id. at ----, 161 A.2d at 85. For Dworkin's analysis of Henningsen see Dworkin, supra note 14, at 24.
Justice or fairness or some other dimension of morality."31 Principles are characterized by the dimension of weight or importance; rules are not. Additionally, in cases involving several principles, resolution requires the assignment of relative weights to each. Of course, it does not follow from these differences that rules do not often result from the application of principles.

Policies, on the other hand, differ from principles for they are standards "that [set] out a goal to be reached, generally an improvement in some economic, political, or social feature of the community."32 The formulation of policy is basically the function of the legislative branch and the judiciary must "pay a qualified deference to the acts of the legislature."33

Dworkin argues that rules and principles, rather than policies, are the legitimate and authoritative sources for judicial decisions.34 Principles, however, cannot be applied mechanically. They are open-textured and controversial; because men may assign different weights to them, reasonable men may disagree on the appropriateness of any given legal decision based on those principles. This does not mean that the framework for judicial reasoning is unstructured or that it is based on the biased evaluation or the idiosyncratic value commitments of the judge. It means only that the structure is much looser and more complex than a narrow rule-oriented model depicts to be possible. This looser structure does not nullify the fact of structure. For example, debates in the Supreme Court and changes in legal opinions—the overturning of precedents—do not indicate a lack of authority in our basic law. On the contrary they indicate, as Robert Goedecke puts it, that "authority is reasonable and not totally blind."35 If the Court did not respond to changing conditions and new information or if it did not interpret and apply constitutional rights and principles to new conditions of human life, it would surely vitiate a major purpose for its existence.

Goedecke speaks of an "open formalism" as the most adequate theory for jurisprudence. This is similar to what Hare is referring to

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32. _Id._ Dworkin recognizes that the distinction between principles and policies "can be collapsed by construing a principle as stating a social goal" but he believes that we lose a valuable distinction in some contexts when this is done. _Id._
33. _Id._ at 38.
34. Dworkin, _Hard Cases_, 88 Harv. L. Rev. 1057 (1975). In this complex and brilliant essay Professor Dworkin extends his analysis of the distinctions between rules and principles and policies which he first formulated in _The Model of Rules, supra_ notes 20-22.
in moral philosophy when he speaks of "decisions of principle," and it seems to be the basic thrust of Dworkin's emphasis on a jurisprudence of principles as opposed to one which is simply rule-oriented or policy-oriented. Both Goedecke and Hare emphasize a framework in which basic principles are applied and extended in light of current conditions and the particularities of concrete cases. If we emphasize only current conditions and needs by adopting a purely pragmatic jurisprudence, we flounder in a morass of individual preferences, values, and attitudes, and we usurp the role of the legislature by judicially creating social goals and policies. If we emphasize only formal rules, we are left with a sterile legal system that will fail to meet the needs of a changing society.

Principles, and the rights founded on those principles, must occupy center stage in the judicial process. There are, of course, different levels of generality of principles, ranging from principles like "no man may profit from his own wrong" to the equal protection and due process clauses of the Constitution. But the substance of judicial decision at whatever level of adjudication depends heavily on the decision that certain principles are relevant; on the weight given to different, sometimes conflicting, principles; and on the interpretation given to those principles. There are, then, at least two basic issues when we speak of "principled" judicial decisions: (1) The proper interpretation of whatever principle or principles are involved in a decision, and (2) a priority ordering of those principles. I will focus on (1) in Section II, using DeFunis as a point of reference. First, a discussion of issue (2) is required.

It has been argued that since the mid-forties, the Supreme Court has embraced the "balancing" doctrine in which competing principles, values, and interests are "weighed" and in which the judgment of each case rests on the particular nature of the case. Whether or not this is true, the basic objection to this balancing doctrine has been that it results in ad hoc decisions rather than principled ones. When decisions are based largely on current needs and on the subjective value preferences of the judge in his choice of both the relevance and weight of principles, no objective principles are invoked or established. Justice Black, who has expressed great concern over what he thinks are ad hoc decisions of the Court, stated:

36. See note 8 supra & accompanying text.
"It is neither natural nor unavoidable in this country for the fundamental rights of the people to be dependent upon the different emphasis different judges put upon different values at different times."38 "Balancing" must not be ad hoc. It must be done, Justice Black argues, within the preferred position of rights which the framers of the Constitution and the Bill of Rights provided. When there is a conflict of rights or liberties all of which are protected by the Constitution, we must settle the conflict by appealing to the preferred position given to certain rights by the Constitution. Justice Black is adamant and unequivocal about the fundamental status of first amendment rights. They have preferred status in the Constitution, he argues, and are not to be treated simply as part of a cluster of rights that must be balanced against other rights, including the interests of government.39 Justice Douglas expressed the same concern as Justice Black over the ad hoc, unprincipled nature of some recent court decisions:

[R]ecently the Court in this and in other cases has engrafted the right of regulation onto the First Amendment by placing in the hands of the legislative branch the right to regulate 'within reasonable limits' the right of free speech. This to me is an ominous and alarming trend. The free trade in ideas which the Framers of the Constitution visualized disappears. In its place there is substituted a new orthodoxy—an orthodoxy that changes with the whims of the age or the day, an orthodoxy which the majority by solemn judgment proclaims to be essential to the safety, welfare, security, morality, or health of society. Free speech in the constitutional sense disappears.40

If Justices Black and Douglas are correct, the preferred status of certain rights in the Constitution provides the basis for principled, as opposed to ad hoc, decisions by the Court. This does not mean that those rights are absolute, for their preferred status could be changed by additional constitutional amendments, and there may be "compelling state interests" for overriding those rights on some occasions. It does mean that, barring reasons of national survival, the grounds for the defeasibility of such rights must be at least as

39. Id. at 66-70, 75.
basic as the rights overridden. These grounds are discovered by attending to what the Constitution says. For example, the state cannot justifiably abrogate or restrict the right to free speech unless that abrogation is necessary to protect other basic rights such as the right to a fair trial. Grounds for abrogation or restriction must be serious circumstances that threaten comparable basic rights, for example, and not simply the feeling of a judge that some imminent tragedy will occur if free speech is permitted on a given occasion. What is at stake are the very values of a free society for which the framers adopted the Constitution and Bill of Rights. In criticizing certain decisions as ad hoc Justices Black and Douglas are not concerned that constitutional rights are being ignored but that they are not being given their proper preferred status. In their view, this makes those decisions unprincipled. Of course, this claim requires arguments that establish that the Constitution gives preferred status to these rights. These arguments are crucial, and I will return to this issue of the priority ordering of principles later with reference to philosophical arguments, not constitutional ones.

II. AN EXAMPLE OF JUDICIAL REASONING IN A “HARD” CASE

*Defunis v. Odegaard* provides a point of reference for discussing the complexities of judicial reasoning. It is an excellent example of a hard case in which there is a conflict of rights and principles, presenting questions of balancing and priorities, invoking the notion of a compelling state interest to order those priorities, and a debate on the very meaning of the constitutional provision of equal protection. Only the barest facts of the now familiar case are required to outline the basic issues of principle and relate them to the parameters and criteria of judicial reasoning discussed in Section I.

The University of Washington Law School denied Marco DeFunis admission to a first year class restricted to approximately 150 students and for which there were roughly 1600 applicants. DeFunis

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42. Paul Freund has characterized the equal protection clause as a moral standard put in the wrappings of a legal command. P. FREUND, ON LAW AND JUSTICE 38-40 (1968). His remark suggests that there is a fusion of legal and moral reasoning at this constitutional juncture. Obviously, there are widely different interpretations of the clause.

43. The objective here is not to give a thorough analysis of *DeFunis*, with detailed facts and a critique of the Washington Supreme Court’s decision, but to use the case to demonstrate the crucial principles and the complexities of judicial reasoning at this level for the light that may be shed on the scope of judicial reasoning. Of course no final legal disposition occurred as the Supreme Court declared the case moot. 416 U.S. 312 (1974).
filed suit in state court, contending that the admissions committee violated his constitutional rights under the fourteenth amendment by discriminating against him on the basis of race. He claimed that a number of minority students were admitted whose credentials (Law School Admissions Test and Predicted Grade Point Average) were considerably lower than his own. DeFunis was admitted when a mandatory injunction against the law school was granted by the trial court. The Washington Supreme Court reversed, holding that DeFunis' constitutional rights had not been violated. DeFunis then appealed to the United States Supreme Court which stayed the judgment of the Washington Supreme Court, permitting DeFunis to continue in law school. When the United States Supreme Court finally heard DeFunis' case he was in his final quarter of study. The Court, deciding that DeFunis no longer needed a remedy, declared the case moot.

The facts in DeFunis are complex and are susceptible of different interpretations. Certainly they may be read as discounting any racial (or reverse) discrimination against DeFunis. Such a reading interprets the action of the committee in denying admission to DeFunis as one based on the fairness and appropriateness of invoking non-standard criteria (letters, interviews, and the like) for minorities otherwise disadvantaged under the standard tests. On this reading, the same standards of merit were applied to majority and minority applicants although the indices of merit differ. This is exactly the reading of DeFunis that Justice Douglas leaves open as the correct reading in his dissent. Though racial classification was used to identify applicants who might be disadvantaged by the standard tests, race itself was not the dispositive factor in admitting minority group members and excluding DeFunis. It was simply a tool for assuring equality of treatment regardless of race, and its use is perfectly consistent with the principle of nondiscrimination and the Constitution.

Like Justice Douglas, I would not want to rule out this reading of the facts of DeFunis. There is another reading of DeFunis, however, in which race, though obviously not the only factor, was the dispositive one in admitting some applicants and in excluding DeFunis. There are substantial grounds for inferring that the admissions com-

44. 82 Wash. 2d 11, 507 P.2d 1169 (1973).
46. Id. at 325-26, 332-33 (Douglas, J., dissenting).
mittee admitted a number of minority students to the exclusion of majority applicants like DeFunis who were by the law school's own standards less qualified and who would have been rejected had they been white. This was done to obtain a "reasonable representation" of racial minority students. Such representation was deemed not only to have pedagogical value but also was deemed necessary to effect what the committee thought to be the "compelling state interest" of overcoming the vestiges of past racism and helping to assure a socially just society in the future. This reading of the case raises the question of whether DeFunis' constitutional rights were violated, for under this reading there is an overriding of DeFunis' right to nondiscrimination or equality of treatment to effect greater equality for minority members.

Actually two "compelling state interest" arguments can be extracted from DeFunis and from other cases in which the preferential treatment of racial minorities is defended. One is that in which the ultimate justifying premise is the norm of social justice for all, summarized above. Another is a utilitarian interpretation of "compelling state interest." In the latter, preferential treatment is justified on the ground that such policies maximize social welfare and social utility. They improve the social and economic conditions of the preferred group at little expense to the non-preferred. They help end civil disorder, and society, it is suggested, benefits from the policy.

That such preferential policies will maximize social utility is a questionable empirical hypothesis. Justice Douglas, for example, suggests that such policies will place a stigma of inferiority on minorities and hence may be self-defeating. My concern here, however, is not with these empirical issues, but with the constitutional issues to which DeFunis gives rise and ultimately with the possible fusion of moral and constitutional arguments or reasoning that takes place at this level.

Three related but distinguishable constitutional issues emerge from DeFunis: (1) the constitutional permissibility of racial classification; (2) the constitutional permissibility of racial discrimination and, crucial to this issue, the question of constitutional grounds for ascribing rights to groups or classes (blacks, women, chicanos, etc.) as opposed to ascribing rights to individuals; and (3) constitutional

47. Id. at 343 (Douglas, J., dissenting).
grounds for overriding individual rights by a “compelling state interest.”

The first of these three issues needs only brief discussion. Racial classification is not always invidious. Historically its use was nearly totally indivious, but the Court has declared correctly, I believe, that the use of racial classification is constitutionally permissible, perhaps even required, in some contexts to effect social justice. Equal protection is in no way violated when race is used to identify persons who may be disadvantaged because of past institutionalized injustice and who, because of that, deserve compensatory treatment. Nor is it violated when race is used to assure equality of treatment in the distribution of some public resource such as education. This is what happened in the key desegregation cases in which race was not used to apportion some benefit to members of one race and exclude those of another but to assure equal benefits for all.\(^4\)

In contradistinction, the second reading of the facts of *DeFunis* concludes that racial classification was used to exclude DeFunis from certain benefits in order to pursue other more compelling objectives.

Assuming arguendo this second reading of the facts of *DeFunis* let us focus on issues (2) and (3). These obviously are related. If there is a compelling state reason for violating a person’s individual rights, then discrimination against a person on the basis of race might be justified for that reason. We will attend to the two compelling state interest arguments mentioned above in a moment. First note that both of the compelling state interest arguments—(a) we must overcome the effects of past injustice and develop a racially just society and, for that purpose, the temporary violation of DeFunis’ right to nondiscrimination is justified, and (b) we must end civil disorder and maximize social utility and, for this purpose, the temporary violation of DeFunis’s right to nondiscrimination is justified—may well presuppose the ascription of rights to groups as opposed to individuals. Although *DeFunis* is not an affirmative action case in the sense of mandated quotas or numerical goals of admission of minority members, still it may be argued that in seeking overall racial justice, the admissions committee and the Washington Supreme Court acted on the basis of what they thought were the interests of a racial group.

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Professor Cornelius Golightly explicitly argues that the theory of rights that underlies affirmative action requirements is one in which rights are ascribed to groups as opposed to individuals.\textsuperscript{49} The premise of those requirements, he believes, with emphasis on overcoming "underutilization" of members of certain groups and the use of numerical goals and timetables that sometimes become specific quotas, is that we accord special rights to entire classes of persons (blacks, women, American Indians and so on) who have not been able to enter the mainstream of American life because of past and current discrimination. According to Golightly, this is contrary to the fourteenth amendment, the thrust of which is non-discrimination, and which vests rights in individuals, not in groups. Emphasis on group rights and emphasis on individual rights are two different "political moralities" that clash in some circumstances. The group-rights emphasis permits the overriding of individual rights in the interest of a given group or groups; nonmembers of certain favored groups are justifiably discriminated against simply because of nonmembership in the group(s), whether the group be defined in terms of sex, race, or some other characteristic. A DeFunis who has been discriminated against on the basis of a group-rights emphasis has no grounds to complain, given the acceptance of the group-rights premise which has been required by the recalcitrance of society to bring oppressed minorities into the equal opportunity mainstream within the traditional individual-rights basis. Golightly declares: "His complaints about the fitness or unfitness of the Black nationality individual who has received preferential treatment is simply out of order. Stated in another way and in the idiom of familiar logical theory, it is a violation of the theory of logical types to intermingle the morality of individual rights and the morality of group rights."\textsuperscript{50} Once racism is overcome, the individual-rights emphasis will return. At that time, a DeFunis will have a legitimate complaint. Until that time, he has none.

Several things must be noted about the role of the group-rights emphasis in the law and in the decisions of the University of Washington admissions committee and the Washington Supreme Court. The legislation out of which affirmative action programs grew does not legalize group rights per se. The Civil Rights Act of 1964,\textsuperscript{51} the

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50. Id. at 13.
\end{footnotes}
Equal Employment Opportunity Act of 1972,\textsuperscript{52} and the affirmative action program that came into existence under Executive Order 11246\textsuperscript{53} all seem to reflect faithfully the nondiscrimination requirement that has been taken by many to be the thrust of the fourteenth amendment. There is little doubt, however, that considerable discrimination on the basis of group characteristics such as race and sex has occurred as a result of the administration of programs that followed this legislation. Although affirmative action requires that employers recruit, hire, train, and promote persons in all job classifications without regard to race, color, religion, sex, or national origin and that "good faith" efforts be made to correct identifiable "deficiencies," (defined as the existence of fewer minorities or women in a particular job classification than would be reasonably expected by their availability),\textsuperscript{54} some employers exceeded these bounds. The recent case of McAleer \textit{v. AT&T Co.},\textsuperscript{55} in which a man successfully sued the company charging that he had been unfairly denied promotion to a supervisor's job because of discrimination in favor of women, may be an instance of exceeding those bounds in the very process of trying to fulfill a consent decree with the government to hire more women. AT & T tried to walk a tightrope between the requirements of the consent decree and those of nondiscrimination. If the requirements of such a consent decree do in fact mandate the hiring of specific quotas from a given group, they contradict the principle of nondiscrimination. The company could not possibly satisfy both demands. If the decree specifies goals that are to be attempted within the nondiscrimination principle, the demands are consistent. Golightly doubts that there is a distinguishable difference between quotas, goals, and timetables. Moreover, he sees affirmative action programs as a response, historically and politically, to the pressures brought mainly by black groups to overcome the oppression of their group. The vesting of special rights in the oppressed black group rather than simply in black individuals is the result of an agreement between blacks as a minority group and

\textsuperscript{53} 3 C.F.R. 169 (1974).
\textsuperscript{54} Affirmative Action Programs came into existence with Executive Order 11246, \textit{id}. Requirements for these programs are found in 41 C.F.R. 228-37 (1976). The requirements are reprinted with an introduction by P. Brownstein in \textit{Equal Employment Opportunity—Responsibilities, Rights, Remedies}, Appendix C (J. Pemberton ed., PLI, Sourcebook 8, 1974).
whites as a majority group.\textsuperscript{56}

I cannot agree with this analysis of either the law undergirding affirmative action, if taken in any literal sense, or of the historical events that preceded this law. I think, however, that the group-rights emphasis does play an important role in cases like \textit{DeFunis}, not at the statutory level where the law on equal employment opportunities demands strict compliance with the principle of non-discrimination (even if the \textit{implementors} of that law demand something contrary), but at the constitutional level. In \textit{DeFunis}, for example, statutory law was not cited as a ground for the preferential admissions program for minorities, though various precedents in common law were cited. The grounds cited were constitutional. The Washington Supreme Court argued that the Constitution permits preferential treatment for disadvantaged minority groups even if that preference results in the denial of a benefit to someone like \textit{DeFunis} who would have received the benefit of admission were it not for the minority admissions policy. The rationale was that preferential treatment was required to accomplish the overriding or compelling state interest of the elimination of racial imbalance within both legal education and the legal profession, thereby attempting to eliminate the effects of past racial discrimination by assuring access to the judicial process by minorities. At this level of adjudication, Golightly is correct. Group rights are pitted against the rights of an individual like \textit{DeFunis}. We must ask whether the Constitution permits the ascription of rights to groups as opposed to individuals and, if it does, whether and under what conditions it also permits group rights to override individual rights.

It is important to distinguish the question of whether group classification is permissible from that of ascribing rights or modes of treatment \textit{on the basis} of that classification. I have argued above that the former is constitutionally permissible but that the latter is problematic. This is not to say that constitutionally there can be no group rights. Obviously there are group rights in the sense of the rights of collective entities like corporations that represent many persons but which are legal individuals. Moreover there are group rights in yet a stronger sense when membership in a group is so central that it directly affects in vital ways each member of the group and when there is a recognized spokesman for the group. Boris Bittker suggests that this situation characterizes the various Indian

\textsuperscript{56} Golightly, \textit{supra} note 49, at 12.
tribes, but he denies that it is true of blacks as a group. If it were true, some form of group treatment in compensation or distribution of goods, services, and opportunities might be a proper way of assuring equal protection. Because it is not true, group treatment often will violate equal protection. Not only are the boundaries of the class of blacks difficult if not impossible to establish precisely given the high proportion of interracial breeding, but also compensatory and distributive policies that operate on the basis of race or sex will result in great injustice. The concept of compensation requires that redress be paid by the party guilty of perpetrating an injury and that the amount of the redress be proportionate to the injury suffered. The disadvantaged condition of many blacks today is an enormous burden. For many other blacks, that is not the case. Furthermore, the individual or collective parties who perpetuated the injury are, for the most part, dead and gone. This is not to deny that much sub rosa racism and sexism continues to operate in our society; nor is it to deny that strong measures must be taken to stop such practices and to rectify the disadvantaged conditions inherited by many persons. But if the method of compensation and distribution is a blanket policy of preference on the basis of race or sex, the effect is to exact redress from majority members who are not guilty of wrongdoing and, in many cases, to award compensation to minority group members who have escaped the disadvantaging effects of past institutionalized injustice. Additionally, there is the problem of adjudicating between different groups who claim disadvantaged status as groups, for example, between blacks, women, and chicanos, if there is conflict between their claims to certain opportunities.

This discussion returns to the compelling state interest arguments and to the meaning of equal protection. Ignoring for present purposes the utilitarian interpretation of that argument specified above, there are two interpretations of the compelling state interest argument that rest on the appeal to social justice or equal protection. One interpretation is that although the preferential policy is injurious to DeFunis and although his right to nondiscrimination in the sense of the uniform application of the same meritocratic criteria of admission to all was violated, that violation was justified in order to attain long-term social justice for all. On this reading De-

Funis' right to equal protection was violated in the interest of equal protection for others, a disadvantaged group in particular. Given this interpretation the question comes to this: Does the Constitution permit the violation of the right to equal protection of some persons to instantiate that same right for others?

It is difficult to think of a compelling state interest grounded in the appeal to equal protection in which equal protection for others is violated. Chief Justice Burger has argued that no state law has "satisfied this seemingly insurmountable standard." It seems insurmountable on a federal level as well. If national survival is at stake, perhaps such a violation would be justified. Here social justice would be pitted against a generically different value, national survival itself, though of course poor judgments about what is required for survival may be made. But under this interpretation, Justice Douglas' dissent in DeFunis is particularly relevant: "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordionlike quality." Douglas makes it clear that the effect of such preferential treatment is the undermining of the entire principle of equal protection, and it seems to me that he is correct.

A second possible reading of the compelling state interest argument in DeFunis is grounded in the appeal to equal protection. This reading might be proposed as a defense of the Washington Supreme Court's decision to exclude DeFunis and as one that denies that DeFunis's right to equal protection was violated. I have in mind Ronald Dworkin's distinction between the right of equal treatment and the right to be treated as an equal; the latter is the generic meaning of the equal protection clause and the former is "derivative." Speaking specifically about DeFunis and issues at stake, Dworkin warns us "not to use the equal protection clause to cheat ourselves of equality." The fundamental meaning of equal protection, he declares, is that each person be treated as an equal with the "same respect and concern." The right to equal treatment, on the other hand, is the right to the equal distribution of some

60. Some feel such a judgment was made in Korematsu v. United States, 323 U.S. 214 (1944).
63. Id. at 33.
resource, opportunity, or burden. The right to equal treatment is sometimes but not always required by the right to be treated as an equal. In DeFunis the fundamental right at stake was the right to be treated as an equal. This was accorded to DeFunis, Dworkin believes, in spite of his exclusion. DeFunis' application and his interests were treated as fully and sympathetically as the interests of any other. The right to equal treatment of distribution was denied DeFunis, but this did not violate his right to be treated as an equal and therefore did not violate his right to equal protection under the fourteenth amendment. Dworkin's claim can also be put in this way: Unless unequal distribution takes place, the right of minority members to be treated as equals will be violated; or, equal protection for all requires the preferential treatment of racial minorities which in turn requires justifiable discrimination against non-preferred persons and an overriding of their rights to equal treatment. The right to equal treatment is simply a derivative right that normally holds but which does not hold in circumstances in which there are many members of racial minority groups who are disadvantaged because of past and present injustice. Discrimination against DeFunis, in the sense of unequal treatment, does not violate DeFunis' right to be treated as an equal. Thus, in regard to the constitutional issues at stake in DeFunis, Dworkin is suggesting that the case is one in which a higher order right or principle, within the generic meaning of equal protection, overrides a lower order right.

If what Dworkin means by the right to equal treatment is the right to identical treatment or the same treatment, one surely must grant him the distinction he draws between the right to equal treatment and the right to be treated as an equal. One must agree that the right to the same distribution is a secondary or derivative right when it holds, and that it holds or is required only when entailed by the principle of equality. Equality or non-discrimination does not require that we ignore relevant differences that justify differential treatment. To the contrary, it requires that we attend to those differences and then accord differential or proportional treatment. Although historically there have been sharp differences of opinion about the criteria that justify differential treatment and how much differentiation they justify, the emphasis on proportionality as opposed to sameness of distribution goes back at least to Aristotle, who declared that "equals are to be treated equally; unequals un-

64. Id. at 30.
equally.” This is the commonplace interpretation of the principle of nondiscrimination. Nondiscrimination permits differential treatment when relevant differences exist.

Apparently this commonplace interpretation is not what Dworkin is addressing by his distinction and argument. Rather he seems to be arguing that the right to nondiscrimination is derivative and can be overridden by the right to be treated as an equal. At least the right to nondiscrimination can be overridden when a person’s “vital” interests are not at stake: “Individuals may have a right to equal treatment in elementary education, because someone who is denied elementary education is unlikely to lead a useful life. But legal education is not so vital that everyone has an equal right to be admitted.” In his discussion of DeFunis Dworkin does not spell out criteria for “vital” interests. DeFunis himself obviously thought that admission to his state’s major law school was a vital interest because he planned to practice in that state. But the important point is that Dworkin seems to be saying not simply that differential treatment is justified when there are relevant differences, but that the principle of nondiscrimination, at least in regard to non-vital interests, can be violated justifiably by appealing to the more generic meaning of equal protection—the right to be treated as an equal. What I am suggesting is that the distinction drawn by Dworkin and the argument used to defend the Washington Supreme Court’s decision to uphold the exclusion of DeFunis break down. Are we treating DeFunis as an equal when we discriminate against him on racial criteria? Are not the interests of anyone who is excluded from admission, employment, and promotion simply because of race being relegated to secondary status? I think they are. His interests are adversely affected because of his race, and he is not being treated as an equal. Violation of his right to nondiscrimination is equivalent to violation of his right to be treated as an equal.

The rejection of Dworkin’s distinction and his argument does not mean that one cannot give priority to one right as opposed to another. Thomas Nagel, for example, suggests that under certain circumstances the right of one person not to be economically disadvantaged may justify the violation of the right of another person to have meritocratic standards of access to positions uniformly applied. This suggestion pits one rule of justice against another and

65. Id.
assigns a certain priority under certain circumstances. Although Nagel's suggestion was made in the context of discussing what might be permitted within a philosophical theory of justice, the same priority perhaps could be defended within a constitutional theory. Just as Nagel does not invoke race as the dispositive factor in granting the priority but rather invokes the greater injustice of the continuation of the disadvantaged condition of certain persons, so also a constitutional theory might justify the same priority without invoking race as the dispositive factor. I have no such fully developed constitutional theory at hand to justify such a priority, but the provision of the fourteenth amendment that there shall be no deprivation of life without due process of law is, however, a possible constitutional ground for according certain special rights to the disadvantaged. If such rights are ascribed on that basis and not on the basis of race or sex, there need be no conflict with equal protection.

This discussion of the different possible interpretations of the facts of DeFunis and the different interpretations of the complex principles applicable to the case illustrates the difficulty in applying the criteria developed in Section I to a hard case. The difficulty exists, at least in part, because complex moral and legal principles are intertwined in a case like DeFunis. The remaining task is to discuss the fusion of moral and legal reasoning and to indicate how the criteria are applicable to cases such as DeFunis.

III. THE FUSION OF MORAL AND LEGAL REASONING

DeFunis is an example of those hard cases that take us to the very boundaries of our jurisprudence. At those boundaries there is a fusion of moral and legal reasoning, and interpretations of constitutional principles such as equal protection are cast in terms of the judge's grasp of the political and moral philosophy that provides the background for those principles. Those interpretations, along with the value priorities that he sees within the Constitution, are ultimately of the greatest magnitude for the legal system because they determine to a large extent the judge's decisions at other levels. Some judges are far better at grasping that moral and political

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68. For discussion of the due process clause as a basis for "minimum protection" see Michelman, The Supreme Court, 1968 Term. Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 1 (1969).
philosophy and applying it to the changing conditions of society than are others.

The interpretation of constitutional principles and a grasp of the moral and political backdrop of those principles are one thing. A philosophical defense of those principles is something else. This is a task that is beyond the role of the judge qua judge, but we might observe briefly some changes in the philosophical terrain on the possibility of such a defense such as John Rawls' *A Theory of Justice.*\(^6\) It is well known that a number of contemporary moral and legal philosophers deny that a set of values or principles of justice hierarchically ordered can be demonstrated with any degree of finality to all rational minds. They agree that reasons can be given for value preferences up to a point, but as Ludwig Wittgenstein says, "[i]f I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do.'"\(^7\) Hans Kelsen's legal positivism leaves fundamental legal norms as unprovable assumptions, as perhaps expressions of basic preferences.\(^8\) R.M. Hare states that all that can be done in a regressive justification is "the complete specification of the way(s) of life" of which alternative decisions of principle are a part.\(^9\)

What is intriguing about John Rawls' mammoth contribution to the theory of justice and to moral philosophy in general is the re-entry of the view that a theory of justice with a hierarchically or lexically ordered set of principles that is acceptable and provable to all rational minds is possible.\(^10\) Rawls would agree that a Nietzschean, for example, may have "turned his spade"—to use Wittgenstein's phrase—in opting for his particular version of a meritocracy with its concomitant concept of justice, and hence he may be impervious to further argument. This does not mean, however, that a common methodological procedure for adjudicating between fundamentally different theories of justice is impossible. We are not reduced to simply describing alternative ways of life and choosing between them.

Both Rawls' methodological procedure for arriving at principles

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72. Hare, *supra* note 8, at 68-69. Hare insists that we cannot call the choice of a way of life based on this complete specification an arbitrary one. The use of the term "arbitrary" in such a context would have no meaning, for by definition no further reasons can be given.
73. Rawls, *supra* note 69 (especially Chapters 3 and 4).
of justice and his substantive theory or set of principles have been subjected to a barrage of criticism in legal and philosophical periodicals.\textsuperscript{4} His method, the use of a hypothetical social contract in which rational, self-interested (but not egoistic) persons choose a set of lexically ordered principles behind a veil of ignorance designed to assure objectivity and impartiality, is not unproblematic. Nor is the substantive theory of justice that emerges an unproblematic one (the lexical priority of the principle of equal liberty over the principle of fair equal opportunity and the difference principle). These problems cannot be analyzed here. But Rawls' theory goes against the trend by affirming the possibility of a rationally defensible ideal theory of justice.

DeFunis demonstrates that the answer to the question of what sorts of relevant considerations a judge must include in order to have a framework for adequate judicial decisions is complex, but it also supports the criteria developed in Section I. There are layers of relevant considerations. Stare decisis and consistency are necessary but are by no means sufficient considerations, as DeFunis, a case of first impression, illustrates. Existing legal rules and precedents may be overturned, but when they are, the judge or court must be able to show or to argue rationally that the changed or overturned rule is justified by reference to a basic right or principle or the preferred status of certain rights or principles as embodied in the Constitution. But as the discussion of DeFunis shows, basic rights and principles are subject to different interpretations. The judge must bring to bear an interpretation of those principles and rights and a theory of constitutional priorities, but his idiosyncratic standards cannot be the justifying ground. If they were, the very concept of legal obligation would become so fluid that it would be nearly meaningless. The judge must respect the autonomous and separate role of legislative bodies, but that respect does not mean a defense of the status quo. As DeFunis illustrates with respect to the need for minority group members in the legal professions, the judge must be sensitive to new social science data that are ultimately relevant to the proper application of constitutional principles. Additionally, he must exercise a balancing function in the context of conflicts of rights, such as the right to equal protection, attending to whatever priorities are embodied in the Constitution or his interpretation of those priorities.

\textsuperscript{74} Bibliographies of articles on Rawls are included in \textit{Reading Rawls} (Daniels ed. 1975) and 3 Soc. Theory & Prac. 149 (1974).
All of these considerations are relevant to adequate judicial decision making, especially at higher court levels. Even without the additional burden of devising a philosophical or ideal theory of justice (though such a theory may come into play in his interpretation of the Constitution) the task of the judge is immensely complex and difficult, and as Aristotle points out in the Nicomachean Ethics, we should expect only the degree of certainty which a given subject matter permits.\(^7\) Judicial reasoning, especially in hard cases such as \textit{DeFunis}, unquestionably does not permit absolute certainty. The very nature of judicial problems beyond the simplistic rule-oriented stage, that is, conflicting interpretations of the facts of a case, conflicting precedents in common law and conflicting interpretations of the principles at stake in those precedents, conflicting interpretations of various statutes, conflicting interpretations of rights and principles at the constitutional level and of priorities among those principles, precludes that sort of certainty. The judge must live with this uncertainty and must decide in which direction the balance seems to point.

\(^7\) Even if Rawls is correct in his claim that an Archimedian point is possible in a theory of justice which, when adopted at the constitutional level, provides a strict lexical ordering of principles, still there would be conflicts of liberties or rights within the lexically ordered principles requiring balancing decisions; for the principle of equal liberty itself, his principle of highest priority, embraces a cluster of liberties that may conflict with one another.