1975

Preferential Policies in Hiring and Admissions

James W. Nickel

PREFERENTIAL POLICIES IN HIRING AND ADMISSIONS: A JURISPRUDENTIAL APPROACH

JAMES W. NICKEL*

This Article discusses some of the troublesome policy issues[1] that arise in connection with preferential policies that are designed to assist blacks and other victims of hardship and discrimination. In dismissing the case of Marco DeFunis Jr. on mootness grounds,[2] the Supreme Court disappointed those who had hoped for a definitive ruling on these matters and insured that the issues involved would be discussed for a while longer. There is still much to be said.

Preferential hiring[3] and admissions policies give an advantage in competitions for jobs or places in educational institutions to members of particular groups. The most common use of preferential policies in the United States has been to provide special educational and employment opportunities for veterans,[4] but the recent controversy over preferential policies has to do with their use in recent years to provide special opportunities to blacks and members of other disadvantaged groups. The advantage conferred on the preferred group may be very small (as it is when the policy is to give preference to a member of the group only when he or she is as well qualified as any other candidate), or it may be very large (as it is when persons who are not members of the group are not even considered for the position).[5] To hire or admit a person on a preferential basis is to do more than to use special investigative measures to determine, in a case where an applicant has an unusual history or

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* Associate Professor of Philosophy, Wichita State University. Work on this paper was supported by a grant from the National Endowment for the Humanities. I am grateful to Charles Frankel, Kent Greenawalt, Virginia Held and Steve Munzer for their contributions to the improvement of this paper.

1. This Article deals primarily with the policy justifications for, and objections to, preferential policies. Statutory and constitutional constraints may be adverted to, but will not be developed in the discussion below. For an example of a statutory barrier to the use of preferential policies, see Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1970).

2. DeFunis v. Odegaard, 416 U.S. 312 (1974).

3. For linguistic economy I will take "hiring" to include matters of promotion and retention, although I recognize that preference in promotion and retention may involve different issues from preference in original appointment.

4. For a history of preferential policies for veterans in public employment, see LIBRARY OF CONGRESS REPORT FOR HOUSE COMM. ON VETERANS' AFFAIRS, 84TH CONG., 1ST SESS., THE PROVISION OF FEDERAL BENEFITS FOR VETERANS 258-65 (Comm. Print No. 171, 1955). The Veterans' Preference Act of 1944, ch. 287, 58 Stat. 387, codified as 5 U.S.C. §§ 2108, 3309 (1972), gives a ten percent bonus on federal civil service examinations to disabled veterans and a five percent bonus to other veterans.

5. The Veterans' Preference Act of 1944, 5 U.S.C. § 3310 (1972), specified that for certain jobs (for example, building guard, elevator operator), no nonveteran was to be considered unless no veterans were available. This is sometimes referred to as "super-preference."

culture, how well his qualifications and potential measure up to that of other applicants.[6] It is rather to use a lower standard in his case which will make it easier for him to succeed.

The use of preferential policies is sometimes accompanied by the use of quotas, and what I have to say about preferential policies will apply in part to quotas as well. A quota, in this context, is a numerical goal or requirement for the hiring or admission of members of specified groups within a certain time or until a certain percentage is reached. Quotas can be used independently of preferential policies in order to provide stimulus for and evidence of nondiscrimination—for example, if the only action required to meet the quota is to stop discriminating and hire the best candidates. Although quotas are sometimes used in these ways, they are more typically used in connection with preferential policies, and this is one of the main reasons why many find quotas objectionable. Hence, if one succeeded in providing a defense of preferential policies, one would thereby succeed in eliminating one of the main objections to quotas. Insofar as quotas involve additional problems such as inflexibility or a threat to institutional autonomy, the following discussion will not provide a defense of their use.

It is important to recognize that preferential policies need not be used in combination with racial or other classifications based on inherent characteristics. One might apply them, for example, to all persons who are on welfare or who have an income below a certain level. Hence, after discussing some justifications for using preferential policies, I will divide my discussion of objections to preferential policies into two parts. The first part will discuss objections to preferential policies that have nothing to do with the use of racial or ethnic classifications to define the preferred group, and the second part will discuss objections that focus on the use of racial (and ethnic) classifications. My approach, put broadly, is that of a defender of preferential policies, but I hope that my analysis of the issues involved will be helpful even to those who disagree. By making needed distinctions, by exposing important premises and inferences to scrutiny, and by illustrating how important policy considerations conflict in this area, it may be possible to make discussions of these matters more rational.

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6. Justice Douglas, in his dissent in DeFunis v. Odegaard, 416 U.S. 312, 335 (1974), claims that preferential policies using racial classifications are unconstitutional, but he is quite prepared to allow law schools to use special tests and procedures to evaluate the potential and qualifications of black, Indian and other minority applicants. The point of these special tests and procedures in his view is not to give an advantage to these applicants, but simply to ensure that they are not disadvantaged by standardized evaluation procedures that do not take into account their unusual backgrounds. In practice, however, it may be difficult to determine whether the school's purpose in using racial or ethnic classifications is to correct for the bias of standardized tests or to implement preferential policies; and it was this difficulty in the case of the University of Washington Law School that led Justice Douglas to urge a remand for a new trial. *Id.* at 344.

I. JUSTIFICATIONS AND CONCEPTIONS

It is a commonplace of political life that people often support social programs for different reasons and consequently have varying conceptions of the proper purposes of a program. Programs which use preferential policies to increase the educational and employment opportunities available to the poor or to disadvantaged minorities are no exception to this. Although such programs are often called *compensatory*, they are not necessarily designed to meet the requirements of compensatory justice by providing compensation for past wrongs. To compensate is merely to counterbalance, and the counterbalancing of disadvantages can be done for reasons other than those of compensatory justice. One may advocate the counterbalancing of disadvantages with special opportunities because doing this would eliminate inequities in the distribution of income—a justification in terms of distributive justice—or because it would promote the public welfare by reducing poverty and its attendant evils, bringing about a better utilization of our human resources, or providing personnel who will provide needed services to the poor—justifications in terms of utility or public welfare. The fact that programs which use preferential policies can be conceived as means to these different ends, and hence be advocated on different grounds, complicates discussion of the merits of such programs. Although some people may be willing to accept more than one of these justifications, others may be bitterly opposed to any conception of the purposes of these programs other than their own. A person who favors the use of preferential policies on grounds of utility to provide special educational and employment opportunities to members of disadvantaged minorities may be strongly opposed to doing this in the name of compensatory justice, perhaps because he thinks that this would involve some admission of guilt that he is unwilling to make, even though the actual operation of the program is amenable to either conception. This is not to say, of course, that the exact character of such programs is never affected by which conception is dominant—and I will try to trace out some of these differences—but in practice many "compensatory" programs admit of all these interpretations.

The situation is further complicated by the fact that two people who would be able to agree in most cases on which particular individuals ought to receive special opportunities may nevertheless disagree hotly over whether racial classifications can be used in dispensing these special opportunities. As a means of clarifying these matters, I will discuss the different sorts of justifications that might be offered for programs that use preferential policies, and the difficulties with each. Depending on the justification used, different groups will benefit by preferential policies, and racial, ethnic, or sexual classifications will be used with greater or lesser defensibility.

A. *Compensatory Justice*

To argue that programs which use preferential policies to provide greater opportunities to members of disadvantaged minorities are justifiable on grounds of compensatory justice is to argue that either the *actual* recipients or the persons that one thinks *ought* to be the recipients deserve compensation for wrongs they have suffered. Compensatory justice requires that counterbalancing benefits be provided to those individuals who have been wrongfully injured which will serve to bring them up to the level of wealth and welfare that they would now have if they had not been disadvantaged. Compensatory programs differ from redistributive programs mainly in regard to their concern with the past. Redistribution is concerned with eliminating present inequities, while compensatory justice is concerned not only with this but with providing compensation for unfair burdens borne in the past. Considerations of compensatory justice can justify a person's getting more in the present than would be fair if his past losses were not considered. For a person who has been unable to get any decent job because of discrimination, it may be feasible to make up for his past losses by using preferential policies to provide special employment opportunities. Similiarly, persons denied adequate educational opportunities by racist school systems can perhaps be brought up to the level they would otherwise have reached if special educational opportunities are provided. Similar steps have often been taken to compensate veterans for opportunities lost, injuries suffered and services rendered during wartime.[7]

There are a number of difficulties involved in using considerations of compensatory justice to justify programs that use preferential policies to assist the disadvantaged. These include: (1) questions about whether compensatory benefits are owed only to those particular individuals who have been harmed substantially by discrimination and hardship or to all members of those groups that have been frequent targets of discrimination; (2) questions about whether a person who was once harmed by discrimination but who has overcome his losses through his own efforts still deserves compensation now; (3) questions about whether governments, companies, institutions and individuals have obligations to compensate losses they did not cause; and (4) questions about how far back into the past the view of compensatory justice should extend. Although I cannot undertake here the extended discussion that would be needed for an adequate exploration of these questions, the first one

7. A distinction should be drawn between compensation for services and compensation for injuries, for the concept of compensatory justice is concerned only with the latter. The special benefits provided to veterans are often compensatory in both ways: they provide compensation for services and they also provide compensation for deprivation of liberty, for being required to take great risks, and for wounds suffered, although, unlike cases of racial discrimination, injuries received in wartime are not seen as having been unfairly imposed by society upon the veteran.

must be given some attention since it is crucial to how justifications in terms of compensatory justice are conceived.

It is sometimes maintained that in addition to compensatory principles that apply to individuals there are compensatory principles that create obligations between groups when one group injures another group or is unjustly enriched at the other group's expense. Paul W. Taylor, for example, argues that there is a principle of compensatory justice which requires that "[w]hen an injustice has been committed to a group of persons, some form of compensation or reparation must be made to that group."[8] In Taylor's view, a group's right to compensation does not derive from the right to compensation of individuals in that group and cannot be satisfied by only compensating those within the group who as individuals deserve compensation.[9] Furthermore, a member of a wronged group who has not personally been wronged may have a right to compensation as a member of the group.[10] Taylor's approach offers a basis for giving preference to all members of wronged groups without regard to their personal histories. Group rights to compensation are not rights against particular wrongdoers but are against society as a whole: "The obligation to offer such benefits to the group as a whole is an obligation that falls on society in general, not on any particular person. For it is society in general that through its established social practice brought upon itself the obligation."[11] Finally, Taylor thinks that "affirmative action" programs are an appropriate way for a government to discharge society's obligation to wronged groups.[12]

Although compensatory principles that apply directly to groups are frequently advocated, I personally do not find them appealing. Although there may well be moral principles that apply directly to groups, I find the principle that Taylor advocates implausible because it would unnecessarily duplicate many of the rights and obligations created by compensatory principles that apply to individuals, and would provide compensatory benefits to persons who personally have sustained no injury and therefore need not be made whole.[13] It may be desirable to offer special opportunities to, say, all young blacks, whether or not they have personally been significantly harmed by discrimination, but the justification would have to be based on considerations of redistribution, utility, or administrative convenience, not on the claim that all blacks, whatever their situation, have a *right* to such benefits on grounds of compensatory justice. Another reason to avoid reliance on compensatory principles for

8. Taylor, *Reverse Discrimination and Compensatory Justice*, 33 ANALYSIS 177 (1973). For another example of this approach, *see* Bayles, *Compensatory Reverse Discrimination in Hiring*, 2 SOCIAL THEORY AND PRACTICE 301 (1973).

9. Taylor, *supra* note 8, at 181.

10. *Id.* at 179.

11. *Id.* at 180.

12. *Id.*

13. For an elaboration of this argument, *see* Nickel, *Should Reparations be to Individuals or to Groups?*, 34 ANALYSIS 154, 160 (1974).

groups in attempting to justify the use of preferential policies is that invoking such principles is likely to be question begging. Since such principles do not have established noncontroversial applications in other areas, a person who is not already committed to the desirability of compensatory programs and who is told that such programs are desirable because they satisfy the requirements of such a principle is likely to find the principle as much in need of justification as the programs it supposedly supports.

Any approach in terms of compensatory justice is likely to be controversial and problematic, but it seems to me that the least problematic approach along these lines is to suggest that the ones who have a right to compensation are those who have personally been injured by discrimination, and who have not yet been able to overcome this injury.

B. *Distributive Justice*

Programs using preferential policies are also conceived as a means of promoting the redistribution of income and other important benefits. This approach would claim that the justification for such programs lies in the reduction of distributive inequities that they bring about. Since good educations lead to good jobs, and good jobs provide income, security and status, altering the ways in which educations and jobs are distributed so as to give a bigger share to the previously deprived is one way of bringing about redistribution. A concern with distributive justice is a concern with whether people have fair shares of benefits and burdens. Distributive justice does not require that all people have the same income or equally good jobs, the requirement is rather that benefits and burdens be distributed in accordance with relevant considerations such as the rights, deserts, merits, contributions and needs of the recipients. Thus, if both Jones and Smith have had adequate opportunities for self-development, and if Jones is qualified for a desirable and prestigious job as a director of an art museum, while Smith is only qualified for janitorial positions, then there will be no injustice in hiring Jones as the director and Smith as the janitor.[14] One who advocates redistribution on grounds of distributive justice must argue that in spite of the fact that it is possible to justify many inequalities in terms of relevant differences, there are nonetheless many inequalities in our society that cannot be justified. Although it is often difficult to pinpoint these inequalities and to discern the extent to which they reveal discrimination rather than reflect relevant distinctions, it is clear that many distributive injustices exist in our society and that it would be desirable to eliminate them. Many people will allow that some persons are undeservedly poor, others undeservedly rich, and that it would be a good thing—both on

14. Whether it would be just for a large difference in income to accompany the difference in jobs is another matter.

grounds of justice and of utility—to reduce poverty. But advocates of preferential policies may not be content to merely increase the opportunities available to those now in poverty. A person may be getting an unjustly small amount of income even though he is above the poverty line, and hence one might advocate the use of preferential policies to help groups that contain many persons who are not justly rewarded for their contributions.

Those who take this approach are likely to point to large statistical differences between the incomes of blacks and whites or men and women as evidence of unjustifiable inequalities.[15] It is beyond doubt that there has been and still is discrimination in employment against blacks and women, and that blacks and women have had fewer opportunities to develop qualifications. The difficulty, however, in arguing from such statistics is in distinguishing the extent to which the differences derive from discrimination rather than from other factors which may vary in strength between sexes and among groups. When there are groups which have different histories and cultures and emphasize different personal goals, it is unlikely that their members will uniformly utilize the same opportunities, go into the same areas of employment, and have the same attitudes towards vocational achievement. The ideal of having all groups represented at all levels of income and achievement in proportion to their numbers in the country's population may therefore be unrealistic, and perhaps even unappealing. This ideal, which might be called the ideal of proportional equality, has been criticized by many of those who are opposed to preferential policies for women or blacks, but the case for the use of preferential policies does not stand or fall with its acceptance or rejection.[16]

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15. The kinds of statistical differences that are likely to he cited are exemplified by the following: the median income of black families in the United States in 1972 was 59 percent of the median for white families (up from 55 percent in 1960, down from 61 percent in 1970); the median black *college* graduate had an income in 1970 that was $160 less than that of the median white *high-school* graduate; full-time female workers in 1970 had a median income that was nearly $4000 less than that of full-time male workers; and white women between 35 and 54 who have worked steadily since leaving school earn nearly $3000 less per year than white men with parallel careers. E.J. KAHN, JR., THE AMERICAN PEOPLE: THE FINDINGS OF THE 1970 CENSUS 143-45, 222 (1974). *See also* Wattenberg & Scammon, *Black Progress and Liberal Rhetoric*, 55 COMMENTARY 35, 36 (April, 1973).

16. Thomas Nagel, in an important recent essay on preferential policies, *Equal Treatment and Compensatory Discrimination*, 2 PHILOSOPHY AND PUBLIC AFFAIRS 348 (1973), suggests that preferential policies for members of disadvantaged groups cannot be justified on grounds of distributive justice but only on grounds of utility because in order to show that differences in income between groups involve injustices one would need "the aid of premises about the source of unequal qualifications between members of different groups. The more speculative the premises, the weaker the argument." *Id.* at 359. Professor Nagel thus confines his arguments about justice to an attempt to show tbat justice permits the use of preferential policies even if it does not require it. I agree that it is impossihle to show that every statistical difference between groups reveals an injustice, but I doubt that it is really very speculative to suggest that many of the differences in income between blacks and whites or between women and men are unjust and derive from the discrimination that keeps many blacks and women from fully developing their abilities and from fully benefiting from the abilities they have. We do not know what statistical differences there would be, if any, between groups within a just distribution, but it seems certain that the differences would be much smaller than they now are.

C. *Utility*

Redistribution of important benefits may also be advocated because it is believed that the public welfare, on the whole and over the long term, can be promoted by reducing poverty and inequality. On this approach a program using preferential policies to increase educational and employment opportunities would be seen as one means of promoting the public welfare by eliminating poverty and its attendant evils and by eliminating the sort of economic inequality that leads to resentment and strife. Extreme poverty is objectionable to one who is concerned with utility because of what it involves, namely unmet needs and suffering, and because of what it leads to, namely crime, family strife, lack of self-respect and social discontent. Economic inequality of the sort that we currently have, with wide extremes of income and wealth and with some groups largely concentrated at the bottom of the economic ladder is objectionable under this view because it perpetuates stereotypes, deprives people in low-income groups of role models, fosters lack of self-respect, and makes understanding and cooperation between groups more difficult.[17] As long as there are, for example, few black doctors, lawyers, or executives, it will be easy for people, blacks included, to believe that blacks generally lack the abilities to fill these positions, and the maintenance of such belief can only perpetuate inequality with its untoward consequences.

Considerations about unmet needs and suffering may only require the elimination of extreme poverty, but considerations about the bad effects of economic inequality—especially the sort that sees some groups concentrated at the lower levels—suggest stronger measures to facilitate upward mobility for those at lower levels. Hence, moving towards proportional representation might be desirable on grounds of utility even if it is not required by distributive justice.

A much-emphasized connection between utility and the use of preferential policies is found in the need of disadvantaged minorities for persons who can and will provide them with legal and medical services. Thomas Nagel puts this as follows:

> Suppose for example that there is a need for a great increase in the number of black doctors, because the health needs of the black community are unlikely to be met otherwise. And suppose that at the present average level of premedical qualifications among black applicants, it would require a huge expansion of total medical school enrollment to supply the desirable absolute number of black doctors without adopting differential admissions standards. Such an expansion may be unacceptable either because of its cost or because it would produce a total supply of doctors, black and white, much greater than the society requires. This is a strong argument for accepting reverse discrimination, not on grounds of justice but on

17. *See* H. GANS, MORE EQUALITY 20-24 (1973).

> grounds of social utility. (In addition, there is the salutary effect on the aspirations and expectation of other blacks, from the visibility of exemplars in formerly inaccessible positions.)[18]

This kind of argument is sometimes attacked on the grounds that it falsely supposes that only black doctors or lawyers can serve blacks effectively, that only Chicano doctors or lawyers can serve Chicanos effectively, and so forth. But one who uses this argument does not need to make this strong supposition; all he need assume is that blacks who become doctors or lawyers are *more likely* to help meet the medical needs of the black community than whites who become doctors or lawyers. It is clear, for example, that there would be no impassioned outcry if a state medical school in Nebraska gave preference to natives because they are more likely to stay in the state to practice, or to persons who promise to practice in an area with a shortage of doctors. The objection to increasing the availability of needed medical and legal services through preferential policies ends up simply being an objection to giving such preferences on the basis of race; it would not work against preferences given on the basis of where one was from, on the basis of an agreement to serve in a particular area, or on the basis of particular skills such as an ability to speak Spanish fluently.

I have discussed some of the utilitarian benefits which are thought to follow from the use of preferential policies to increase the educational and employment opportunities available to disadvantaged minorities, but on any utilitarian approach these benefits must be balanced against the accompanying costs. Taking money or other benefits away from those who have much in order to promote the public good by giving these benefits to the disadvantaged is not without its costs. The rich person who has some of his money taken to finance job programs, or the young person who finds it difficult or impossible to get into professional school because of programs designed to increase the number of economically disadvantaged persons applying or accepted will not normally be made happier or better off as a result. There may also be attendant social costs, for the rich person may have invested the appropriated money in a way that would have benefited more people, or the young professional school applicant may have been more qualified. These costs cannot be ignored; utilitarian advocates of preferential policies must claim that they are outweighed by greater benefits. This is probably true in many cases, but judgments about this depend on particular facts and must be made in particular cases.

D. *Comparisons*

In practice, at least, the differences between programs which take compensation for past wrongs as their goal and programs which take creation of a more equitable distribution or promotion of utility as their goal are not likely

18. Nagel, *supra* note 16, at 361.

to be very apparent. The point at which differences are most likely to appear is in the criteria that are used to determine which applicants are eligible for preference. If the criteria pertain to the discrimination and wrongful treatment that the applicant suffered, the inequitable position that he presently is in, or the good that would be done by increasing his opportunities, then the program could be seen to be, respectively, compensatory, redistributive, or utilitarian. But preferential programs typieally select recipients on the basis of gross criteria such as having a low income or membership in a disadvantaged group.[19] Since the groups selected by these gross criteria overlap substantially, but not completely, with those who have been harmed by discrimination, or who are in an inequitable position, or whose betterment would promote utilitarian objectives, the primary goal of programs based on preferential policies is often not apparent from the selection criteria they use.

One useful way of comparing the different conceptions of the goals of preferential programs is in terms of whether they can justify, and if so, how they justify, giving preference to *all* applicants who are members of specified disadvantaged groups. If one accepted a compensatory principle that applied directly to wronged groups then one would probably be willing to advocate, for example, preferences for all black applicants regardless of their personal histories. If, however, one held that compensatory principles applied only to individuals then one would advocate preference only for those black applicants who had personally been harmed by discrimination. On this latter approach, preference for all black applicants would be harder to justify, and could only be done on the basis of a claim that *nearly all* black applicants have been harmed by discrimination and that it is therefore administratively efficient and not intolerably unfair simply to prefer all black applicants.

A similar contrast can be drawn between an approach which holds that the ideal of proportional representation expresses the requirements of distributive justice—and which correspondingly requires that *any* member of an underrepresented group should be preferred, whether or not he personally is in an inequitable position—and an approach which holds that inequities should be recognized and dealt with only in individual cases. The latter approach in terms of distributive justice would find it more difficult to justify preferring *all* female applicants, for example, and could do this only on the basis of a claim that the vast majority of female applicants have been subject to distributive injustices and that it is therefore administratively efficient and not intolerably unfair to prefer all female applicants.

If one is not inclined to accept compensatory principles that apply directly to groups or to believe that proportional equality is required by distributive justice, one will then have to justify preferences for all members of

19. At the University of Washington Law School, preference was given to those who were black, Chicano, American Indian, or Filipino. 416 U.S. at 323.

disadvantaged groups in terms of the administrative advantages of doing so. It may be somewhat easier, however, to justify preference for all members of disadvantaged groups on the utilitarian approach. If progress toward proportional equality is desirable on utilitarian grounds, even if not required by distributive justice, the conferral of a preference to all applicants (or all promising applicants) from groups that are substantially underrepresented at higher levels of income and achievement may be justifiable. If the utilitarian approach, however, concentrated on poverty, unmet needs and serving the needs of the poor rather than on inequality per se, then to qualify for preference one would have to be poor. Approaches which emphasize proportional representation (whether they do so on grounds of distributive justice or utility) will sometimes conflict with approaches that emphasize the elimination of poverty and unmet needs. In law school admissions, for example, those who are concerned with proportional representation for blacks in the legal profession may want to admit middle class black applicants on a preferential basis because they often have better educational backgrounds and hence may have a better chance of succeeding in law school and as lawyers. Those who are concerned with poverty and unmet needs, however, may be opposed to extending preferences to these applicants and want to restrict preferences to low-income blacks or to low-income applicants generally.

An interesting difference between the approaches in terms of justice and the approach in terms of utility is in the nature of the recipient's claim to preference. Viewed as a matter of justice, the preference is claimed as something that satisfies the recipient's right to compensation or his right to a fair share. Viewed as a matter of utility, the claim is not that the recipient personally has a right to preference; it is rather that the public good can be promoted by preferring him in awarding opportunities.

II. General Objections to Preferential Policies

In this section and the next I discuss two quite different sorts of objections to preferential policies. The objections discussed in this section apply to any sort of preferential policy for anyone—whether it be for blacks and other minority group members, veterans, or persons with physical handicaps. The objections discussed in the next section go to preferential policies that define the target group in racial, ethnic, or sexual terms.

A. *Problems of Incompetency*

The use of preferential policies to achieve important social goals rests on the recognition that the distributive effects of hiring and admissions practices are very important in determining the character of the overall distribution of benefits and burdens, and on the recognition that these practices can be

altered slightly in order to bring about more desirable results. Preferential policies utilize and alter the distributive practices and effects of existing institutions. In a similar way, special home loan programs altered the distributive effects of the housing market in favor of veterans, and special scholarship programs altered the distributive effects of the educational system in favor of veterans. But preferential hiring and admissions policies do more than provide the money needed to enter the competition; they alter the rules of the competition so that veterans have a better chance of success. And that is why they are more controversial.

Insofar as the use of preferential policies led to the admission or hiring of unqualified persons, significant reductions in the efficiency and productivity of companies and institutions would be likely to follow. Those who are opposed to preferential policies often raise the specter of illiterate students, highway patrolmen who do not how to drive, teachers who cannot handle children and surgeons who remove tonsils by cutting throats. Although these dangers are easily exaggerated, the importance of competent personnel to institutional efficiency must be recognized, and it can be readily conceded that preferential policies should be restricted to those who are adequately qualified, or who, with the training provided, can become adequately qualified for the position sought. This will mean that if a person is unable to perform the task adequately, then preferential policies will not apply to him with respect to the position. Although there will be cases in which it will be difficult to decide the degree of competence that is adequate, I think that the criterion of adequate competence can serve as a useful general limit for preferential treatment.[20] A narrower limit may be required with regard to jobs where small differences in competence within the range of adequate competence can make a great deal of difference in the level of performance, and hence in the level of institutional efficiency. For gardeners, postal clerks, X-ray technicians and sales personnel, adequate competence may be sufficient; but in the case of surgeons, professional athletes and airline pilots, small differences in competence can make a great difference, respectively, in lives saved, games won, or crashes averted, and hence the scope allowed to preferential policies should be more restricted. One advantage of the minimal preferential policy—hire the preferred person only when he or she is as well qualified as any other candidate (a policy that only serves when a tiebreaker is needed)—is that it does not lead to the selection of a less qualified candidate.

B. *Problems of Unfair Burdens*

A second objection is that preferential policies unfairly place the burden of helping those who are preferred on those who are thereby excluded. Thus,

20. The courts have read such a limitation into veterans' preference legislation as constitutionally mandated. *See, e.g.*, Opinion of the Justices, 324 Mass. 736, 85 N.E.2d 238 (1949); Commonwealth *ex rel.* Graham v. Schmid, 333 Pa. 568, 3 A.2d 701 (1938).

it might be argued that putting the burden of helping to compensate and meet the needs of veterans on those who are excluded from government jobs by policies which prefer veterans is an unfair way of distributing the cost of a legitimate goal. A well-qualified nonveteran who had hoped to get a government job but who was denied it because of a policy which gives veterans an advantage may feel that too much of the cost of helping veterans was placed on him. This person may feel that providing benefits from taxes—where the cost can be spread among many taxpayers—is preferable as a means of helping veterans to programs which impose the burden on a few people whose opportunities are reduced by preferential policies.[21]

The problem here is one of justice in the spreading of burdens rather than one of total costs. A policy which prefers veterans does not result in any more persons being excluded than a normal policy; the only difference is in who is excluded. The complaint of those excluded will have to be that it is somehow worse to exclude them and to reduce their opportunities than to do the same to the veterans who would not have gotten the job were it not for the preferential policy.

If we assume that preference is only given to adequately qualified candidates, and hence that both preferential and non-preferential policies are compatible with the requirements of efficiency, what is it that makes it worse when those excluded are persons who are better qualified than some of those hired? An answer to this question will obviously refer to the better qualifications of the persons excluded by the preferential policy, but why is it worse to exclude better qualified persons than to deprive less qualified candidates of preferences indicated by considerations of compensation, distributive justice, or utility? One possibility is to say that better qualifications confer upon their holders a prima facie right to be chosen in preference to anyone who is less qualified. This claim is plausible because, other things being equal, the best way of distributing jobs is to give them to the best qualified candidate. Although this is normally the best way, it does not seem to be the only permissible way. If in a case where small differences in competence had little impact on institutional efficiency, a company chose to save money and effort by hiring the first adequately qualified person who applied or to select among the adequately qualified candidates by lot, no one would have good grounds for complaint.[22] It is unclear whether these cases show that there is no right to be hired in preference to less qualified candidates, or simply that this right is

21. This kind of complaint was made with respect to preference for veterans in promotions in McNamara v. Director of Civil Service, 330 Mass. 22, 25-26, 110 N.E.2d 840, 842-43 (1952).

22. Interestingly, Justice Douglas suggests in DeFunis that law schools might select by lot among well qualified applicants so as to insure that all groups were represented without using racial classifications. DeFunis v. Odegaard, 416 U.S. 312, 344 (1974). This approach might be especially appealing in highly competitive situations where insignificant differences in text scores can, under normal admissions procedures, make great differences in one's chances of being accepted.

one that can be overridden by considerations of efficiency in some cases, but these cases do at least show that the policy of selecting in accordance with the best qualifications is not sacrosanct.

Suppose, however, that one recognized a prima facie right to be hired in preference to all less qualified candidates. To recognize such a right would be to recognize an obligation on the part of hiring officers to award, other things being equal, jobs to the best qualified candidates. The question then arises whether things *are* equal in the case of veterans—that is, whether there are other considerations that can override this obligation. If there are such considerations, they would pertain to the special needs that veterans have, to the utility of a smooth reintegration of veterans into the economy, and to the fact that many veterans deserve compensation for their services and sacrifices. These are considerations which personnel officers do not normally consider, but the question is whether they should be considered.

A proper judgment on this issue depends, I think, on the recognition that when one awards a good job, more is usually at stake than finding a capable employee. One is also awarding or denying a strategic benefit that often has great consequences for a person's long-term levels of income, security and status. Since the decisions of personnel officers often have this effect, it may be appropriate for them to consider matters that are relevant to the proper distribution of income, security, and status. When two or more benefits tend to go together—for example, a job and a good and secure income—to consider only those matters that are relevant to whether a person should get one of these is to award or deny one of the benefits on the basis of an incomplete consideration of all of the relevant factors.[23] When a society succeeds in providing many paths to good and secure incomes, then personnel officers may be justified in generally ignoring the distributive effects that their decisions have and concentrating on job qualifications. But in cases where a denial of a job, or a pattern of denying jobs, is likely to have very bad consequences for the individual or for society, it may be desirable for personnel officers to take these broader consequences into account.

My presupposition here is that hiring officers, and those who create the policies that guide them, are morally obligated to promote desirable social goals when this can be done at slight institutional cost. I think that this applies to both private and public institutions, but one who disagrees with this can still allow that there is such an obligation for public institutions and for those private institutions that are committed to serving the public good—and this will cover most of the institutions where questions about the desirability of preferential policies have arisen. It is not uncommon in any institution for

23. This point is made by Nagel, *supra* note 16, at 357, in regard to the connection between allocating professional education to the intelligent and awarding the high incomes that go along with being a professional. Although a high intelligence may be a good reason for getting the education, it does not seem to be a good reason for getting the high income.

considerations other than those of qualifications to be taken into account in awarding jobs. Such considerations come into play when it must be decided whether to retain an older employee who has ceased to be very useful to the company but who would find it very difficult or impossible to find another source of income. These considerations also come into play when it must be decided whether to give a job to a qualified handicapped person or to an equally qualified applicant who is not handicapped. Knowing that the scarcity of such jobs may make denying the job to the handicapped person tantamount to denying him a good income and a basis for self-respect, personnel officers are likely to take this into account. In public employment, legislation has dictated that this be done with regard to disabled veterans. The Veterans Preference Act of 1944 gave disabled veterans a ten point advantage in competition for some jobs, and superpreference in others.[24]

Similar considerations apply with regard to nondisabled veterans, but with somewhat less force. In a postwar period, jobs are likely to be scarce because of production cutbacks in war affected industries in the face of an oversupply of labor due to the many returning veterans and the workers who have been laid-off in those industries. In these circumstances, a veteran who spent several years as a soldier when he might otherwise have been getting an education or job experience may have special difficulties in getting a good job and the good income that goes with it. Denying such a person a job may be tantamount to denying him a decent income for a period. Not only are veterans likely to have difficulty in getting decent jobs and decent incomes in the period after a war, they are also likely to have a special claim to such benefits because of their services and sacrifices. These are considerations which hiring policies and hiring officers may appropriately take into account.

Even if it is allowed that it is sometimes appropriate for personnel officers to take the special needs and claims of veterans into account, one may continue to hold the view that to place the burden of helping veterans on the nonveterans whose opportunities are reduced by a preferential policy is to place the cost of a legitimate objective on too small a group. Because jobs are such strategic benefits, unfairness in the allocation of job opportunities must be taken seriously. Although one might argue that the excluded nonveterans owe something to veterans because of the services and sacrifices of the veterans, or because of the opportunities that nonveterans had and which veterans missed, this is also true of other nonveterans—not just those who happen to be now competing for jobs—and hence it provides no justification for putting a burden on only some of the nonveterans.

One way to reduce the force of this charge of unfairness would be to combine preferential policies with measures that will increase the total number of

24. *See* notes 4-5 *supra*.

jobs available, thereby increasing job opportunities and reducing the loss of opportunities that nonveterans suffer because of preferential policies for veterans. This could be done, for example, by using tax money to create more government jobs, to increase jobs in the private sector, and to provide retirement benefits that will encourage early retirement. Preferential policies might also be restricted to a certain percentage of the jobs or promotions in a given department or bureau so as to insure that nonveterans will not be at a disadvantage with regard to all opportunities within that agency.

Even if all these policies were followed there would probably still be some unfairness in the allocation of the cost of helping veterans. Rather than trying to deny this, it is probably more plausible to argue that the fact that there is some unfairness in the distribution of this burden does not settle the question of whether using preferential policies is acceptable or wise. In order to meet its obligation to veterans, society imposes a greater part of the cost of doing this on some individuals than on others. It is not that these nonveterans owe more than other nonveterans; it is rather that society requires them to live with reduced opportunities in order to meet its obligations.[25] Many wise and acceptable policies involve placing burdens on individuals where similar burdens are not placed on all individuals or even on all individuals who are similar in relevant ways. Fighting a war, building a dam or highway and protecting public access to a beach through zoning restrictions are all activities that inevitably place heavier burdens on some individuals than others. Weaker but more equitable means are preferable if they will do the same job in the same time, but this is seldom the case. The advantage of preferential policies is that they are fast and effective as a means of shifting patterns of distribution, and this, no doubt, is the key to their appeal in the instant context of the use of such policies for blacks and other disadvantaged groups.[26]

III. Objections to Preferential Policies that Use Racial, Ethnic, or Sexual Classifications

Much of the discrimination that blacks have suffered in this country can be viewed as the result of preferential policies that prefer whites, and hence many people are likely to hold the view that using preferential policies in combination with racial classifications is a very dangerous business. The focus of this section is on the objections that are likely to be made by people who feel that racial, ethnic and sexual preferences are dangerous. In order to make the discussion concrete and to avoid the repeated use of lists such as "blacks,

25. This point is made by Thomson, *Preferential Hiring*, 2 Philosophy and Public Affairs 369 (1973).

26. One's willingness to use preferential policies to remedy problems of injustice, poverty and inequality will probably depend in large measure on one's beliefs about how bad the problems are and on how fast they should be remedied. For a discussion of these matters, see Held, *Reasonable Progress and Self-Respect*, 57 Monist 12 (1973).

women, Chicanos and Indians," I will take as my example preferential policies for blacks.

A. *Race as an Irrelevant Characteristic*

When a black person is preferentially awarded a job, and a nonblack person is thereby denied it, both the award and the denial seem to be on the basis of an irrelevant characteristic, namely the race of the candidates. Awarding and denying benefits on the basis of such an irrelevant characteristic seems to be no different in principle—even though the motives may be more defensible —from traditional sorts of discrimination against blacks and in favor of whites. Preferential hiring or admissions policies for blacks are therefore likely to be charged with being discriminatory, even though they are done in the name of rectifying discrimination and other evils. If one condemns the original discrimination against blacks because it was based on an irrelevant characteristic, and hence was unreasonable, one is likely to be charged with inconsistency if one now advocates policies that award and deny benefits on the basis of the same characteristic.

The defect in this charge is that it mistakenly assumes that race is the justification for preferential treatment. This is only apparently so. If preference is given to blacks because of past discrimination and present poverty, the basis for this preference is not that these people are black but rather that they are likely to have been victimized by discrimination, to have fewer benefits and more burdens than is fair, to be members of an underrepresented group, or to be the sorts of persons that can help public institutions meet the needs of those who are now poorly served. Being black does not itself have any relevancy to these goals, but the facts which are associated with being black often do in the present context.[27]

B. *Administrative Convenience as Inadequate Justification*

When this defect is pointed out, the person arguing that racially based preferential policies are discriminatory may formulate a new version of his objection. This version recognizes that the *justifying basis* for preferential policies is discrimination, injustice, unmet needs, and so forth, but it notes that being black is often a necessary condition for receiving preference and therefore forms the *administrative basis* for preferential programs. Those who defend the use of race as part of the administrative basis allow that race in itself is irrelevant, but they assert that the use of racial classifications in administering preferential policies is justified by the high correlation between

27. This argument was advanced in Nickel, *Discrimination and Morally Relevant Characteristics*, 32 ANALYSIS 113 (1972). A somewhat similar argument was recently offered by Karst and Horowitz in *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974). They claim that what should count as "merit" is a function of social needs, and that in a context where there is a need for rapid and substantial integration one's race can be part of one's "merit."

being black and having the characteristics that form the justifying basis. Having noted this, the critic of preferential policies using racial classifications is likely to point out that a similar claim was and is made by racists.[28] Racists claim that they do not treat blacks worse than whites simply because they are black, but rather because blacks are lazy or untrustworthy or have some other characteristic that makes them undeserving of good treatment. Like the advocates of preferential policies for blacks, racists deny that they base differential treatment on an irrelevant characteristic such as race. They claim that the justifying basis for their differential treatment of blacks is something relevant such as being lazy or untrustworthy, not something irrelevant such as race. Race only forms, the racist might say, the administrative basis for his policy of treating blacks worse than whites. The critic of preference on the basis of racial classifications will argue, therefore, that an approach to the justifications of preferential policies which distinguishes between the justifying basis—for example, having been harmed by discrimination—and the administrative basis—for example, being a low-income black—makes the same mistake as the racist since the form of reasoning is exactly the same. Thus, the objection continues, if the advocate of preferential policies can use this distinction between the justifying and the administrative bases to show that he is not practicing invidious discrimination, then so can the racist. But since this defense will not work for the racist, neither will it work for the defender of preferential policies.

But there is a way of distinguishing these cases, and it can be seen by comparing the premises that are used to connect being black with having a relevant characteristic. When these premises are compared, it becomes apparent that for the racist to defend his position, he has to make claims which can be proven to be erroneous about the correlation between being black and having some relevant defect such as being lazy or untrustworthy, while the defender of racially administered preferential policies can make a plausible case without using erroneous premises. Hence, one important way of distinguishing justifiable from unjustifiable uses of racial classifications is in terms of the soundness of the alleged correlation between race and a relevant characteristic.

It is possible, however, that there are cases in which a racist can find genuine correlations between race and a relevant deficiency that will serve his exclusionary purposes. He might claim that blacks are more likely than whites to have a criminal record, no high school diploma, or chronic health problems.[29] But a higher percentage of some relevant deficiency in a particular group does not ordinarily justify excluding all members of that group without considering whether a member personally has that deficiency. Excluding all

28. This criticism was made by Bayles, *Reparations to Wronged Groups*, 33 ANALYSIS 182 (1973).

29. There is another reason to avoid using correlations such as these to exclude blacks—namely that these correlations may themselves be the result of racist practices and institutions.

members of a group on the basis of a correlation between membership and having a relevant deficiency would be justifiable only if (1) the correlation between membership and having the deficiency was very high, and (2) it was so difficult to check for the relevant deficiency itself in individual cases that it would be unacceptably wasteful and inefficient to do so.[30] These conditions are seldom met, and they are certainly not met with regard to correlations between race and characteristics such as having a criminal record, no high school diploma, or chronic health problems—both because the correlations are not high enough and because the relevant deficiencies themselves are not difficult to identify.[31]

Suppose, however, that a racist was able to show that his policy of excluding all blacks was in fact based on a genuine correlation between race and a difficult-to-identify relevant deficiency. Would we then say that his practice of excluding all blacks on that basis was justifiable? To make this even clearer (and even less likely to occur), suppose that there was no question about whether the correlation was high enough or about whether having the relevant deficiency was always sufficient to disqualify one for the position. The question, then, would be whether it would be permissible to exclude all blacks because of a deficiency that statistical sampling revealed, say, 90 percent of them to have.

One might reply that the exclusion of all blacks would not be permissible because it would not be unacceptably wasteful and inefficient to use the difficult-to-identify characteristic itself as the criterion. In *DeFunis*, Justice Douglas dismissed the objection to the administrative inconvenience of the individualized admissions procedures he prefers: "Such a program might be less con-

30. It is conceivable, for example, that individual examination could have been employed to segregate out those Japanese-Americans who presented a real danger of espionage and sabotage during World War II. But in light of the presumed threat of an imminent invasion, such a time-consuming process might well have been viewed as self-defeating. Hence, this procedure, though avoiding the racial classification, did not appear to be a viable alternative to the exclusion of all Japanese from the West Coast military zones.

The decision whether a particular alternative is truly feasible cannot be made by resort to a general formula. One can, of course, point to such factors as manpower requirements, financial costs, and time demands as relevant considerations. Furthermore, as the distinction becomes more invidious and the hardship imposed becomes more severe, one can expect the courts to demand greater sacrifices on the part of the state. But the resolution of this balance in any one decision cannot be given any greater objective precision.

Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065, 1102 (1969) (citations omitted).

31. It is likely that the modern day racist will use correlations between race and a relevant deficiency in a different way. Instead of using them to justify a policy of exclusion by race (which is now legally dangerous), the racist is likely to fasten upon a correlation between race and a relevant deficiency, overemphasize the importance of that deficiency, and hereby exclude a disproportionate number of blacks. This method of excluding most black applicants will require the racist to exclude some whites, but he may be willing to pay this price. One does not need to use racial classifications in order to discriminate against blacks. For an interesting discussion of such "facially innocent criteria," see Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1970). *See also* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

venient administratively than simply sorting students by race, but we have never held administrative convenience to justify racial discrimination."[32] Were the racist to use individual tests or investigations to exclude only the 90 percent that had the relevant deficiency, then he would exclude all unqualified blacks without unnecessarily excluding the qualified ten percent. In the same way, the objection runs, the advocate of preferential policies could achieve all of his desired results if he were to predicate preference in education and employment directly on relevant characteristics such as having been harmed by discrimination, being unjustly poor, or having unmet needs. By doing this he would give preference to only those persons who had these characteristics. This practice would have the advantage not only of excluding blacks without these characteristics, but also of including nonblacks who had them.[33]

The question, then, is whether the price of excluding that ten percent of the blacks who are qualified for the job that the racist is awarding, and of excluding those nonblacks who also ought to get preference is too high a price to pay for administrative efficiency. Efficiency in administering large-scale programs requires that detailed investigations of individual cases be kept to a minimum, and this means that many allocative decisions will have to be made on the basis of gross but easily discernible characteristics. By giving preferences to all applicants who are members of certain disadvantaged groups, administrative costs can be kept to a minimum. The alternative is to investigate on an individual basis. The expense of such investigations might be reduced by inviting applicants to provide information about their personal history as part of their application materials if they think they deserve special consideration because of past discrimination, hardships, injustice, or present need. But this would merely reduce, not eliminate, the costs of investigation because some check on the authenticity of these claims would be needed. An approach of this sort might be workable and desirable in some circumstances, but it would be expensive both for the applicant and for the institution processing the applications. For this reason, there are considerable advantages in using gross indicators, including racial, ethnic and sexual ones, as indicators of the presence of the characteristics that provide the justifying basis.

C. *Problems of Stigmatization and Loss of Self-Respect*

One might argue that it is permissible to use gross indicators such as being an honorably-discharged veteran, but not ones such as being black. This,

32. 416 U.S. at 341 (Douglas, J., dissenting). *See also* Justice Brennan's dissenting opinion in Kahn v. Shevin, 416 U.S. 351, 360 (1974). While granting that the state has a compelling interest in providing remedial measures to ameliorate the poor economic positions of many widows, Justice Brennan would find unconstitutional a Florida statute granting a tax exemption to *all* widows since less overinclusive measures were readily available. The state, in his view, could permissibly exempt those widows who earn incomes or possess assets up to specified amounts indicating actual victimization by past economic discrimination.

33. This position is advocated by Cowan, *Inverse Discrimination*, 33 ANALYSIS 10 (1972).

no doubt, is Justice Douglas' position, since he has often expressed his willingness to allow legislatures considerable latitude, outside of the racial and First Amendment areas, in designing classifications for dealing with complex problems.[34] Given our history of evil uses of racial classifications, there are good reasons, both moral and constitutional, for being very cautious in their use, even for good ends. Hence, we should be reluctant to use them to effect a small gain in administrative efficiency. But the consequences of using racial classifications are not always the same as when they were used to stigmatize and exclude blacks, and their likely nonpejorative impact in the present context ought to be taken into account in balancing their use against less efficient procedures. Using racial classifications which place a burden on whites is probably less dangerous than using classifications that put a burden on blacks, since there is little likelihood that whites will ever be an isolated and mistreated minority in this country. The kind of self-hatred and belief in one's own inferiority that sometimes resulted from discrimination against blacks is not likely to result among white applicants who have their opportunities reduced by preferential programs, since such programs carry no implication of white inferiority.

It may be the case, however, that the use of racial classifications in preferential programs favoring blacks may confirm a sense of inferiority among black recipients, since the presupposition of such programs is that blacks deserve or are in need of such assistance. Justice Douglas offered an argument of just this sort:

> A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved, that Blacks or Browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.[35]

Although special admissions procedures for blacks may, if misunderstood, be taken to imply black inferiority and thereby to stigmatize blacks, it seems to be an exaggeration to say, as Justice Douglas does, that programs designed to remedy injustices and overcome handicaps nevertheless stigmatize blacks no less than policies that required blacks to attend segregated schools. Indeed, if the stigmatizing effect of preferential programs were as great as that of segregated schools, one would expect to find blacks avoiding such programs, black organizations opposing them, and black leaders denouncing them. In

34. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949). Justice Douglas' defense of underinclusive classifications in *Williamson* is especially interesting: "Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." 348 U.S. at 489.

35. 416 U.S. at 343 (Douglas, J., dissenting).

practice, however, one finds nothing of the sort and indeed finds the opposite.[36]

Making predictions about the consequences of using racial classifications is a risky and difficult business, but it seems to me that the use of such classifications in remedial programs is not likely to have the bad consequences that resulted from using them to exclude and segregate blacks.[37] Condemnations of discrimination, it seems to me, should not go so far as to prohibit all uses of racial classifications; they should rather condemn those that are based on false beliefs of high correlations between race and relevant characteristics, that can be avoided without great loss of efficiency through the use of nonracial classifications, or that result in a group's being stigmatized and subject to loss of self-respect.

IV. A Framework for Analyzing Preferential Policies that Use Racial, Ethnic, or Sexual Classifications: Modifying the Correlation Between Classification and Relevant Characteristic

It will be helpful to begin by introducing some general considerations about the use of gross criteria—characteristics which, although irrelevant in in themselves, are useful as statistical indicators of relevant characteristics. For a gross criterion C to be perfectly correlated with a relevant characteristic R, it must be the case that *all* and *only* C's are R's. Thus, for ". . . is black" to be perfectly correlated with ". . . has been harmed by discrimination," it would have to be the case that all and only blacks have been harmed by discrimination. If it is not the case that all American blacks have been harmed by discrimination, then the gross indicator would be overinclusive since it would select some individuals who do not have the relevant characteristic. And if it is not the case that only blacks have been harmed by discrimination—as it clearly is not—then the gross indicator would be underinclusive since it would not select some individuals who have the relevant characteristic.[38] Most classifications used in legislation are both over- and underinclusive to some extent, and the importance of having clear boundaries that are administratively workable requires that some looseness be tolerated. Hence, the requirement

36. On the "problematical benignity" of programs using racial classifications in attempting to help blacks, *see Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1113 (1969).

37. For additional and divergent discussions of this matter, *see* Alexander & Alexander, *The New Racism*, 9 San Diego L. Rev. 190 (1972); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L.J. 699 (1971); Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 Mich. L. Rev. 1553 (1969); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U.L. Rev. 363 (1966).

38. *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949); *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1084, 1119 (1969).

cannot be perfect correlation but must rather be something like high correlation (in a case where one is distributing something as important as educational and employment opportunities, and where one is using racial classifications to do so, one would probably want to say that there must be a *very* high correlation). When a gross criterion is overinclusive, one way to remedy this is to add additional characteristics to the indicator until one includes only the desired smaller group. Thus, if the gross criterion ". . . is black" is overinclusive because most blacks with a personal income of over $20,000 a year do not have the relevant characteristic of having been harmed by discrimination, then the overinclusiveness could be reduced by adding "with an income of less than $20,000 a year" to the gross criterion. The cost of adding characteristics to the gross criterion is the loss of efficiency that may result from having to verify the presence of more characteristics. When a gross criterion is underinclusive, this can be remedied either by substituting another that has wider scope (for example, substituting ". . . is a member of a disadvantaged minority group" for ". . . is black"), or by using a disjunctive clause to include another gross criterion (for example, substituting ". . . is black *or Chicano*" for ". . . is black"). In the former case, the cost of remedying underinclusiveness would be a loss in efficiency because a vague general classification is likely to be difficult to verify in individual cases, while in the later case, there is ordinarily no significant additional cost.

The extent to which the criteria used by a preferential program are over- or underinclusive will depend on which relevant characteristics one selects as the justification for awarding preference. It is clear, for example, that there are now more blacks who are not in poverty than there are blacks who have not suffered from discrimination, and hence a program which attempted to reduce poverty by giving money to all blacks would be more overinclusive than one which compensated victims of discrimination by giving money to all blacks. If cases of overinclusion are frequent, serious objections can be made on grounds of justice and efficiency. If, for example, a black was hired in preference to a better qualified white, and if this particular black person had not been harmed by discrimination, was not unjustly poor, did not have unmet needs, was not likely to be upwardly mobile if given special opportunities, could not serve as a role model, and could not help to provide needed services to blacks, then a less qualified person was hired, and a better qualified person excluded, without achieving any counterbalancing goal. Although it may be possible to reduce overinclusiveness by adding characteristics to the gross criterion which restrict its scope, it would be pointless to do this if it would reintroduce the need for individual investigations that the use of racial classifications was designed to avoid. Since family income can be checked without too much difficulty, restricting preference to group members with a family income below a certain level may be an effective means of reducing

overinclusiveness with regard to some conceptions of the proper goals of preferential programs.

Underinclusiveness is probably a greater problem, since one of the most divisive aspects of preferential programs has been the nonpreferential treatment of disadvantaged persons who are not members of groups that are now deemed to be disadvantaged. Assuming that there is sufficient similarity between the situations of the latter persons and that of blacks to justify similar treatment,[39] these programs are clearly underinclusive. Although some latitude must be allowed those who create such programs in experimenting with small groups, in meeting different problems with different means, and in beginning with programs for those with the greatest needs, none of these considerations can justify a long-term policy of using administrative classifications which provide benefits to some while ignoring others with similar claims for preferential treatment. Although underinclusiveness can sometimes be remedied by adding disjunctive clauses, and hence one could offer benefits to anyone who is black *or* Chicano *or* Puerto Rican *or* Filipino *or* American Indian, this solution will result in groups being either entirely included or excluded and therefore generate intense political pressures on behalf of excluded groups who have some members with the relevant characteristics and perhaps many others who are borderline cases. Justice Douglas accurately sensed this problem:

> The reservation of a proportion of the law school class for members of selected minority groups is fraught with similar dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded. . . . There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to Blacks, or to Blacks and Chicanos.[40]

The prospect of controversies of this sort is one reason for switching to a general, nonracial criterion, but the appeal of this alternative will depend on the justification for preferential programs. If one is trying to compensate victims of discrimination or to provide legal and medical personnel for poorly served groups, such a general criterion will be less appealing than if one is trying to reduce poverty and inequality. Since there are many poor persons who are poor for reasons other than that of having been harmed by discrimination, selecting persons for a program designed to help victims of discrimination on the basis of a low income would involve much overinclusion. If no nonracial criteria were found suitable, one might reduce the underinclusiveness

39. For a discussion of the exaggerations that these claims of similarity to the hardships borne by blacks sometimes involve, *see* Thalberg, *Justifications of Institutional Racism*, 3 PHILOSOPHICAL FORUM 243, 247-48 (1972).

40. 416 U.S. at 338 (Douglas, J., dissenting). For an account of one problems of this kind encountered by India in its use of preferential policies, *see* D.E. SMITH, INDIA AS A SECULAR STATE 316-22 (1963).

of preferential programs that use lists of groups as selection criteria by allowing persons who do not belong to any of the listed groups but who think they have the characteristics that justify preference to apply for preference by presenting a documented claim. This would still require individual investigations in these cases, but not in the cases of persons who qualified on the basis of membership in one of the listed groups. If one utilized this approach, one could construct a criterion for awarding preference that would be acceptable in regard to over- and underinclusiveness and which would retain considerable administrative efficiency. It would have the following form:

> Preference will be awarded to persons who have a family income of less than _____(specify amount)_____ dollars per year, *and* who are members of any of the following groups __(list groups)__. Persons who do not qualify in accordance with the above criterion but who believe that they have the characteristics which justify preferences such as ___(list relevant characteristics)___ may apply for preference by presenting evidence for their claim on forms available from the admissions (or personnel) officer.

This kind of scheme, even though it employs racial, ethnic and sexual classifications, is not underinclusive with regard to entire groups, and hence relatively well-off groups who have some disadvantaged members would not need to fight to get on the list. This kind of criterion would be overinclusive only to the extent that having a low income and being a member of one of the listed groups was insufficient to exclude persons who lacked the characteristics that can justify preference.