THE MORALITY OF PREFERENTIAL TREATMENT (THE COMPETING JURISPRUDENTIAL AND MORAL ARGUMENTS)

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[*The author examines the principles that underlie programs of preferential treatment for disadvantaged groups. He puts forward and evaluates the competing arguments which are used to criticize or to support the moral defensibility of such programs. Throughout he draws on American experience of many forms of positive discrimination but he is interested in the ethical justification of the principle of preferential treatment rather than the merits of particular programs.*]

1. INTRODUCTION

The internal logic of anti-discrimination legislation leads from the prohibition of invidious discrimination to various types of 'preferential treatment' (or, 'reverse discrimination'[1]). The professed aim of such preferential treatment is to restore the members of groups which have been discriminated against in the past to a position of equality with other groups in the same community. This has been the trend in the United States (from *Brown*[2] to *Bakke*[3]) and it seems that the Australian legal system is now at the point where the pressure for racial and gender-oriented preferential treatment is gaining momentum. It may be useful, therefore, to look at the American experience in order to assess the various legal and jurisprudential arguments about preferential treatment raised there. Escalating demands for preferential treatment in Australia[4] will clearly be accompanied by legal, jurisprudential and moral objections.[5]

One thing should be avoided at the outset: that is, the tempting illusion that we may solve questions of discrimination (and reverse discrimination) without clarifying our underlying values. As I have shown elsewhere,[6] the ideal of equality before the law is more troublesome than it may at first appear as it hinges upon

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[1] I deliberately avoid using this term, for reasons explained in the text accompanying n. 11, *infra*, p.574.

[2] *Brown v. Board of Education* (1954) 347 U.S. 483.

[3] *Regents of the University of California v. Bakke* (1978) 438 U.S. 265 (hereinafter cited as *Bakke*).

[4] See *e.g.*, Evans G., 'Benign Discrimination and the Right to Equality' (1974) 6 *Federal Law Review* 26; Creighton W.B., 'The Equal Opportunity Act — Tokenism or Prescription for Change?' (1978) 11 M.U.L.R. 503, 532-3; Partlett D., 'Benign Racial Discrimination: Equality and Aborigines' (1979) 10 *Federal Law Review* 238; Tatz C., 'Aborigines, law and race relations' (1980) 3 *Ethnic and Racial Studies* 281, 289; 'Make way for women, says Labor' *Sydney Morning Herald*, 19 November 1982; 'Making Equality Work' *Age*, 15 March 1984, 11.

[5] See *e.g.*, Passmore J.A., 'Civil justice and its rivals' in Kamenka E. and Tay A. (eds), *Justice* (1979); Chipman L., 'Equality Before (and After) the Law' (1980) *Quadrant* (March) 46; Krygier M., 'Affirmative Action — I' in Tay A. (ed.), *Teaching Human Rights* (1981).

[6] Sadurski W., 'Equality, Law and Non-Discrimination' (1981) 21 *Bulletin of the Australian Society of Legal Philosophy* 113.

prior judgments about the substantive justice of a given legal regulation. Since it is absurd to postulate identical treatment of people irrespective of characteristics such as age, sex and profession, we must conclude that equality before the law requires equal treatment of *relevantly* equal people. What characteristics of people are relevant depends on substantive value-judgments about the justice of a particular practice. It is *not* that we believe that the law is just by virtue of its being equal but rather, we believe that it is equal on the basis that it is just. The judgments about equality (and about discrimination) derive from prior moral judgments which are not based on the value of equality itself.[7]

A serious discussion, therefore, about the merits and demerits of preferential treatment must avoid the *ersatz* arguments about reverse discrimination and, instead, start with an attempt at articulation, clarification and assessment of substantive moral judgments. This is the aim of this article: I will try to put forward and evaluate the competing arguments about preferential treatment. It is only *after* one assesses the relative value of these arguments that one can decide rationally whether various systems of preferential selection, admission, hiring or promotion violate the principle of equality before the law.

2. THE SCOPE OF THE PROBLEM

Programs of preferential admissions to universities are of particular importance and they can serve as a basis for the discussion of the principle of preferential treatment. What makes the distribution of educational opportunity so crucial is that so much else is given along with it. In all advanced societies, the level of education determines, to a certain degree, income, occupation and prestige.[8]

The best known example of preferential treatment in access to universities is offered by contemporary practice in the United States. It has resulted in a huge number of books and articles analysing various legal, political and ethical aspects of programs designed to reduce the effects of racial discrimination.[9] But the problem, of course, is not confined to the United States nor to racial groups; there are many other countries in which different forms of affirmative action (including preferential admissions programs) have been established. I am interested here in the ethical justification of a *principle* of preferential treatment and not with particular programs. I want to reflect on the principle that once we have correctly

[7] See also Flathman R.E., 'Equality and Generalization, a Formal Analysis' in Pennock J.R. and Chapman J.W. (eds), *Equality* (1967); Stone J., *Human Law and Human Justice* (1965) 325-30, more fully developed in 'Justice Not Equality' in Kamenka and Tay, *Supra* n.5; Vierdag E.W., 'Non-Discrimination and Justice' (1971) 57 *Archiv fur Rechts- und Sozialphilosophie* 187; Perelman C., *The Idea of Justice and the Problem of Argument* (1963) 36-41; Tussman J. and tenBroek J., 'The Equal Protection of the Laws' (1949) 37 *California Law Review* 341.

[8] Brown H.P., *The Inequality of Pay* (1977) 235; Wesolowski W., *Classes, Strata and Power* (1979) 132.

[9] For succinct summaries of these discussions, see *inter alia* Greenawalt R.K., *Discrimination and Reverse Discrimination* (1979); Rossum R.A., *Reverse Discrimination: The Constitutional Debate* (1980); Buckley M., 'Reverse Discrimination — A Summary of the Arguments with Further Consideration of its Stigmatizing Effect' (1977) 16 *Washburn Law Journal* 421; Thalberg I., 'Themes in the Reverse-Discrimination Debate' (1980) 91 *Ethics* 138 and Redish M.H., 'Preferential Law School Admission and the Equal Protection Clause: An Analysis of the Competing Arguments' (1974) 22 *University of California, Los Angeles Law Review* 343. For an important collection of essays, see Cohen M., Nagel T. and Scanlon T. (eds), *Equality and Preferential Treatment* (1977).

identified a group of people who have been discriminated against significantly in the past, or who are deprived of important opportunities, justice requires some preference to be accorded to them.[10] It is only this type of preferential treatment that I will be discussing in this article because this is the most controversial and is subject to the strongest criticisms. If it proves defensible, then, *a fortiori*, milder preferences are also justifiable.

For the purposes of this article, I shall take preferential treatment to be synonymous with what is often called reverse, benign, compensatory, or positive discrimination. It is based upon the principle that in the processes involving selection, admission or distribution of important opportunities, preference should be given to persons singled out on the basis of those very characteristics which have been used in the past to deny them equal treatment. I shall avoid using 'reverse discrimination' because the very notion of 'discrimination' carries negative connotations while 'preferential treatment' sounds morally neutral. If discrimination is understood as treating people differently when they are similar in relevant respects or treating them similarly when they are different in relevant respects[11] then one of the arguments of this article will be that preferential treatment is not discriminatory because it treats differently people who are indeed different. Discrimination denotes usually an unjustified distinction yet whether preferential treatment is justified remains to be shown and must not be resolved by terminology.

Although only this type of preferential treatment will be discussed here, it should be noted that it constitutes but a part of a generic notion of 'affirmative action'. Affirmative action can operate without preferences at the point of admission, selection or distribution; it can be carried on, for instance, through priority being given to a particular group in welfare expenditure. When, say, the Australian government provides special grants for health programs designed to alleviate the depressed conditions of Aborigines (whose health standards are well below those of white Australians)[12] then this affirmative action does not raise any special moral issues beside the routine questions of the appropriateness of the goal and the effectiveness of the scheme. Although schemes like this one reflect certain preferences, they do not give rise to the moral problems of one applicant being turned away because another is admitted on grounds other than the traditional notions of competence. Preference in the Aboriginal health grant is given at the taxpayer's expense and not at the expense of someone whose expectation of obtaining a particular benefit is frustrated; the cost imposed on a group that is not a recipient of the scheme is so mild as to be insignificant morally.

There may be various other types of affirmative action which do *not* involve preferences such as special training programs designed to improve the qualifications of minority-group applicants before the point of their admission to a uni-

[10] For a similar definition of 'preferential treatment', see Perry M.J., 'Modern Equal Protection: A Conceptualization and Appraisal' (1979) 79 *Columbia Law Review* 1023, 1043.

[11] Katzner L., 'Is the Favoring of Women and Blacks in Employment and Educational Opportunities Justified?' in Feinberg J. and Gross H. (eds), *Philosophy of Law* (1975) 291.

[12] Partlett, *supra* n.4 at 269.

versity.[13] The advertising of vacancies in the ethnic-language newspapers too, merely broadens the channels of information about the positions available and helps members of ethnic minorities to apply for them. These are facilitatory measures which are part of the concept of affirmative action but which do not constitute preferential treatment because they do not involve any preference in the process of selection itself. Consequently, they present no special problems for moral or legal theory.

Programs of preferential treatment use various techniques. They can establish special quotas, that is, a fixed number of places reserved for minority applicants who have been singled out as disadvantaged.[14] They can set up goals or targets which increase the representation of under-privileged groups and, thus, allow decision-makers to take into account minority status when considerating applications.[15] Extra points can be awarded to the members of such groups in the admissions process[16] or there can be a requirement that for each successful non-minority applicant there must be one minority applicant admitted.[17] There are preferences which operate irrespective of a comparison of the qualifications of candidates: preference may be given to a person even if he is not as qualified as a non-minority applicant. There are schemes which award preference to an applicant from a nominated group if he has the same qualifications as an ordinary candidate.[18] The differences between these methods may be very important in practice. The distinction between quotas and goals was crucial in the opinion of Powell J. in *Bakke* where he struck down as unconstitutional the Davis Medical School special admissions program for reserving a quota for minority applicants while upholding the validity of increasing minority representation.[19] However, these are merely insignificant distinctions which do not affect the very principle. The moral status of quotas is the same as that of goals or extra points or of any other preferential technique. All these techniques provide a competitive edge for the people singled out as victims of past discrimination. As White J. stated, '[i]n any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preferences to be given is unavoidable'.[20] Now, the method of granting this preference and the actual degree of preference need not worry us here. We are interested in the moral defensibility of the general principle of preferential treatment and not in the appropriateness of this or that technique.

[13] See the description of an 'orientation year' for prospective Aboriginal undergraduates at the Monash University, *Australian*, 4 August 1982, 10.

[14] See *e.g.*, the special admissions program in the Medical School of the University of California at Davis, *Bakke* (1978) 438 U.S. 265.

[15] See *e.g.*, Harvard College Admissions Program, *ibid.* 321-4.

[16] See Blasi V., '*Bakke* as Precedent: Does Mr Justice Powell Have a Theory?' (1979) 67 *California Law Review* 21, 66.

[17] See *e.g.*, Kaiser-Steelworkers training program, *United Steelworkers v. Weber*, (1979) 443 U.S. 193.

[18] See *e.g.*, employment preference for qualified Indians in the Bureau of Indian Affairs, *Morton v. Mancari*, (1974) 417 U.S. 535.

[19] *Bakke* (1978) 438 U.S. 265, 315-9.

[20] *Ibid.* 378.

3. UTILITY AND PREFERENTIAL TREATMENT

Before the compensatory arguments are discussed, I will consider briefly the main utilitarian arguments for and against preferential treatment. Most of the arguments about preferential treatment may be characterized as either compensatory and directed towards the past or utilitarian and directed towards the future. Although I treat the first kind of argument as decisive in this debate, I think it would be a mistake to ignore the utilitarian arguments altogether. Certain arguments which have the appearance of compensatory reasoning in fact appeal to utilitarian notions.

The main argument put forward in favour of preferential treatment is that it is the only way to interrupt a cycle of disadvantage. The deprivations suffered by some groups discriminate against them in their access to the education and training they need for desirable jobs; these discriminations tend to perpetuate all other deprivations. It is claimed that the advantages connected with the promotion of a traditionally deprived group prevail over the disadvantages of discrimination against groups that have not suffered.[21]

The force of this argument depends, however, on our evaluation of the aim fostered by the preferential treatment program. That there is more equality in a society as a result of this program is not a sufficient *utilitarian* justification because equality is not a value in itself for the utilitarians.[22] If, however, a more equal society is considered to be valuable *per se*, then this is no longer a utilitarian argument. It boils down to a general assertion about the moral value of equality and, as such, is vulnerable to all the traditional criticisms of egalitarianism.[23] I, for one, can see the sense in the egalitarian argument about preferential treatment but I also see that it requires further justifications which transcend utilitarian theoretical frameworks. The value of this argument in utilitarian terms depends on other values fostered by a more equal society; for instance: social harmony and social peace, less frustration and aggression, more co-operation with fewer tensions and so on. To the extent that these values are considered important parts of a general utilitarian social ideal, the argument about breaking the vicious circle of disadvantages seems to be a valid one.

The problem is more complex than this. It still must be proven that preferential treatment programs are effective in fostering harmony, integration and social peace. Those categories are not easily verifiable and it is by no means obvious that empirical evidence supports preferential treatment clearly. There are important counter-arguments. Alan Goldman, for instance, questions the whole notion that preferential treatment for minorities really favours harmony and integration; the reason for his doubt about it is that 'others know that the treatment *is*

[21] See Greenawalt R.K., 'Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions' (1975) 75 *Columbia Law Review* 559; Kaplan J., 'Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment' (1966) 61 *Northwestern University Law Review* 363; Hughes G., *The Conscience of the Courts* (1975) 273. See also *Califano v. Webster* (1977) 430 U.S. 313, 316-21; *Bakke* (1978) 438 U.S. 265, 362 *per* Brennan, White, Marshall and Blackmun JJ.

[22] See Smart J.J.C., 'Distributive Justice and Utilitarianism' in Arthur J. and Shaw W.H. (eds), *Justice and Economic Distribution* (1978) 104-5.

[23] See Raphael D.D., *Justice and Liberty* (1980) 150.

preferential'.[24] In consequence, he says, the non-members of the preferred minority will feel that some people are getting undeserved benefits which are not available generally. The persistence of such feelings will slow down the whole process of the integration of the previously disadvantaged groups; as a result, there will be 'more friction and resentment than that inevitable from residual bigotry'.[25] The argument about preferential treatment as reinforcing bigotry is quite popular. R. A. Posner notes that '[t]he characteristics that university admissions officers associate with black people . . . are the same characteristics that the white bigot ascribes to every black'.[26] The reason for this is that, as Posner explains, benevolent discrimination reinforces racist stereotypes about blacks being lazy, unintelligent and, hence, unable to make it to the universities without preferences. It is also claimed that any racial distinction, no matter whether it discriminates against or in favour of the underprivileged minority, is inherently divisive and tends to invoke the prejudices of both non-minorities and minorities. This divisiveness is often taken for granted. For example, the Supreme Court of California stated in *Bakke* that '[t]he divisive effect of such preferences need no explication and raises serious doubts whether the advantages obtained by the few preferred are worth the inevitable cost to racial harmony'.[27]

The moral force of this argument, however, hinges upon the prior argument about the justice of a particular program. The very fact that someone (or a particular group) is given preferential treatment is not a sufficient cause of prejudice and divisiveness; this only happens when people are not convinced about the fairness of the treatment. Preferences for handicapped people usually do not foster prejudices and frictions. Similarly, if a community is aware of real and important deprivations suffered by a certain group, it has no valid grounds for resentment. If this resentment is felt by some members of the community out of bigotry and prejudice, there is no reason why the community has to resign itself to those feelings and treat them as an important. The whole argument about fostering prejudice, bigotry and divisiveness evaluates preferential programs not on the basis of what they entail really but in terms of how they are perceived by people denied the advantages of the programs. It is simply not appropriate to build a theory of justice on such perceptions. The speculations about the effects of preferential treatment upon social prejudices and attitudes are no substitute for justification of a particular policy. Similarly, a Gallup poll showing disapproval of preferential programs by the majority[28] is not an argument in the moral debate but rather provides an additional illustration of the problem. In sum, the divisiveness argument is a derivative one: it cannot stand on its own because its plausibility depends upon a prior evaluation of the justice of preferential treatment.

The other argument frequently made is closely related to the previous one. It is that preferential treatment stigmatizes the preferred minority. The knowledge that

[24] Goldman A.H., *Justice and Reverse Discrimination* (1979) 143.
[25] *Ibid.*
[26] Posner R.A., *The Economics of Justice* (1981) 368-9.
[27] *Bakke v. Regents of the University of California* (1976) 18 Cal. 3d 34, 62-3.
[28] See Glazer N., 'Individual rights against the group rights' in Kamenka E. and Tay A. (eds), *Human Rights* (1978) 97.

someone's promotion, recruitment or admission is a result of preferential treatment may 'unfairly stigmatize those members of the groups who receive it, especially those who could have obtained their positions without it'[29] and places on them, to use the words of Douglas J., 'a stamp of inferiority'.[30] This stigma argument is being understood in two distinct ways. First, it is maintained that preferential treatment stigmatizes members of the minority in the eyes of the general public, fostering prejudices, imposing a badge of inferiority, and thus causing greater difficulties for the minority students who have to make a special effort 'to impress others with their competence'.[31] Secondly, the stigma argument sometimes points out the consequences of preferential treatment for the way the preferred minority sees itself. They may feel frustration, lose self-respect or lack pride and incentive.[32] I shall distinguish between those two aspects of the stigma argument because they raise different questions.

As far as the stigma in the eyes of the general public is concerned, it again depends upon people being convinced about the unfairness of the whole arrangement. There is no reason to think that *any* preferential treatment will be judged as unfair and, hence, that *any* preferential treatment will cause a stigma effect. After all, certain preferences for war veterans do not stigmatize them as inferior.[33] If the rest of the community recognizes that the present deprivations suffered by a certain minority are not a result of its inferiority but of 'a long history of discrimination, economic impotence and cultural deprivation'[34] and that the only fair solution is to accord some preference to this group now which will help it overcome the past, no stigma is necessarily produced by this program. The more educated and more convinced about the fairness of such an arrangement the society is, the less likely is the stigma effect to occur. There is no reason to back down in the face of bigotry and unjustified stereotypes. A general conviction that invidious discrimination in the past is the source of the present under-representation of certain groups in higher education, is the best way to overcome 'stigmas'. This is, at any rate, much more efficient and honest than to pretend that the problem does not exist or that stigma is a result of preferential treatment. As has been pointed out with respect to the American racial problems:

> Governmental use of benign racial classifications may destroy blinding myths by teaching people that race is indeed a factor of great importance in our society and that many people are now disadvantaged because of past and continuing racial discrimination.[35]

This propostion may well be applied to many other forms of societal discrimination, not only racial ones. It suggests also that the stigma argument is based upon a double standard: the governmental use of distinctions in according preference is condemned as likely to foster stigmatization, while the stigma inevitably produced by the perpetuation of the deprivation and under-representation is tolerated.

[29] Goldman, *supra* n.24 at 144.
[30] *DeFunis v. Odegaard* (1974) 416 U.S. 312, 343.
[31] Goldman, *supra* n.24 at 144.
[32] See Graglia L.A., 'Special Admission of the "Culturally Deprived" to Law School' (1970) 119 *University of Pennsylvania Law Review* 351, 356-7.
[33] See Nickel J.W., 'Preferential Policies in Hiring and Admissions: A Jurisprudential Approach' (1975) 75 *Columbia Law Review* 534, 546-9.
[34] Redish, *supra* n.9 at 368.
[35] 'Developments in the Law. Equal Protection' (1969) 82 *Harvard Law Review* 1064, 1113.

As far as the second aspect of the stigma argument is concerned, namely, that preferential treatment causes loss of self-respect by the group singled out as disadvantaged, the easiest way to deal with it is to say that if losses for a certain minority were really significant then one would expect this minority to protest against the programs. There do not appear to be the protests on any major scale by the beneficiaries of preferential treatment programs discussed here. Although in the United States some Black intellectuals oppose these programs,[36] the Black minority as a whole and its representative spokesmen support such policies.[37] '[M]inority admissions programmes are far more the product of minority insistence than the tardy manifestation of white conscience', says Derrick A. Bell, Jr.[38] The same applies, of course, to Australia: the organised groups of woman and Aborigines, more often than not, support proposed affirmative-action programs. The alleged stigmatizing effect for those groups evidently is not perceived as important enough to outweigh the benefits of those programs.

However, even if there is an element of truth in the stigma argument, and even if preferred minority members have good reason to feel frustrated by the procedures of their access to certain important places in a society, one might suggest that these minorities are stigmatized even more when they are drastically under-represented in education, administration, professional life, and so on. Is not this under-representation (which has, as we know, its roots in past invidious discrimination) likely to produce stereotypes of minorities as being inherently less intelligent, able, clever and laborious? In consequence, it is likely also to affect the self-perception of the group members and to deepen their sense of hopelessness.[39] As Hardy Jones observes with regard to groups that traditionally had enjoyed privileged situations in a society: 'There is hardly much rational self-respect on the part of persons whose good qualifications derive heavily from discrimination against others'.[40] This argument may be reversed: there are no great chances for self-respect on the part of persons whose hopes of attaining prestigious and significant social positions are much lower than is the case with members of other groups.

The other principal argument about preferential treatment concerns the effects of those programs upon professional and academic standards. In particular, with regard to education, it is often claimed that recruitment of students on any other basis than their competence (understood as knowledge, intellectual capacities and so on) will result inevitably in the lowering of general standards of education.[41] This will produce, in turn, the lowering of professional standards, for instance of legal or medical services. Anyone who needs help, it is claimed, wants the best

[36] See *e.g.*, Sowell T., '*Weber*, and *Bakke*, and the Presuppositions of "Affirmative Action"' (1980) 26 *Wayne Law Review* 1309.

[37] See *e.g.*, 'Blacks Urge Carter to Back "Affirmative Action" ' *New York Times*, 10 September 1977; 'The Landmark Bakke Ruling' *Newsweek*, 10 July 1978; 'Commission Intends to Reassess Rights' *New York Times*, 8 January 1984.

[38] Bell D.A., '*Bakke*, Minority Admissions, and the Usual Price of Racial Remedies' (1979) 67 *California Law Review* 3, 18.

[39] Pinderhughes Ch. A., 'Increasing Minority Group Students in Law Schools: The Rationale and the Critical Issues' (1971) 20 *Buffalo Law Review* 447, 456-7.

[40] Jones H., 'Fairness, Meritocracy and Reverse Discrimination' (1977) 4 *Social Theory and Practice* 211, 224.

[41] Freedman W., 'Is Race Relevant? Discrimination in Education Today' (1976) 48 *New York State Bar Journal* 170; Graglia, *supra* n.32 at 357-60.

available lawyers and physicians — not the lawyers and physicians selected through a process which disregards competence and qualifications.[42]

We should not, however, take this argument at face value. It is correct only under the condition that its specific assumptions about competence and merit are accepted. In the first place, it assumes that various tests, grades or selection exams constitute an accurate measurement of qualifications and academic merits. This may or may not be the case. The argument is frequently made that qualifications are tested very inadequately by various grade averages or test scores and that these grades and scores are very inaccurate in predicting an applicant's success. There are various personality factors (of non-cognitive nature) which are relevant to potential success in school or in a profession. As one writer observes, 'people do not qualify for medical training the way a Girl Scout qualifies for a merit badge — by tying certain knots — or the way a discus thrower qualifies for a gold medal'.[43] It, therefore, comes as no surprise that such unquantifiable and apparently non-academic qualities as compassion, leadership potential, unique work experience, maturity or ability to communicate with the poor are considered to be important for successful students.[44] None of these qualities can be measured by the standard ability tests but a candidate exhibiting these characteristics may become a much more successful lawyer or physician than a marginally more able fellow-candidate. The departure from the strict principle of merit (the principle which demands that whoever scores higher in ability tests, wins the competition) may serve the aim of improving professional standards. Besides, it is by no means definitively settled that the only aim of professional schools at universities is to produce professionals in their particular fields. As R. Kent Greenawalt notes: 'A [law] school might well, for example, admit a student it thought had great potential for political leadership, though believing he might perform less well as a lawyer than some rejected applicant'.[45] The adoption of this aim, which does not strike me as blatantly irrational, will result in the use of other selection criteria in addition to academic merit.

I do not propose to rest my argument categorically upon this point: after all, it might be argued that some very refined tests are the least objectionable of all the imperfect criteria of selection. However, before I introduce the principal objection to the argument that preferential treatment brings about lowered standards, a simple observation may be useful. The less than perfect composition of a student body does not lead necessarily to a lowering of the quality of education in *absolute* terms. If anything, it may lead to a lowering of standards in *relative* terms, that is, in comparison with the highest possible level imaginable under the existing circumstances. But the actual level of education, even if not as high as it could be in the absence of preferential admissions, may still be as high as it was previously

[42] See Posner R.A., 'The *Bakke* Case and the Future of "Affirmative Action" ' (1979) 67 *California Law Review* 171, 187.

[43] Thalberg, *supra* n.9 at 140.

[44] See *Bakke* (1978) 438 U.S. 265, 317 *per* Powell J.

[45] Greenawalt R.K., 'The Unresolved Problems of Reverse Discrimination' (1979) 67 *California Law Review* 87, 124.

or perhaps even higher. There may be no consequent lowering of professional standards: 'less qualified' does not mean 'unqualified'. This point is ignored by many critics of preferential admissions who frequently talk about unqualified or unprepared students without acknowledging that these are merely relative descriptions.[46] The universities which operate preferential admission programs may easily protect themselves against the danger of admitting unqualified students; after all, preferential admissions are quite compatible with the setting of minimum standards of competence. Universities use cut-off points below which they will not admit students; employers utilize tests which determine whether an applicant can perform a job. All those above a certain level are qualified and marginal differences in scores rarely matter. In the case of many employment positions, anyone who meets the minimum requirements is qualified to do the job. In these cases, any candidate whose qualifications meet the basic requirements can do the job equally well and no additional skills will enable him to do it better. The same argument applies to university admissions. And yet, in the situation of a relative scarcity of these positions, 'the selection process inevitably results in the denial of admission to many *qualified* persons'.[47] Therefore, as long as minimum standards are observed, those admitted preferentially are not unqualified, and perhaps even not less qualified than those who had scored better on competence tests. That preferential admissions have very little detrimental effect upon academic standards, is demonstrated by practical experience. It lends support to the view that preferentially admitted students usually catch up quickly with the rest of their peers and do not push the general level of education down.[48] That is why warnings about incompetent lawyers and physicians as a result of preferential admissions have to be taken with scepticism.

The main counter-argument to the lowered-standards thesis has to do with the very notion of the standard of education. Even if one agrees that some of the favoured minority students are less qualified in the academic sense than those who could have been admitted had only the test grades been taken into account, the very presence of minority students at the university is important. If university education is understood not only in a narrow professional sense but also as a means of learning about one's own society and as a practical study in community life, diversity in the student body becomes an important condition of the quality of education. The presence of a significant number of minority students, as a consequence of preferential admission, helps to expose students to different social and cultural backgrounds. In certain fields of studies it may be considered as a part of the professional studies themselves: in law, sociology or political science. In all these fields where the knowledge of one's own society is a part of professional qualifications, it is especially valuable. As Vinson C.J. has observed: '[t]he law school, the proving ground for legal learning and practice, cannot be effective in

[46] See Graglia, *supra* n.32 at 353, 360.

[47] *Bakke* (1978) 438 U.S. 265, 403 *per* Blackmun J.

[48] See *e.g.*, Bell, *supra* n.38 at 8; Duncan M.L., 'The Future of Affirmative Action: A Jurisprudential/Legal Critique' (1982) 17 *Harvard Civil Rights — Civil Liberties Law Review* 503, 531.

isolation from the individuals and institutions with which the law interacts'.[49] Let us add that this need for broad cultural and social experience is important not only in the social sciences and law: it seems to be a significant part of the learning process in the university in general.

The argument about the importance of having a diverse student body is often opposed on the grounds that ethnic or racial differences are not the only significant social differences; therefore, one should not limit attention to these. This is certainly true. It is also true that in different societies the importance of ethnic divisions varies. In racially homogenous societies racial distinctions are socially insignificant and therefore they are irrelevant to the quality of the teaching process. This is misunderstood or ignored by those critics who attack the argument about the importance of a diverse student body and the effect it has on the quality of education. Alan Goldman suggests that this argument can be challenged on utilitarian grounds. He asks: 'Is it true that one learns better in a racially, ethnically, or sexually mixed atmosphere? Do students in Sweden then learn less than those in New York?'[50] Probably not, but it is irrelevant. For various reasons race is a much more important social characteristic in the United States than in Sweden. Students in Sweden, even if there is no racially mixed atmosphere at the university, do not necessarily lose an important experience which reflects something significant about their society; students in New York do. This aspect of university education which is linked with a general knowledge of one's society and its different social and cultural backgrounds, cannot be determined in isolation from the social environment of a university; hence the difference between Sweden and the United States. It is the whole concept of a university education which is essential to this argument.

4. EQUAL OPPORTUNITY AND PREFERENTIAL TREATMENT

Utilitarian arguments about preferential treatment therefore are not conclusive. Utilitarian considerations give arguments both to the partisans and opponents of preferential treatment; a more fruitful area of moral controversy is, therefore, elsewhere. It seems to me that what is decisive is the moral argument in favour of or against preferential treatment as a rectification of past discrimination by which members of particular groups were disadvantaged and their access to important social positions reduced. What is essential about this argument is the implicit use it makes of the notion of equal opportunity. Since both the partisans of preferential treatment[51] and its opponents[52] appeal to the ideal of equality of opportunity, it will be necessary to devote some attention to this concept.

[49] *Sweatt v. Painter* (1950) 339 U.S. 629, 634. On the importance of diverse student body, see in particular *Bakke* (1978) U.S. 265, 311-5 *per* Powell J.; Sandalow T., 'Racial Preferences in Higher Education: Political Responsibility and the Judicial Role' (1975) 42 *University of Chicago Law Review* 653, 686-8.

[50] Goldman, *supra* n.24 at 147.

[51] See Richards D.A.J., *The Moral Criticism of Law* (1977) 162-78; O'Neill O., 'How Do We Know When Opportunities are Equal?' in Vatterlin-Braggin M. *et al.* (eds), *Feminism and Philosophy* (1977); Pateman C., 'The Concept of Equity', in Troy P.N. (ed.), *A Just Society?* (1981) 21-2. See also *Kerala v. Thomas* (1976) A.I.R. (S.C.) 490, 514-6 *per* Mathew J.

[52] See Goldman, *supra* n.24 at 170-99.

The real controversy about equality of opportunity arises when some sections of society suffer deprivations yet there are no formal or legal restrictions on their access to the positions they desire. Is such a situation consistent with the principle of equality of opportunity? The answer to this question depends, obviously, on one's understanding of that principle. We are often inclined to suppose that equality of opportunity occurs when particular groups and persons face no obstacles to or barriers against their access to higher positions in a society. Although not everybody can become a factory manager or a medical student, no one should be *a priori* excluded from the competition for these positions and no one should be discriminated against in the competition. But surely there is more to it than that: after all, *any* distribution of limited resources or positions must be based on certain criteria, and any formulation of the criteria for distribution will inevitably disadvantage certain groups; namely, those who satisfy the criteria to a lesser extent than others. Any standard of admissions, promotions, awards and distributions 'will place certain candidates at a disadvantage as against others'.[53] If, for instance, ability is considered as a criterion for admissions to universities, it automatically places those less able at a disadvantage. There is nothing unreasonable in this remark of Dworkin's: 'Suppose an applicant complains that his right to be treated as an equal is violated by tests that place the less intelligent candidates at a disadvantage against the more intelligent'.[54] The standard reply to this applicant would be: the criterion of intelligence is *relevant* for the selection of students and therefore, even if it puts you at a disadvantage, it is not unfair. Now, I leave aside the question whether the criterion of intelligence (granted that we have the means of measuring it) is relevant indeed and whether it is the only relevant criterion. Let us assume for the sake of this argument that the criterion of intelligence *is* relevant for university admission. This does not carry us any further in the elucidation of the idea of equality of opportunity; it is one thing to say that opportunities are distributed on the basis of *relevant* criteria and quite another to say that these opportunities are *equal*.

It might be argued that the judgment about the relevance of distributional criteria is utilitarian in nature: it concerns efficiency and not equality. Consider the following example. The commander of a bombing squad has to choose one of his pilots for a particularly difficult and important mission. He makes his selection by considering which pilot is the most experienced, the most physically fit, the best prepared at the moment. Obviously these are relevant grounds of selection and they will necessarily put some of the pilots at a disadvantage (assuming that there are many who wish to undertake the mission). But from the fact that the criteria are the most appropriate it does not follow that we assess this selection in terms of 'equality of opportunity'. We do not ask ourselves whether all of the pilots had equal training, equal past experience and equal physical abilities. No issue of equality is involved here and the judgment about the relevance of criteria is based solely on the considerations of efficiency. I do not see great differences between this example and the selection of university candidates on the basis of their

[53] Dworkin R., *Taking Rights Seriously* (1978) 227.
[54] *Ibid.*

abilities. If we say that this criterion is the most appropriate or relevant, it is not because it establishes any sort of equality among the applicants but because we think that, by its application, we will obtain the best results in terms of social utility. For instance, we believe that universities will produce the best possible graduates who in turn will be able to render the best possible services to the community. It does not express our judgments of justice but, rather, it is founded upon the criteria of efficiency. Views about relevance are influenced here by ideas about utility; those are the real grounds of assertions about 'equality of opportunity' when the criteria established are considered relevant. This line of reasoning about 'equality of opportunity' is a realm of utility and not of justice.

If we want to have stronger grounds for our assertions about equality of opportunity, we should reflect not only on the proper choice of selection criteria but also on the social chances of satisfying those criteria. One of the reasons why we were unable to evaluate the commander's decision in terms of 'equality of opportunity' was that he did not take into account the pilots' opportunities to acquire the qualifications necessary for the mission. This was not relevant because we assume that the commander's decision should have been based solely on the grounds of efficiency. The success of the mission was all that counted. If, however, we want to postulate the principle of 'equality of opportunity' as relevant to social selections or distributions, we usually want to treat it as something else than merely the matter of efficiency; we suggest that the selection is not only (and not necessarily) the most useful but rather that it is the most fair. We should therefore satisfy ourselves that all the applicants had equal possibilities for acquiring those qualities which are considered as relevant to the distribution in question. This is what Bernard Williams had in mind when he suggested that equality of opportunity

> requires not merely that there should be no exclusion from access on grounds other than those appropriate or rational for the good in question, but that the grounds considered appropriate for the good should themselves be such that people from all sections of society have an equal chance of satisfying them.[55]

This suggests that the principle of equal opportunity has a complex, 'multi-level' structure. Its implementation depends upon people having equal chances to satisfy a criterion of selection, but those equal chances depend on previous equal chances in the acquisition of the chances to satisfy this condition . . . , and so on. For instance, equal opportunity in obtaining a particular position depends on equal opportunity of studying at a good university, and that depends in turn on equal opportunity to study in a good secondary school and that depends . . . , and so on. Each time, in order to discern equal opportunity we must step back to a previous stage when the opportunities to acquire qualities needed at the present stage have been distributed. If we pursue this regression to the first decisive factors we end up with the conclusion that perfect equality of opportunity requires not only an equal family encouragement and environmental influence but also equal genetic endowment. This may sound absurd but it only proves that a demand for *perfect*

[55] Williams B.A.O., 'The Idea of Equality' in Laslett P. and Runciman W.G. (eds), *Philosophy, Politics and Society* (1962) 125-6.

equality of opportunity is absurd. On the other hand, this suggests that the concept of equality of opportunity is taken in an extremely narrow sense if it is limited only to the last link in the chain, that is to say, if we are interested only in the application of a relevant standard to a selection process without inquiring into differential chances of acquiring qualifications defined by that standard. In consequence, it is not correct to classify as 'equality of opportunity' a situation in which some people are excluded from obtaining a certain good on 'appropriate' grounds if the possibilities of satisfying them were clearly unequal.

From this point of view, it is very important to consider not only the distribution of opportunities to acquire certain qualifications but also to see whether those opportunities mask other factors which have not been formally established as relevant in the distribution of a good in question. This problem is illustrated by the following example given by Bernard Williams:

> Suppose that in a certain society great prestige is attached to membership of a warrior class, the duties of which require great physical strength. This class has in the past been recruited from certain wealthy families only; but egalitarian reformers achieve a change in the rules, by which warriors are recruited from all sections of the society, on the results of a suitable competition. The effect of this, however, is that the wealthy families still provide virtually all the warriors, because the rest of the populace is so undernourished by reason of poverty that their physical strength is inferior to that of the wealthy and well nourished. The reformers protest that equality of opportunity has not really been achieved; the wealthy reply that in fact it has, and that the poor now have the opportunity of becoming warriors — it is just bad luck that their characteristics are such that they do not pass the test. 'We are not', they might say, 'excluding anyone *for* being poor; we exclude people for being weak, and it is unfortunate that those who are poor are also weak'.[56]

Williams properly describes this answer as cynical although there is one aspect in which the hypothetical wealthy are right: it would be disastrous to have an army consisting of weak, unfit men. But that only shows that the genuine ground of reasoning in this case is of a utilitarian nature: the cynicism starts when the official justifications for those grounds of selection and exclusion are given in terms of equality of opportunity. Even if no one is excluded from the selection process *for* being poor, it is clear that when being poor and being weak are closely interconnected and causally linked, those who are poor are *de facto* excluded. It is the same in university admissions: even if no one is excluded for being black or for living in a small remote village with a poor school and no library, these factors correlate with the formal criteria of ability or knowledge. This may still be found an insufficient reason for granting preference but such a refusal will be made not on the basis of equality of opportunity but on the basis of efficiency.

Let us now return to the question of equal educational opportunities. It is a notorious fact that in all modern societies those opportunities are influenced strongly by the social position of a child's parents which determines their style of living and so affects the level of parental encouragement, housing conditions, quality of primary and secondary schools. There is unquestionable empirical evidence showing that educational opportunities are strongly determined by social stratification.[57] The statistical under-representation of certain groups or minorities

[56] *Ibid.* 126. See also *Kerala v. Thomas* (1976) A.I.R. (S.C.) 490, 513-5 *per* Mathew J.

[57] See Hoivik T., 'Social Inequality — the Main Issues' (1971) 8 *Journal of Peace Research* 119; Boudon R., *L'inegalité des chances* (1973) and *'Justice sociale et intérèt général'* (1975) 25 *Revue Francaise de Science Politique* 193; Miller S.M. and Roby P., *The Future of Inequality* (1970) 119-41; Jencks C., *Inequality* (1975) 135-75.

raises the presumption of discrimination: unless it can be shown to the contrary, it can be recognized that this under-representation is due to reduced opportunities. Statistical evidence is, therefore, a *prima facie* indicator of discrimination.[58]

To be sure, one must not overestimate the significance of the statistical evidence in this regard. I do not take statistical under-representation to be conclusive evidence of invidious discrimination; it is rather a fair guess based upon wide historical experience suggesting that, more often than not, under-representation is a result of discrimination. It may well be true that a particular social or ethnic group has special aptitudes for, or interests in, particular disciplines. Their over-representation in those fields does not necessarily mean that other groups are victims of discrimination. A particularly high percentage of Italians running pizza restaurants does not indicate that other groups are discriminated against. On a slightly more serious note, Richard Posner may well be correct in suggesting that, for instance, medical aptitude and interest is not distributed evenly among racial and ethnic groups in the United States. In consequence 'the failure of blacks to achieve proportionate representation cannot automatically be ascribed to the history of discrimination against them'.[59] To equate every fact of statistical under-representation 'automatically' with discrimination against the group in the past would be a grave error indeed. Similarly, it would be erroneous to measure the extent of invidious discrimination by the numbers of particular groups in the universities, business or government. Statistical imbalance may well be the result of factors that have little or nothing to do with discrimination yet which are relevant to processes of selection and recruitment. Thomas Sowell points out, for instance, that median age differences among American ethnic groups account for significant variations of these groups' representation in adult jobs.[60] He observes also that many important differences among ethnic groups reflect historical differences which have their sources in the diverse traditions and cultures of these groups.[61]

But one must not protest too much. Statistical imbalances do not *prove* anything, but nonetheless they should not be totally ignored. We know, for instance, that under-representation of American blacks in important, prestigious and lucrative positions in a society is, by and large, due to past invidious discrimination. This explanation is not necessarily correct in each case of under-representation, but as a rule of thumb it works reasonably well. Imbalances such as those cited by Marshall J. in *Bakke*, that is, in life expectancy, average income and unemployment figures,[62] can hardly be explained by the lower aptitudes and interests of blacks. It is hardly believable that blacks have less interest in the length of life, a decent income or employment. Even if it is true that, for example, black

[58] This opinion has been widely accepted in American judicial practice. See *e.g.*, *State of Alabama v. United States* (1962) 304 F. 2d 583, 586; *Parham v. Southwestern Bell Telephone Company* (1970) 433 F. 2d 421, 424-6; *Carter v. Gallagher* (1971) 452 F. 2d 315, 323; *Parson v. Kaiser Aluminum & Chemical Corporation* (1978) 575 F. 2d 1374, 1389. See also McCrudden C., 'Institutional Discrimination' (1982) 2 *Oxford Journal of Legal Studies* 303, 349-56.

[59] Posner, *supra* n.42 at 186.

[60] Sowell, *supra* n.36 at 1314-7.

[61] *Ibid.* 1317-8.

[62] *Bakke* (1978) 438, U.S. 265, 395-6.

families in the United States do not emphasize the importance of formal education to the same extent as some other ethnic groups, these attitudes themselves are products of the long history of discrimination. As for the hypothesis about lower capacities, it is extremely doubtful whether such proof can be made since even poor biological inheritance may be a result of the poor environmental conditions of the group. The lower average IQ of the members of the group may be the result rather than the cause of its underprivileged position in a society.[63]

This suggests that the principle of equality of opportunity, if viewed more broadly than when restricted to the last link in the chain of stages in a person's life, requires taking into account those different social opportunities to acquire qualifications relevant to the distribution or selection in question. Equality of opportunity calls for a differential approach to candidates, unless it can be shown that their chances of acquiring competence were similar. It is a consequence of the principle of equality of opportunity that those with inferior initial means of obtaining the types of competence required should be treated in a more favourable way; otherwise their opportunities are unequal. This is how John Rawls defines genuine, as opposed to formal, equality of opportunity. Discussing the principle of redress, he says:

> [T]he principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favourable social positions. The idea is to redress the bias of contingencies in the direction of equality.[64]

Thus the principle of compensation is *required* by the principle of equality of opportunity, not contradicted by it. Equality of opportunity demands equal treatment of those who had equal opportunities to acquire a qualification demanded; the other side of the coin is that those with unequal opportunities should be treated unequally and should be compensated for the handicaps imposed upon them if those handicaps result in reduced competitive chances. If the social system is unable to abolish the differences resulting in unequal opportunities to acquire valuable qualifications, it should at least compensate for those differences. In this context preferential treatment is a method of equalizing opportunities. As Felix E. Oppenheim puts it, 'giving certain minorities extra points is a device which helps them reach the common starting line'.[65]

5. PREFERENTIAL TREATMENT: FOR GROUPS OR INDIVIDUALS?

Is it to *minorities* or to particular individuals that we should give those extra points which Oppenheim mentions? In this section I will discuss one of the most common objections to preferential-treatment programs: that they confer benefits upon groups and not individuals. Many writers among those who criticize

[63] See Cohen D.K., 'Does IQ Matter?' in Coser L.A. and Howe I. (eds), *The New Conservatives* (1973) 212-3.

[64] Rawls J., *A Theory of Justice* (1972) 100-1. See also Frankel C., 'Equality of Opportunity' (1971) 81 *Ethics* 191, 204-11.

[65] Oppenheim F.E., 'Egalitarian Rules of Distribution' (1980) 90 *Ethics* 164, 178-9.

preferential-treatment programs admit that they would not object to individual compensations.[66] For example, Alan Goldman approves of actions taken 'to compensate individuals who themselves deserve it on grounds of actual prior discrimination or denial of equal opportunity' but

> with regard to groups that are defined only according to some shared characteristic, that have no official representative bodies, whose members have no formal interaction, and whose individual members may suffer harms from injustices that do not necessarily affect others, compensation can be owed only to the individual members who have been harmed and not to the groups as a whole.[67]

Preferential treatment, the argument goes, tends to benefit all the members of the favoured group indiscriminately, irrespective of the actual discrimination or deprivation suffered by them. It is a far cry from acceptance of the duty to compensate a particular individual (about whom we know precisely that he was denied a job or place at the university on a discriminatory basis) to the claim that all the members of the group are entitled to preference. Goldman, who is prepared to accept reverse discrimination in favour of *individuals* who have been discriminated against overtly in the educational system or in employment, rejects all forms of *group* reverse discrimination. 'Certainly not all members of these groups [women and blacks] have been unjustly denied a job or a chance at a decent education — the type of harm that may call for reverse discrimination as compensation in kind'.[68] It has been also suggested that group preferences tend to select those individuals who least deserve compensation compared with other members of the same group. Krishna Iyer J. of the Supreme Court of India has warned that the benefits of preferential promotions 'are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake'.[69]

For the sake of clarity I will distinguish between two types of arguments advanced by opponents of group preferential treatment. The first type rejects group preferential treatment as unjustified on the grounds that a group is not an entity which may have moral claims, needs, merits or deserts; that it is not a proper subject of moral rights and obligations. The second, more pragmatic, type of argument points to the dangers of over-inclusion and under-inclusion when those entitled to preferential treatment are defined on a group basis.

The first type of argument may be best illustrated by an article by George Sher who indicates that groups cannot be reasonably said to have merits or needs, and these are the two bases of distributive justice.[70] Referring to racial and sexual groups in particular, Sher points out convincingly the absurdities resulting from ascribing merit or needs to groups and concludes that 'such groups do not fall under the principle of distributive justice at all'.[71] Now, there is an initial appeal in

[66] See *e.g.*, Gross B., *Discrimination in Reverse: Is Turnabout Fair Play?* (1978); Goldman, *supra* n.24; Gahringer R. E., 'Race and Class: The Basic Issue of the Bakke Case' (1979) 90 *Ethics* 97, 112-4; Simon R., 'Preferential Hiring: A Reply to Judith Jarvis Thompson' in Cohen *et al.*, *supra* n.9 at 40-8.

[67] Goldman, *supra* n.24 at 88.

[68] *Ibid.* 76-7.

[69] *Kerala v. Thomas* (1976) A.I.R. (S.C.) 490, 531.

[70] Sher G., 'Groups and Justice' (1977) 87 *Ethics* 174.

[71] *Ibid.* 176.

the idea that groups do not deserve or need anything except in a metaphoric sense. Groups do not qualify for desert or merit because they are not capable of 'acting' in a literal sense of the word. Groups cannot need anything because they do not experience the various states of comfort or discomfort which are presupposed by the notion of needs. However, group preferential treatment need not rely upon the assumption about group merits or group needs. In most of the cases, with important exceptions to which I shall refer later, preferential treatment is justified not on the basis that a group as a whole merits compensation but rather that its *members* have been discriminated against and that compensation is owed to them. Group characteristics are only an indicator of discrimination or deprivation suffered by particular members. In so far as this indicator is accurate, that is to say, in so far as there is a strong correlation between membership of the group concerned and actual discrimination, past or present, the group characteristics play a useful role of defining a class of particular individuals to whom preferences should be given.

It is appropriate, at this point, to make a distinction between two types of justification for group preferential treatment: distributive and collective. The group characteristic is used distributively when it defines a property which may be attributed to each of the group's members; it is used collectively when a group property is attributed to a group as a whole and is not reducible to characteristics of its particular members.[72] Sher's reasoning constitutes an effective rebuttal only of the collective arguments about preferential treatment. However, the bulk of arguments in favour of group preferential treatment are based upon group characteristics in the distributive sense. Group preferential treatment is usually argued for on the basis that compensation is due to particular persons who have been wronged and, as these deprivations are correlated with group membership, persons who have been wronged are *identified* through their group membership. This identification may be correct or incorrect: this is a matter to be verified empirically in particular cases. For instance, when it is claimed with regard to the United States that '[b]eing black can . . . become morally relevant in distinguishing between those individuals who are members of the group to whom reparations are owed and those who are not',[73] this may be confirmed by empirical evidence or not. In any event, 'being black' is taken in this phrase to be a method of identifying those individuals to whom reparations should be given. The property of 'being black' is not considered in this quotation as morally relevant *per se*: the preferences which are demanded are due to blacks not because of their race but because they are individuals who have been wronged on the ground of their race. With regard to such an obviously distributive group approach, Sher's argument against group preferential treatment is simply irrelevant.

It should be observed that the collective approach to group characteristics against which Sher's arguments are in fact directed, should not be entirely rejected. True, we must be circumspect in applying collective group characteristics but it does not follow that we are never justified in doing so. There may well

[72] See Ezorsky G., 'On "Groups and Justice" ' (1977) 87 *Ethics* 182.
[73] Bayles M. D., 'Reparations to Wronged Groups' (1973) 33 *Analysis* 182, 184.

be situations in which a group as a whole has been wronged or discriminated against; in these cases a group characteristic is something more than an indicator of particular individuals who are most likely to have suffered the consequences of discrimination. When people are discriminated against because of their membership in a given group and not because of their individual characteristics, the collective approach is justified.[74] Classifications that single out minority groups for the purposes of redress are, in these cases, fully justified.

Such a collective rather than a distributive approach requires proof that the past discrimination was directed against the group as a whole; it seems that it is proper, in this case, to place the burden of proof on those who demand group preferential treatment on collective basis. An institutionalized system of racial inequality, such as apartheid, would provide an example of such past discrimination that justifies a collective approach to group preferences. One may consider also cases where stereotypes and prejudices against an ethnic group create such a general social climate that each and every member is necessarily touched by it. This type of collective justification of group preferential treatment is expressed well in the words of Marshall J.: 'It is unnecessary in 20th Century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact'.[75]

In the cases when such collective past discrimination can be found, the so-called reversal test proposed by Alan Goldman as a method of evaluation of preferential treatment, is clearly inadequate. This test, as applied to the American preferential-treatment programs, 'calls upon us to judge whether a white male in similar circumstances . . . would deserve preferential treatment in the context in question'.[76] It is applicable to distributive group preferential treatment but in the cases of collective arguments such a test is simply not available: if the individuals have received discriminatory treatment because of a group characteristic, the non-members of the group cannot be thought of as being 'in similar circumstances'. If, for instance, one can claim that discrimination against blacks in the United States had a collective, rather than a distributive character, then 'a white male in similar circumstances' is a contradiction in terms: relevant circumstances here include race.

More often than not, however, it is a distributive sense which is attached to an argument about group preferential treatment. Preferences are demanded for a member of a particular group not because he is a member of this group but because it is a fair assumption that he was discriminated against. In the distributive sense, group membership is not a justification of the preference but an index of probability of past discrimination or deprivation. James W. Nickel proposes to distinguish between a justifying basis and an administrative basis for preferential treatment programs: being a member of a group does not justify the preferences but

[74] See Lichtman R., 'The Ethics of Compensatory Justice' (1964) 1 *Law In Transition Quarterly* 76, 96; Taylor P.W., 'Reverse Discrimination and Compensatory Justice' (1973) 33 *Analysis* 172; Van Dyke V., 'Justice as Fairness: For Groups?' (1975) 69 *American Political Science Review* 607.

[75] *Bakke* (1978) 438 U.S. 265, 400.

[76] Goldman, *supra* n.24 at 17.

it indicates the features correlated with those which actually do justify such preferences. For example, 'since almost all American blacks have been victimized by discrimination it would be justifiable to design and institute programs of special benefits for blacks'.[77] Such programs, Nickel adds, are justified in terms of the injuries that nearly all of the recipients have suffered and not in terms of their race. We see, therefore, that this justification is based mainly on the considerations of practicality and administrative convenience: it is much easier to detect the feature of being black than that of being deprived of equal opportunity. The higher the correlation between the administrative basis and the justifying basis, the smaller is the risk that the programme will result in unfair over- and under-inclusiveness. In other words, the smaller is the risk of producing benefits for a large number of people who had not suffered any discrimination (over-inclusiveness) and of disregarding the legitimate claims of those who had been discriminated against (under-inclusiveness).

This empirical correlation between the justifying and the administrative basis is of particular importance: much of the jurisprudential discussion of preferential treatment has been concerned not with the moral weakness of the principle but with the defects of particular programs in which this correlation is not sufficiently high. However, the fact that the administrative basis is not identical with a justifying basis is not a sufficient reason to reject the principle of preferential treatment. The demands to abolish all 'proxy' features in preferential treatment programs (that is, features which indicate the existence of another feature which is the real justification for preferences) would not only cause immense administrative problems but also would be inconsistent with the nature of the discrimination which is intended to be eradicated. As was clearly illustrated by Williams's example about warriors,[78] discrimination can be effected without indicating its real basis openly but rather through a criterion of classification which is linked with the actual ground of discrimination. Racial discrimination can be instituted by proxy, without mentioning race as a basis of classification. In a relatively recent decision of the Supreme Court of the United States the issue was whether the Civil Rights Act of 1964 prohibited an employer from requiring a school diploma or an educational test where such requirements were unrelated to job performance and resulted in a limitation on the number of blacks employed.[79] Title VII of the Act prohibits differentiation among employees on the basis of their race, color, religion, sex or national origin.[80] The Court held that if the use of tests results in a statistical decrease in the number of minority employees then the burden of proof is shifted to the employer who has to show that the tests are job-related. The Court concluded also that the absence of discriminatory intent 'does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability'.[81] Another example of such discrimination by proxy is the setting of such an age

[77] Nickel J.W., 'Should Reparations Be to Individuals or to Groups?' (1974) 34 *Analysis* 154, 155.
[78] See text accompanying n.56 *supra*.
[79] *Griggs v. Duke Power Co.* (1971) 401 U.S. 424.
[80] *Civil Rights Act* 1964 (U.S.A.) s. 703
[81] *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432.

requirement which indirectly discriminates against women. In England a woman complained to an industrial tribunal that a condition of appointment to the particular position in the civil service which required that the candidates should be under 28 years of age discriminated against her on the ground of sex.[82] She maintained that women have greater difficulty in complying with the upper age limit of 28 than do men because many women in their twenties are having children or looking after children. By the time they feel able to apply for a job, it is too late. The Employment Appeal Tribunal agreed that this condition of appointment was discriminatory because 'the condition is one which it is in practice harder for women to comply with than it is for men''.[83]

We see, therefore, that sex discrimination need not operate through the explicit use of sex criteria, just as racial discrimination can be effected without mentioning race.[84] Some anti-discriminatory statutes prohibit such indirect discrimination.[85] The lesson to be drawn from this for the purposes of affirmative action is rather obvious: if invidious discrimination can operate effectively by proxy, then sometimes it may be necessary to eradicate it by proxy. If, say, 'being uneducated' works as a surrogate for 'being black' in the invidious discrimination, then 'being black' should be used as a surrogate for 'being discriminated against' in a preferential treatment program. Or, to take again Williams' example about warriors, 'being weak' serves as a proxy in the discrimination against poor, and 'being poor' may serve as a proxy for 'being discriminated against'.[86]

To what extent this use of surrogate features is justified depends on the degree of correlation between the proxy feature and the characteristic which is represented by the proxy. It is with regard to this matter that the second important argument against group preferential treatment is relevant. According to that argument, preferential admissions, selections and distributions are necessarily over- and under-inclusive. When individuals to be compensated are singled out by their group membership, not *all* the deserving and not *only* the deserving obtain preference.[87] My initial answer to this charge is simple: it depends on the empirical correlation between the justifying basis and the administrative basis of preference, between the fact of discrimination and group membership. This is a question of fact that can be resolved by evidence. If this empirical correlation is low and the property which is the administrative basis of the preference does not indicate accurately those who suffered discrimination or deprivation, then it is simply a bad preferential treatment program. But this is an empirical matter and not a matter of principle; the fact that some preferential treatment programs are bad does not provide an argument against the principle of group preferences. It may be argued, for instance, that in the United States being black is a relatively accurate indication of deprivation in educational opportunities. If that is so, race may be a relevant

[82] *Price v. Civil Service Commission* (1977) 1 W.L.R. 1417.
[83] *Ibid.* at 1422.
[84] See also *Gaston County v. United States* (1968) 395 U.S. 285.
[85] See *e.g.*, *Sex Discrimination Act* 1975 (S.A.) s. 16(3); *Race Relations Act* 1976 (U.K.) s. 1(1)(b).
[86] Williams, *supra* n.55 at 125-6.
[87] See Goldman, *supra* n.24 at 76-94.

indicator of previous discrimination or deprivation. If most black children in a certain school district received an inferior education because they were excluded from white schools in one way or another, a measure that requires remedial classes for all black children is a reliable means of overcoming the hardship resulting from past discrimination. By the same token, preferential treatment designed to help Aborigines in Australia contains very little risk of benefiting those individuals who had not experienced the consequences of discrimination. As an Australian legal scholar notes: 'There are few middle class Aborigines and this avoids immediately over-inclusion as a major problem'.[88]

So much for the argument about over-inclusiveness. The charge of under-inclusiveness is more serious. It is sometimes claimed that preferential treatment gives insufficient protection to problems of less vocal minorities and in particular to disadvantaged members of a group which is as a whole well-off and therefore is not given preference.[89] The charge is often justified but again it does not necessarily upset the principle of a group preferential scheme. It is important to bear in mind that such programs must not be viewed as universal devices for eradicating the results of discrimination against all members of a society or of deprivations suffered by all its members. Those programs are established in order to overcome the consequences of some typical deprivations: they compensate *some* of the victims of *some* social wrongs. There is no reason why some others who were also discriminated against, should not be compensated on another basis. As Hardy Jones puts it: 'The fact that not every injustice can be rectified should not make us feel justified in compensating no one'.[90] Group preferential programs strike at harm where it is thought to be most acute. To require that a single program remedy all aspects of a particular social discrimination or none at all might preclude the law from undertaking any program of correction. If the critic of such a scheme takes the problem of under-inclusion as an argument against the *principle* of group preferential treatment, this must be because he presupposes a curious moral proposition that we should not try to compensate for *any* harm to the victims of discrimination unless we can compensate for *all* injustices. Preferential treatment programs try to compensate some groups which were discriminated against in a significant way: their members suffered forms of discrimination which were typical, because related to their group-membership. This is not to say that other claims to compensation should be ignored.

The argument about over- and under-inclusiveness of group preferential treatment is useful in so far as it indicates the need for a close correlation between the administrative and justifying basis. In certain cases a wrong choice of the administrative basis results in a general failure of the program. This was the case in Poland where the basis of preference in university admissions was established in an arbitrary way, according to so-called 'class' criteria, and this did not reflect properly the real social discriminations and inequalities in access to education.

[88] Partlett, *supra* n.4 at 250.

[89] See Posner, *supra* n.26 at 371; Blackstone W.T., 'Reverse Discrimination and Compensatory Justice' (1973) 3 *Social Theory and Practice* 253, 268.

[90] Jones, *supra* n.40 at 218.

Critics of the existing scheme argued convincingly that more complex criteria, taking into account family income, place of habitation, educational disadvantages at the secondary school level and so on, would express more correctly the obstacles one has to overcome on one's way to the university.[91] This problem of proper identification of the group characteristics of those to whom the preferential treatment is due may be illustrated well by the case of preferential programs in India. The Indian Constitution provides for preferences in favour of 'any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State'.[92] In 1953, India's President appointed a Backward Classes Commission charged with the responsibility of determining criteria for social backwardness.[93] The Commission's report submitted two years later categorized over two thousand castes or communities as backward and announced guidelines for criteria of backwardness relying mainly on the criterion of caste. The report was met with strong criticism and ultimately was rejected by the Parliament. The task of determining the criteria of backwardness was then assumed by the Supreme Court of India. In a series of decisions, starting with the landmark case *Balaji v. Mysore*[94], the Court established a complex set of indicia of backwardness which included poverty, occupation and place of habitation.[95] In order to avoid the risk of an overbroad designation of backward classes, the Court approved the imposition of income ceilings for State preferences thus excluding affluent citizens from the benefits of preferential programs even if, by other standards, they would fall into a favoured group of citizens.[96]

This suggests to me that the problem of under-inclusive and over-inclusive classifications can be solved through a more refined designation of group characteristics of those who should receive preferences. To reject the very principle of group preferential treatment on the basis that some of the existing programs do not properly identify the scope of the recipients would be a typical example of throwing the baby out with the bathwater. The alternative, suggested by the critics of group preferential treatment, is to consider each candidate individually and accord preferences only when specific acts of past discrimination against this particular individual are established: 'reverse discrimination is . . . justified in order to compensate specific past violations of . . . rights or denials of equal opportunity'.[97] I leave aside here the question of the costs of such a procedure which may require the organisation of a whole army of investigators inquiring into past acts of discrimination or denial of equal rights. What is important is that even

[91] See Hajnicz W., Lubomirska K., 'Pod gorke do szkoly' *Polityka* (Warsaw), 28 February 1981.

[92] *India Const.* art. 16(4).

[93] See Gupta S.S., *Preferential Treatment in Public Employment and Equality of Opportunity* (1979) 13; Witten S.M. ' "Compensatory Discrimination" in India: Affirmative Action as a Means of Combating Class Inequality' (1983) 21 *Columbia Journal of Transnational Law* 353, 373-5. On legal aspects of affirmative action in India, see also Galanter M., ' "Protective Discrimination" for Backward Classes in India' (1961) 3 *Journal of Indian Law Institute* 39; Katz A., 'Benign Preferences: An Indian Decision and the Bakke Case' (1977) 25 *American Journal of Comparative Law* 611.

[94] *Balaji v. Mysore* (1963) 50 A.I.R. (S.C.) 649.

[95] *Ibid.* 659.

[96] *Chitralekha v. Mysore* (1964) 51 A.I.R. (S.C.) 1823, 1832; *Jayasree v. Kerala* (1976) A.I.R. (S.C.) 2381.

[97] Goldman, *supra* n.24 at 6.

if we agree to preferential treatment solely on an individual basis, we still have to establish general criteria of what is to be counted as past discrimination (or relevant deprivation) and how it is to affect the preference accorded. The absence of such general criteria would lead to total arbitrariness: if the admission officers were instructed merely to accord preference to those who had been deprived of equal opportunity in the past, it would lead to a situation in which not rules but whim were decisive. The existence of rules excludes a case-by-case basis for solving problems. Strictly speaking, 'individual' treatment is, in its extreme version, incompatible with treatment by means of law: law considers typical situations and prescribes typical remedies. If, however, the administrators of preferential programs are given the general guidelines about those deprivations which justify particular kinds of compensation and, hence, about distinctions which can be incorporated in their decisions, it leads inevitably to a group approach; those meeting the conditions described by a preferential treatment program constitute a group of recipients of preferential treatment. Now it is unimportant whether it is a group in a sociological sense which exists irrespective of the preferential treatment provisions (for example an ethnic group) or a class in a merely statistical sense (say, all those earning under a certain minimum) or even a class established on the basis of multiplicity of traits (perhaps, all divorced women earning under a certain income and living in big cities). There may be different ways to answer the question: 'Who should be given preference?', but the answer: 'All those who deserve it on individual grounds' is insufficient as far as legal regulation is concerned. Such a guideline would simply mean that the admission committees would be left to their own devices as to how to decide on the selection of candidates.

6. PREFERENTIAL TREATMENT AND ITS 'VICTIMS'

Finally, I would like to consider probably the most serious charge against preferential treatment and certainly the most emotionally and psychologically persuasive one. The arguments discussed so far may be said to take into account only one side of the coin: that of the beneficiaries of the preferences. This is not the whole story, however. For each preferred person there is one rejected. For each black admitted preferentially there is a DeFunis[98] or a Bakke.[99] The generosity of preferential programs, it is argued, is at the expense of other innocent persons who have to pay for it in the currency of frustrated expectations.[1] It seems natural that the opponents of preferential treatment tend to stress the situation of its 'victims' while its partisans are more concerned about the recipients of the preferences.

The argument starts by maintaining that '[f]or every less qualified person who is admitted to a college, or hired for a job, there is a more qualified person who is being discriminated against, and who has a right to complain'.[2] On this basis,

[98] See *De Funis v. Odegaard* (1974) 416 U.S. 312.

[99] See *Bakke* (1978) 438 U.S. 265.

[1] See *e.g.*, Posner, *supra* n.42 at 187-9; Passmore, *supra* n.5 at 41-2; Dixon R.G., '*Bakke*: A Constitutional Analysis' (1979) 67 *California Law Review* 69, 85-6. See also *Bakke* (1978) 438 U.S. 265, 307-10 *per* Powell J.

[2] Katzner, *supra* n.11 at 292.

several arguments in defence of alleged victims of preferential treatment are formulated. It is claimed, for instance, that if a discrimination is societal and can be attributed to the social structure in general, it is inequitable to charge a few individuals who are innocent with the cost of compensation.[3] The costs of compensation, we are told, should be assigned either to the perpetrators or to the beneficiaries of injustice; when it is not possible, these costs should be distributed evenly among the entire community.[4] In particular, it is argued that those who pay the costs of preferential admissions are the least likely to have benefited from the past discrimination against others, let alone to have been engaged actively in such discriminatory practices.[5] In consequence, it is often claimed that preferential treatment violates the rights of those who have to bear its burdens; for example, in the United States, the rights of 'most qualified white males, who are not liable for past injustices'.[6] On the extreme side of the argument based on the victims preferential treatment is compared to shooting hostages[7] or Nuremberg laws.[8]

These are serious charges. The feelings of frustration of a white applicant refused a place at the university because a less qualified black was admitted, is something very human, natural and understandable. However, emotion and frustration are not good advisors in reflections about what is just. For a moment, let us take the victims' argument at its face value, accepting the assertion that preferential treatment results in deprivations for those not belonging to a preferred group, and that they are being discriminated against. Even if it is true, the general calculus of gains and costs may still result in a conclusion that those discriminations and deprivations are reasonable costs for the rectification of other, more oppressive, discriminations and deprivations. After all, we have to compare the degree of one injustice with that of another. To discriminate is unjust, but to tolerate the existing discrimination or deprivation is also unjust. A failure to establish a system of preference devised to assure genuine equality of opportunity may be a greater injustice than to establish such a scheme. The very fact that we merely abstain from doing something does not release us from moral responsibility in so far as it is within our power to prevent existing injustices.[9]

This argument is answered sometimes by saying that no injustice can be justified by a desire to rectify another injustice. J. A. Passmore rejects the proposition that 'injustice in selection is so serious a form of injustice that it demands reparation in the form of preference in selection', and he says:

[3] Leiser B.M., *Liberty, Justice, and Morals* (1979) 337.

[4] Amdur R., 'Compensatory Justice: the Question of Costs' (1979) 7 *Political Theory* 229; Fullinwinder R. K., *The Reverse Discrimination Controversy* (1980) 66.

[5] Goldman, *supra* n.24 at 109 and 114-9.

[6] *Ibid.* 231. See also Simon R., 'Individual Rights and "Benign" Discrimination' (1979) 90 *Ethics* 88.

[7] Passmore, *supra* n.5, p.572, at 42.

[8] Moynihan D. P. *quoted* by Leiser, *supra* n.3, p.572, at 337.

[9] 'A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury', Mill J.S. 'On Liberty' in *Utilitarianism, On Liberty, Essay on Bentham* (1962) 137. See also Singer P., 'Famine, Affluence and Morality' (1972) 1 *Philosophy and Public Affairs* 229, 231-5.

> [T]his argument, fully set out as 'civil injustice in [*sic*] so serious a form of injustice that it demands compensation in the form of committing acts of civil injustice', contains the same moral absurdity as: 'killing is so terrible a crime that the killer must be killed'.[10]

I must confess that I do not see anything particularly shocking about this supposed absurdity. It is an unfortunate truth about the human condition that we do not always make choices between good and bad but often between degrees of bad. There is nothing morally absurd about situations where we have to infringe one moral principle in order to save another; when, for example, we prefer to lie in order to diminish someone's suffering. This allegedly morally absurd situation reflects the tragedy of human life in which conflicts of values are part of our world and in which to act morally often means to choose a lesser evil. The same applies to the realm of justice: not always do we have the luxury of choice of an absolutely just solution against an unjust one; sometimes a just act consists in the choice of a less unjust solution. Passmore's comparison with killing exploits the dramatic and emotional quality of the act, but even here it seems to me that to sacrifice one life in order to protect many others is not inherently and necessarily morally absurd. To kill a dangerous maniac who commences executing a group of hostages may be the only method to prevent him from completing his task. Killing him may be morally admissible. Certainly it is controversial but not absurd.

This absurdity is even less obvious when we move from the sphere of such fundamental moral questions as life and death to more ordinary cases such as decisions about preferential admission to university. It is doubtful whether anyone's rights are violated in such a case, although some expectations may be frustrated. What rights of non-members of a preferred group may be said to be violated? The right to be admitted to a university? Not really, no-one has an intrinsic right to become a student (otherwise, any selection procedure would violate the rights of those not admitted).[11] The right to be selected only on the basis of one's intellectual capacities as measured by tests and grades? It is hard to see why such a *prima facie* right should exist; I see no plausible argument that selection on the exclusive basis of knowledge is a matter of *right*.[12] The right to be treated equally, the right to equal opportunity? Yes, but I have tried to show that, in the process of selection and distribution, the principle of equal opportunity requires a differentiated treatment and that to link it with the tests of abilities is a matter of utility rather than of equality.[13] Hence, even if non-preferred applicants are deprived of *something* by the process of preferential admissions, it is doubtful whether their *rights* are violated. Therefore, the issue raised by preferential treatment is *not* one of the rectification of injustice by the means of violation of rights. Rather, it is a matter of balancing one injustice against another.

Now, if we have to chose between an injustice affecting the minorities systematically discriminated against and an injustice against a traditionally dominant group, there is a good deal to be said for choosing the latter. Certainly, it is hard to argue that preferential treatment for blacks in the United States or Australia

[10] Passmore, *supra* n.5, p.572, at 42.
[11] See Dworkin, *supra* n.53 at 225.
[12] *Ibid.* 225-9.
[13] See part 4 of this article, *supra*.

endangers seriously the self-esteem, confidence and motivation of the white majority.[14] Measures undertaken in order to upgrade a social group which is in a particularly disadvantaged situation seem to justify the inevitable injustices imposed upon those who are better off in all other regards. The measures which are unjust towards a dominant group do not perpetuate prior unjust deprivation and do not stigmatize those discriminated against.[15] If indeed it is an injustice, it is an injustice based upon the expedient of choosing a lesser evil. Of course, it would be better if we did not have to frustrate the expectations of anyone but, alas, such a painless course of action is rarely available.

The argument that it is unjust to make non-minority members pay for the compensation assumes so far that they have not engaged in, or benefited from, past discrimination. But this assumption is not unquestionable. The argument that the costs of compensation should be paid only by the perpetrators and/or beneficiaries of past discrimination is not a sufficient reason for rejecting programs such as preferential admissions for the Aborigines in Australia or for the blacks in the United States. In societies where various groups suffer reduced opportunities of access to say, education, as a result of past discrimination, the rest of society enjoys unearned advantages in this access. The argument could be made, for instance, that in the absence of past discrimination there would be a larger pool of qualified minority candidates for university studies. Reverse discrimination is, then, the removal of an unfair advantage to which a person is not entitled.[16] It does not need to be shown that, for instance, a white applicant 'has inherited profits from his father's discrimination against blacks'[17] to prove that he is benefiting from the unequal position of blacks. What *is* relevant is the question whether he has actually benefited from unequal educational opportunity. If this is the case, then his right to equal opportunity is not violated by the preferential treatment, because his opportunity *before* the treatment was better; this is, therefore, a situation of unequal treatment of unequal cases.

Consequently, it is incorrect to claim that, for example, in race-conscious preferential admissions, non-members of the preferred race are excluded *because of* their race. Stevens J. has made this observation: '[t]he University [of California at Davis], through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race'.[18] But, strictly speaking, it is not true. Bakke was not excluded *because of* his race. Rather, he was excluded because his examination results were not good enough. True, he had to pass more stringent exams than black applicants, but this is because it could be reasonably presumed that he had had better opportunities to obtain the qualifica-

[14] See Nagel T., 'Equal Treatment and Compensatory Discrimination' (1973) 2 *Philosophy and Public Affairs* 348, 361; Wasserstrom R.A., 'Racism, Sexism, and Preferential Treatment: An Approach to the Topics' (1977) 24 *University of California, Los Angeles Law Review* 581, 618.

[15] See *Bakke v. Regents of the University of California* (1976) 18 Cal. 3d 34, 68-9 *per* Tobriner J.; *Bakke* (1978) 438 U.S. 265, 374-6 *per* Brennan, White, Marshall and Blackmun JJ.; Ely J.H., 'The Constitutionality of Reverse Racial Discrimination' (1974) 41 *University of Chicago Law Review* 723, 735-9.

[16] See Boxhill B.R., 'The Morality of Preferential Hiring' (1978) 7 *Philosophy and Public Affairs* 246, 261-8; Phillips D., *Equality, Justice and Rectification* (1979) 304-8.

[17] Passmore, *supra* n.5, p.572, at 43.

[18] *Bakke* (1978) 438 U.S. 265, 412.

tions necessary for medical students. Ultimately, his combined qualifications, measured by tests scores *and* by other considerations[19] did not outweigh the combined qualifications of other applicants. Bakke scored better in the Medical College Admissions Tests than some of the admitted blacks, but this was only a part of the measurement of his qualifications and, all things considered, he proved to be less qualified than the persons who displaced him.

If this line of reasoning seems demagogic, the following example might be useful. In a particular factory, all male manual workers are expected to perform onerous tasks, including carrying heavy objects, while women are released from this type of work and are directed to duties which do not require the same physical strength. Now, imagine that a male worker consistently refuses to carry heavy boxes and in consequence is sacked. He cannot complain that he has been fired *because of* his sex. He has been fired because he was not doing a job which was reasonably expected of him. At the same time, it is true that those expectations were directly influenced by sex considerations.

Thus, at the end of the day, the controversy about preferential treatment boils down to the controversy about the concept and criteria of qualifications. In the discussions about preferential admissions to universities, opponents of these programs assume that abilities and skills, as revealed by test grades, are the only relevant criteria for the decision about who should become a student where places are scarce.[20] I have attempted to show that the principle of equal opportunity requires taking other criteria into account as well; those other criteria supplement the criteria of ability which still remain central.[21] If I have suggested that social opportunities of acquiring qualification should be taken into account, it is because they could be relevant to the acquisition of skills and abilities. But now I should like to go a step further. Education, besides serving utilitarian social purposes, plays an essential role in human self-development; it is an important condition of self-realization for those who see it as part of their life plans. If this approach is taken towards the aim of education, then the problem of skills and abilities becomes much less relevant. The purpose of assistance in self-development is as equally well served in the case of an exceptionally talented person as it is in the case of a mediocre one. Each of them gains as much as he is capable of using and developing. Above a certain basic level of qualifications, without which a student cannot obtain any benefits from participating in classes, the difference between a less qualified and a more qualified candidate is not relevant from the point of view of attaining those broad purposes of tertiary education.

Consider criteria for limitation of the access to culture. Probably no-one would suggest, when the demand for opera tickets exceeds the number of seats available, that musical skills or theoretical knowledge of music on the part of theatre-goers should be taken into account in the distribution of tickets. Some will propose an increase in prices of tickets, others will call for a distribution on a first-come,

[19] That is, considerations related to his prior educational opportunities.
[20] See *e.g.*, Goldman, *supra* n.24 at 48-64; Leiser, *supra*, n.3, p.572, at 337-42.
[21] See part 4 of this article, *supra*.

first-served basis or through a lottery. The superiority of these methods of distribution over distribution on the basis of musical tests stems from the very purposes of opera performances. Both the most sophisticated connoisseurs and the musical illiterates will draw some satisfaction from this cultural experience: it will help in the self-development of each within everyone's individual scale of potentiality. *Mutatis mutandis*, the same applies to education. The difference is that in the case of education, utilitarian goals are much more urgent and obvious. But in so far as inner satisfaction and self-realization are also important aims served by educational system, selection solely on the basis of skills is hardly justified. Selection on meritocratic grounds is justified by considerations of efficiency and utility; they are important, probably the most important, but not the sole aims of education.

One final point. A charge is frequently made that preferential admissions programs try to remedy the effects without curing the cause. It has been argued that the proper way is to equalize educational opportunities and not to accord preferences when it is already too late. There is a great deal of truth in this argument. Preferential treatment does not cure causes, it operates only in the sphere of consequences. But this approach does not contradict the other: it is important to try to eliminate causes of discrimination but it is also important to rectify consequences where this has not been done. Equalization of the quality of schools is a task for generations but what of today's teenagers? In his opinion in *Bakke*, Blackmun J. said: 'I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past'.[22] It would be better if there were no circumstances which give rise to preferential treatment but if, alas, they exist, why should the just claims of people who actually suffer these consequences be ignored? By the same token, one might say: it would be better if, instead of compensating some workers for their onerous work, we should rather see to it that each job is equally pleasant and satisfying. True as it is, it does not make actual claims for compensation unfounded. Future goals are not sufficient remedies for past and actual deprivations.

[22] *Bakke* (1978) 438 U.S. 265, 403.