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## GOALS, QUOTAS, PREFERENCES AND SET ASIDES: AN APPROPRIATE AFFIRMATIVE ACTION RESPONSE TO DISCRIMINATION?

PETER G. KILGORE\*

"Affirmative action" has been described as a concept with no single meaning.<sup>1</sup> Professor Thomas Nagel of New York University made a distinction between "weak affirmative action" (advertising, active recruitment, special training, etc.) and "strong affirmative action" (preferences to various groups).<sup>2</sup> Mechanisms used to effectuate affirmative action such as set asides, quotas, preferences, and goals similarly escape consistent or uniform meaning.<sup>3</sup> Indeed, both the broader concept of "affirmative action" as well as these implementing tools have received such varied application that the only conclusion one can reach is that they mean different things to different people, ranging from simple diligence in ensuring against discrimination to conscious favoritism of persons based on race, ethnic status or sex.<sup>4</sup>

Accordingly, at the threshold it is necessary to define the specific affirmative action concept under examination here. As long as the mechanism is drawn on the basis of race, ethnic status or sex, with the objective being a result oriented approach rather than a nondiscriminatory procedure, the concept will fall within the issue being addressed, irrespective of whether the term used is labeled "set aside," "goal," "preference," or "quota."<sup>5</sup>

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1. Sowell, *Affirmative Action Reconsidered*, 42 THE PUBLIC INTEREST 47, 47-48 (1976).

2. *Senate Committee Hears Views of Academics on Affirmative Action*, DAILY LAB. REP. (BNA) No. 117, at A-9 (June 18, 1981) (statement of Professor Thomas Nagel before the Subcomm. on the Constitution of the Senate Judiciary Comm.).

3. See Sisneros, *Revisiting Affirmative Action Case Law*, 34 LAB. L.J. 350 (1983).

4. See DAILY LAB. REP. (BNA) No. 184, at F-1 (Sept. 23, 1981) (statement of Assistant Attorney General Reynolds before the House Labor Subcommittee on Employment Opportunities).

5. Justice Powell commented that labels such as goals, quotas, or set asides

## EXAMPLES

To illustrate the major factors examined within this article, several recent cases will be used. First, these cases will demonstrate the mechanisms used in affirmative action, such as goals, quotas, or preferences. The cases will also highlight the type of discrimination each of these mechanisms intend to address—the perceived societal or historical acts against certain classes. This article will then demonstrate that the groups and persons receiving the benefits did not actually suffer any identifiable harm and that the implementation of these mechanisms injured innocent third parties. Finally, through the use of definitions and the concept of fairness, this article will analyze the problems with the use of the current mechanisms of affirmative action and possible alternatives.

The first case concerns a matter, in which this writer was co-counsel, involving preferences under Presidential Executive Order 11246, as amended.<sup>6</sup> In *United States Department of Labor v. Priester Construction Company*,<sup>7</sup> a small construction contractor in Davenport, Iowa entered into a federal contract covering work on a project for a twenty-month period between 1975-77. The contract was found to have incorporated a requirement to meet a 5-6% minority "goal" in each construction craft utilized on all projects (both federal and non-federal) during the twenty-month period in the covered geographical area. This "goal" was derived from a so-called Hometown Plan formulated several years earlier focusing on a much more industrialized and correspondingly higher minority Standard Metropolitan Statistical Area (Peoria, Illinois SMSA) than the area in which the contractor was located (Davenport-Rock Island-Moline SMSA). Also, the Peoria, Illinois SMSA was neither an area from which the company recruited workers nor one where the federal contract in question and other projects subject to the goals were performed. Furthermore, the company's workforce was unionized, resulting in all trade workers being hired through a hiring hall arrangement from applicants provided by the union.

Federal census statistics established that the goals far exceeded minority availability. For example, the 5-6% goal in the categories of brick masons and iron workers was imposed even though government figures revealed that no minorities existed in those trades in

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were nothing more than semantic distinctions. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 288-89 (1978).

6. 3 C.F.R. § 339 (1965).

7. 78-OFCCP-11 (1983).

the Davenport-Rock Island-Moline SMSA. Similarly, in the carpenters' trade the 5-6% figure applied notwithstanding government data indicating only a 1.2% minority availability. These figures were also required notwithstanding the fact the government had prescribed "goals" for a project in this contractor's SMSA three years *after* the company's federal contract, less than half the figure imposed on Priester. The trial judge accordingly found, which the government did not dispute, that the "goals" were unrealistic.

Nevertheless, the 5-6% figures were reimposed in 1983 in the categories the contractor failed to statistically obtain during the contract period in order for the company to again bid on federal projects. This result was ordered by the Department of Labor (DOL) even though *no* discrimination had occurred or was even charged in the case, the Company had *never* been found to have discriminated in the past, and in fact *no charge* of discrimination had ever been filed against it in any local, state or federal agency or court since its inception. Moreover, DOL reimposed these "goals" notwithstanding the fact that during the contract period the company had a minority hiring rate of 10%, which was almost double the goal if applied overall rather than as to each craft; and had actually met or far exceeded the 5-6% minority goal for the alleged deficient time in each of the crafts after completion of the federal contract even though the company was not a federal contractor during this period; and had made substantial efforts to implement the government's suggested affirmative action paper work both during and after the contract.

The second example, *Fullilove v. Klutznick*,<sup>8</sup> also involves a matter in which this writer co-represented a party. In 1977, Congress enacted a statute<sup>9</sup> authorizing billions of dollars in appropriation to state and local governments for use in local public work projects in the construction industry. A provision was inserted in the Act imposing a "set aside" for minorities on these projects.<sup>10</sup> Specifically, at least 10% of all articles, supplies and materials used in a funded project essentially had to be procured from minority business enterprises (MBE). Congress imposed these affirmative action quotas to supposedly eliminate the effects of past societal discrimination resulting in a negligible percentage of public contracts awarded to minority contractors.

The purpose in imposing the set aside was to counteract the perceived effects of past and present discrimination generally thought

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8. 448 U.S. 448 (1980).

9. Public Works Employment Act of 1977 (PWEA) § 102 *et. seq.*, 42 U.S.C. § 6701 *et. seq.* (1982).

10. 42 U.S.C. § 6705(f)(2) (1982).

to have existed in the construction industry, to assure MBEs a certain percentage of federally funded public work contracts, and to compensate minorities bidding on contracts under the program at the time of passage of the Act for the effects of social, educational or economic disadvantage. However, no evidence existed of discrimination by Congress in disbursement of federal contracting funds, by the state and local government bodies implementing the disbursement, or by companies to which contracts were granted. Several individual construction companies as well as associations of construction contractors challenged the enactment since they were being excluded from bidding on such portions not because they had discriminated or because those MBEs permitted to bid had been identifiable victims of actual discrimination, but simply due to the fact of each business's ethnic or race identity.<sup>11</sup>

In addition, illustrations abound as to affirmative action plans (AAP) being implemented to supposedly statistically balance an employer's workforce by race, ethnic status or sex. For example, in 1978 the Santa Clara County, California Transportation Agency implemented a voluntary affirmative action plan establishing a "goal." This goal was unlimited in duration and imposed to attain a workforce percentage which approximated the distribution of women and minorities in the county labor market.<sup>12</sup> The AAP, which made no admission or mention of past discriminatory practices, was utilized as a basis to promote a female employee over a more qualified male who had been recommended for the position by the Agency's examiners.

In Philadelphia, the City's Board of Education adopted a quota system in order to employ at each school's respective level (elementary, middle and high school) between 75% and 125% of the existing proportion of black teachers employed city wide. This system, originally imposed at the insistence in 1978 of HEW's Office of Civil Rights (OCR) as a remedial device to desegregate school facilities,<sup>13</sup> was voluntarily reinstituted in 1982 even though OCR had informed the Board that the faculties had been successfully integrated, and that no further need existed to continue the 75/125% quota. The Board nevertheless decided to continue the quota in order to maintain a faculty ratio based on race. Teacher transfers were accordingly made thereafter on this basis at the detriment of certain white instructors.

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11. For a general discussion of MBE assistance programs, see Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 GEO. WASH. L. REV. 61 (1980).

12. See *Johnson v. Transp. Agency, Santa Clara County, Cal.*, No. 83-1532, DAILY LAB. REP. (BNA) No. 239, at D-1 (9th Cir., Dec. 12, 1984).

13. *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 896 (3rd Cir. 1984).

In another case, the Jackson Teachers Association (a union) and the Jackson, Michigan, Board of Education agreed in their collective bargaining agreement that in the event layoff of teachers became necessary, seniority would dictate "except that at no time [would] . . . a greater percentage of minority personnel [be] laid off than the . . . percentage of minority personnel employed at . . . [the time of the] lay off." The agreement also required that callbacks would be made in order to "maintain the above minority balance."<sup>14</sup> (Emphasis added). No finding of discrimination supporting the use of this set aside had been made.

Another recent example concerned the City of South Bend, Indiana. A preferential treatment system was established in hiring on the basis of the existence of a statistical disparity between the percentage of minorities employed in certain job categories and their class representation in the population of the City.<sup>15</sup> The plan, which was invoked voluntarily even though the City's hiring procedures previously in use were not considered discriminatory, had two separate lists to rank those minority and nonminority applicants achieving a certain base score on hiring tests. From each list a recommendation of hire was made. In 1980, a white male took the test and was ranked second on the nonminority hiring list, but was not hired even though several minority applicants with lower overall scores were hired.

Finally, in a case recently denied review by the Supreme Court, the State of New York raised examination scores of minority applicants in order to promote more minorities for the position of "Correction Captain" in the New York State prison correctional system.<sup>16</sup> The basis for the affirmative action measure was that a statistical disparity existed between the promotion test's selection rate of minorities and nonminorities. Specifically, the test in issue was given to 275 candidates in 1982, 32 of which were minority. Results indicated that 25% of the minorities passed the test, while non-minorities had a 48% passing rate. Notwithstanding the test's objectivity, relationship to job duties, and the lack of any discriminatory acts committed by the employer, a conclusion was reached that the minority passage rate of approximately 50% of the nonminority rate demonstrated adverse impact under EEOC guidelines.<sup>17</sup> A separate normalization curve was therefore established for minorities, resulting in eight more

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14. *Wygant v. Jackson Board of Education*, No. 82-1746, DAILY LAB. REP. (BNA), No. 215, at D-1 (6th Cir. Oct. 25, 1984), cert. granted, 53 U.S.L.W. 3727 (U.S. April 15, 1985) (No. 84-1340).

15. *Janowiak v. City of South Bend*, 750 F.2d 557 (7th Cir. 1984).

16. *Bushey v. New York CSC*, 105 S. Ct. 803 (1985).

17. 29 C.F.R. § 1607.4(D) (1984).

minorities passing the test, increasing the scores of minorities who had previously passed, and revising the highest minority score to become the overall highest score of all candidates.

These cases show the various mechanisms used in affirmative action cases and their heavy-handed effects. The problem with the use of these mechanisms is better understood if one examines the meaning of two often used and seldom understood terms; Discrimination and Fairness.

### DEFINITIONS

Two basic definitional issues have been given little regard in setting up preferential remedial programs. A brief definition of each of these issues is given below, along with an explanation of the problems inherent in a remedial program that overlooks these issues.

#### *Discrimination*

Absent some form of actual or historical discrimination, racial, ethnic or sexual preferences implemented *solely* to achieve a statistical balance constitutes discrimination for its own sake.<sup>18</sup> Presuming some indicia of discrimination forms the background for the program, no matter how remote or unconnected it may be with the particular employer involved, the question becomes what *type* of discrimination warrants a preferential treatment program.<sup>19</sup>

The examples cited indicate that the entities implementing the program were not found to have discriminated against any individual, nor were the beneficiaries found to have been identifiable victims of any actual discrimination. The program was justified in each case either because of a perceived concept of historical discrimination committed in the past against the chosen classes by society in general and/or the fact that a racial or sexual statistical imbalance existed between the entity's workforce and the population or labor market survey.<sup>20</sup> For purposes of utilizing preferences, this is too broad a definition.

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18. *Fullilove*, 448 U.S. at 529; *Bakke*, 438 U.S. at 307.

19. The issue here is *not* what legally can be or is implemented under existing court interpretations, but what *should* be the standard for use of these type of mechanisms.

20. This article is directed only at *remedies* imposed after a finding of some form of discrimination has been determined. It does not address the separate question whether statistical disparity alone is a justifiable basis to find discrimination. As to this issue, compare, e.g., *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983)(plan with end goal of 50/50 staffing ratio was constitutional); *Stetser v. Novack Investment*

Nonvictims of any specific identifiable discrimination committed by an entity considering affirmative action should not benefit at the expense of innocent third parties. If in fact a discriminatory practice is identified, then appropriate measures such as an injunction can be obtained to eliminate the practice. Make whole remedies, including perhaps some form of preferential treatment, may be considered. However, unless there are identifiable victims such as, for example, applicants being denied hire or employees denied promotion due to race, sex or ethnic status, the type of discrimination which triggers as a *remedy* the possible use of goals, quotas, preferences or set asides should not include societal or historical discrimination against classes or statistical disparities between various groups.

### *Groups and Individuals*

Depending on the statute, ordinance or program under which the preferential treatment falls, various groups and individuals have been either included or excluded from favored treatment. If, however, benefits are to be expended, clear definitions of the beneficiaries need to be made.

With respect to *groups*, under the Executive Order program preferences are directed towards Blacks, Hispanics, Asian or Pacific Islanders, American Indians or Alaskan Natives.<sup>21</sup> Under the PWEA set aside, Negroes, Spanish-speaking persons, Orientals, Indians, Eskimos and Aluets are included.<sup>22</sup> Some of the AAPs referenced, on the other hand, use some, but not all, terms similar to both programs. It is readily apparent, however, that inclusion of groups has been given little definitional consideration since the groups, while appearing at first glance to be the same, use names which are neither always facially identical nor necessarily fully interchangeable. To illustrate, "Black" is a term used both under the Executive Order Program and the AAPs cited earlier. However, "Negroes" is used under the NBE provision. Are the two terms identical? Similarly, are "Spanish-speaking" persons, as used in the MBE set aside, identical to "Hispanics" as identified under the Executive Order program? Also, are "Orientals" coextensive with "Asian or Pacific Islanders"? Are "American Indians" or "Alaskan Natives" the same as "Indians, Eskimos or Aluets"?

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Co., 657 F.2d 962 (8th Cir. 1981)(burden on employer to show affirmative action plan is in response to a conspicuous racial imbalance); *Lehman v. Yellow Freight System, Inc.*, (informal quota system held invalid as lacking procedural safeguards) 651 F.2d 520 (7th Cir. 1981); and *EEOC Chief Cites Abuse of Racial Bias Criteria*, Washington Post, Dec. 4, 1984, at A-13 (statement of EEOC Chairman Thomas).

21. See 41 C.F.R. § 60-4.3(a) (1983).

22. 42 U.S.C. § 6705(f)(2) (1982).



Even more complex problems arise in identifying subgroups under each of these classes. For example, in the only program that has apparently attempted to delineate the definition of groups,<sup>23</sup> "Black" means any racial group of Africa (except North Africa); "Hispanic" includes persons of Mexican, Puerto Rican, Cuban, Central or South American *origin* or other Spanish culture; "Asian" or "Pacific Islanders" refers to the *original* peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands; and "American Indian" or "Alaskan Native" signifies the *original* peoples of North America who maintain identifiable tribal affiliations. These so-called definitions, however, raise separate identification questions, such as what African racial groups are "Black"? Does "other Spanish culture" include persons from Spain or Portugal? How far "East" should one look to define the scope of the subgroups for Asian or Pacific Islanders? Indeed, what areas are included in the "Pacific Islands"? Are all citizens of Hawaii and Alaska included? What is meant by "identifiable tribal affiliations"? Does "Spanish-speaking" mean *any* person who speaks Spanish, irrespective of his or her "heritage" (PWEA provisions)? Is a college language major of American parentage who speaks Spanish included? What is meant by the term "Indian" (PWEA provision)? Does this refer only to American Indians, or does it also include American citizens from India?

In addition, classifying someone into (or excluding a person from) minority groups necessitates a determination of an *individual's* racial or ethnic make-up. The problem is, of course, that such classifications under existing standards appear inherently ambiguous and open-ended.<sup>24</sup> For example, under the Executive Order 11246 program, the focus, as indicated earlier, is on an individual's "origin."<sup>25</sup> The immediate question, however, is what is meant by "origin"? Taken literally, it could be argued that all humans originate from the same source. If "origin" means something different or to a lesser extent than the same source, is it based on a certain blood percentage? If so, Justice Stevens's comment in *Fullilove* is appropriate: "What percentage of . . . blood . . . is required for membership in the preferred class?"<sup>26</sup>

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23. See 41 C.F.R. § 60-4.3(a) (1983); see also, EEO-1 Reports, 1 EMPLOY. PRAC. (CCH) ¶ 1881, at 1322 (1981), submitted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17 (1982).

24. See generally Nagan, *Conflict of Laws: Group Discrimination and the Freedom to Marry—A Policy Science Prologue to Human Rights Decisions*, 21 How. L.J. 1, 30-34 (1978).

25. 41 C.F.R. § 60-4.3(a) (1983).

26. *Fullilove*, 448 U.S. at 552 n. 30 (Stevens, J., dissenting).

Must the candidate's parents, grandparents, great-grandparents, and so on, be considered to determine eligibility? If so, how far back must one go, and, how can the race or ethnic status of relatives be traced? Indeed, identifiers could find themselves in the dilemma where a "Black" was deemed in one state to be a person with 1/8 or more African blood while an American Indian was not a "colored" person if he or she had only 1/16 or less of such blood.<sup>27</sup>

Identification of individuals may also be made under government programs by using a three-fold standard:<sup>28</sup> appearance; whether he or she professes to be a minority; or whether the community regards the individual as belonging to a particular minority group. As to "appearance," one must first determine whether it pertains to color of a person's skin, some other physical characteristic, or both. If skin color is a gauge, Caucasians have been judicially recognized to range from white to olive brown.<sup>29</sup> Yet, some persons who would likely be acknowledged as members of minorities under the government's "origin" test ("Asian") have nevertheless been determined "light skinned" in appearance.<sup>30</sup> If "appearance" involves physical traits other than skin color, what physical characteristics should be examined? Would the factors vary depending upon whether the group is Black, Hispanic, American Indian, Asian or Pacific Islanders? Should the shape of a person's lip seam, eye fold, the size and shape of his or her ears, the configuration of toes, the torso generally, teeth, jaws, hair, or the concentration of pigments in certain anatomical positions (such as hands and feet) be inspected?<sup>31</sup>

In addition, whether the individual "identifies with the minority group" or is "regarded by the community" presents obvious problems. For example, a self-labeling (or even employer-labeling) analysis surely could defeat the purpose of classification. Factual questions will arise as to whether a particular person can rightly claim minority status. What mechanism is provided for determining such issues? There may be a desire on the part of many persons to be recognized as minority

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27. See *Loving v. Virginia*, 388 U.S. 1, 5 n. 4 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 187 n.6 (1964). Recently, such legal battles over racial designation continued. See *Louisiana Sees No Shades of Gray in Women's Request*, Washington Post, May 21, 1983; *Black Blood Measure*, Washington Post, June 10, 1983 (corresponding bill introduced in the Louisiana Legislature to repeal the law declaring a person to be black if he or she has 1/32d Black blood).

28. See EEO-1 Reports required under Title VII to the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982). See also 41 C.F.R. § 60-4.3(a) (1983).

29. *Trehan v. IBM Corp.*, 24 F.E.P. 443, 445 (S.D.N.Y. 1980).

30. *Ali v. Nat'l Bank of Pakistan*, 508 F. Supp. 611 (S.D.N.Y. 1981).

31. *Green v. New Orleans*, 88 So. 2d 76, 79 (La. Ct. App. 1956).

group members in order to receive preferred treatment or governmental benefits or protections flowing from such a determination.<sup>32</sup> Furthermore, if a person is "regarded in the community" as being a minority, one must ask "regarded" by whom? What constitutes "the community?" Is a poll required? Does "one person one vote" apply? What happens when there is a split of opinion? How recently and under what circumstances is the "criterion" satisfied?

It seems apparent that much difficulty exists in defining characteristics by which persons are labeled as being of a particular race or ethnic group. Indeed, a United Nations UNESCO study concluded that the division of the human species into races is arbitrary and invites abusive generalization, depending entirely upon the classifier, circumstance and purpose.<sup>33</sup> However, if entities are to be in the business of establishing preferential programs based on race or ethnic status for persons other than actual identifiable victims, studies need to be undertaken to eliminate, if possible, arbitrary identification determinations.<sup>34</sup>

#### FAIRNESS

These case examples illustrate the fact that awards of specific benefits are made to certain individuals while denied to others because of race, ethnic status or sex. The detriment to others, however, is summarily dismissed as the price nonminority individuals must pay for the acts of our forebearers. For example, the Jackson Board of Education set aside was justified as being fair to the white teachers being displaced on the basis that when effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such

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32. N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 200 (1975).

33. UNESCO Meeting of Experts on Race and Racial Prejudice, UNESCO House, Paris, 18-26 Sept. 1967, U.N. Doc. SHC/CS/122/8 (1967).

34. While no conclusion is made on the success of attempting to define characteristics identifiable for each race or ethnic group, the reader is directed to certain revealing comments. For example, one scholar commented: "It is unlikely that the species homo sapiens was ever divided into 'pure' races; but if it was, the fact that members of the species are both cross-fertile and migratory unquestionably means that virtually all of us would prove to be of mixed blood if the geneticists were to discover an infallible means of tracing the racial [or ethnic] inheritance of individuals." Bittker, *The Case of the Checker Board Ordinance: An Experiment in Race Relations*, 71 *YALE L.J.* 1387, 1421 (1962).

Studies utilizing U.S. Census Bureau surveys have also pointed out that a substantial portion (one-half) of the American population cannot identify their own ethnicity with any degree of certainty, presumably because of generations of intermixtures. See Sowell, *Myths About Minorities*, 68 *COMMENTARY* 33 (Aug. 1979). See also

a "sharing of the burden" is not impermissible.<sup>35</sup> The Philadelphia School District Plan was deemed fair to foster racial balance because it did not "unnecessarily trammel" the rights of reassigned nonminority teachers.<sup>36</sup> The Santa Clara AAP was found permissible because the excluded white happened to only be one person or at most, the non-minorities directly harmed were low in numbers.<sup>37</sup> Such justification was similarly used for the MBE set aside in *Fullilove*.<sup>38</sup>

Fairness of these types of programs must also be evaluated from two different perspectives. First, does justification exist for giving preferences to the chosen beneficiaries. This question, in turn, breaks down to whether justification exists for selecting certain groups and individuals to receive these benefits. As to groups, it cannot be argued that class-based discrimination against Blacks is part of America's history.<sup>39</sup> However, that fact certainly cannot justify class-wide conclusions of discrimination against other groups currently preferred under preferential programs. As pointed out in *Fullilove*<sup>40</sup>: "How does the legacy of slavery and history of discrimination against the descendants of [Blacks] . . . support a preference for Spanish-speaking citizens. . . ."

Estimates have been given that over 100 separately identifiable ethnic groups exist in the United States, all of which could be considered "minority."<sup>41</sup> Justice Powell acknowledged in *Bakke* that the United States became a nation of minorities, each of which: "had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said . . . that a shared characteristic was a willingness to disadvantage other groups."<sup>42</sup>

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*Cape Verdeans Face Identity Problem in U.S.*, Washington Post, July 6, 1980, at A-1, col. 1 (recounts experiences of Cape Verdean Americans who are descendants of white Portuguese and black Africans, which "confound(ed) . . . American social conditioning and bureaucratic pigeon voters."). The difficulty in identification has also been acknowledged in the judicial setting. See *Aponte v. Nat'l Steel Service Center*, 500 F. Supp. 198, 202 (N.D. Ill. 1980); *Fullilove*, 448 U.S. at 534 n. 5 and 552 n. 30 (Stevens, J., dissenting).

35. *Wygant*, No. 82-1746, DAILY LAB. REP. (BNA) No. 215, at D-3.

36. *Kromnick*, 739 F.2d at 911.

37. *Johnson*, No. 83-1532, DAILY LAB. REP. (BNA) No. 239, at D-4.

38. *Fullilove*, 448 U.S. at 484.

39. See Justice Marshall's separate opinion in *Bakke*, 438 U.S. at 387.

40. *Fullilove*, 448 U.S. at 552 n. 30 (Stevens, J., dissenting).

41. S. TERNSTROM, HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS vi (1980).

42. *Bakke*, 438 U.S. at 292.

This being so, one must ask "what basis exists to single out certain groups for benefits at the exclusion of others"? In a pluralistic society, such as the United States, a list of any groups which excludes some seems to be inevitably underinclusive.

Furthermore, even if a basis for preferential treatment exists as to a particular group<sup>43</sup> benefits should not be extolled automatically to all current individuals who possess the group's distinguishing racial or ethnic characteristic if in fact no identifiable discrimination and harm has actually occurred against each specific beneficiary of the program. As stated in *Fullilove*<sup>44</sup>:

In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut . . . currently suffers from the effects of past or present racial discrimination. Since the [preferential treatment] . . . must be viewed as resting upon such an assumption, it necessarily paints with too broad a brush. Except to make whole the identified victims of . . . discrimination, the guarantee of equal protection prohibits . . . taking detrimental action against innocent people on the basis of the sins of others of their own race.

The second different perspective from which "fairness" of preferential programs must be examined concerns persons actually hurt by giving benefits to others. As the examples indicate, remedies for *nonvictims* are deemed acceptable because the burden imposed on the *class* of innocent third parties is perceived as "necessary" even though *specific* individuals are totally trammelled. Emphasis must be made that justification for the detriment imposed is considered as to the *class* of nonminorities rather than the *individuals* actually suffering the harm.<sup>45</sup> This perception, however, fails to acknowledge that rights should be construed to inhere in individuals, not groups.<sup>46</sup> Race, gender or ethnic status is an improper basis to either reward or penalize any person who has not suffered identifiable harm. Indeed,

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43. If justification for group preferences is based on discrimination against each class in the past, it seems that benefits given each class somehow should correspond only to the magnitude of discrimination each class suffered in comparison with other groups. Otherwise, both under and overinclusive remedies would seemingly result.

44. *Fullilove*, 448 U.S. at 530 n.12 (Stewart, J., dissenting).

45. Compare *Vanguards of Cleveland v. City of Cleveland* No. 83-3091, DAILY LAB. REP. (BNA) No. 21, at E-3 (6th Cir. 1985).

46. See *Civil Rights Commission Praises Supreme Court's Stotts Ruling*, DAILY LAB. REP. (BNA) No. 125, at A-4 (July 13, 1984).

preferential treatment accorded to nonvictims, or even to actual victims beyond measures necessary to make them whole, deprive certain innocent individuals in the examples cited their rightful place. The issue in using preferential programs should not be clouded by our resolve against historical patterns of discrimination, but must be examined as to what *remedy* is appropriate to improve the status of disadvantage groups. Should an employer or any other entity give benefits to nonvictims at the expense of innocent third parties because of a perceived guilt of our forefathers?

Where discrimination is found to currently exist in any entity, proper judicial channels are available to eliminate its continuation under the civil rights acts, various government programs, constitution or state laws. However, in remedying the damage caused by any such historical or societal acts, one of the leading advocates of civil rights in this century properly noted<sup>47</sup>: "The relief [for findings of discrimination against an entity calls for] an injunction against future acts or practices of discrimination . . . [However] affirmative relief, such as hiring, reinstatement . . . or back pay . . . for anyone [not an actual victim should be] *forbidden*. . . ."

Preferential programs may be warranted as a remedial device, but only in the narrowness of circumstances. When specific persons are identified as having suffered actual harm because of an entity's discrimination, all forms of relief, including set asides, quotas, goals or preferences should be considered to "make whole" such victims. Even then, however, a balancing must occur as to the burden imposed on innocent third parties against alternative, less harmful means to "make whole." This concept, although admittedly in a more narrow context, was recently articulated by the Supreme Court and should constitute the standard for use of preferential programs<sup>48</sup>:

If individual members of the [preferred] . . . class demonstrate that they have been actual victims of the discriminatory practice [of a particular entity], they may be awarded [reparation for actual harm suffered] . . . [H]owever, . . . mere membership in the . . . class [should be] insufficient to warrant . . . award; each individual must prove that the discriminatory practice had an impact . . . even when an individual shows that this discriminatory practice has had an impact . . . automatic [entitlement does not follow, for a] . . . balance [of] the equities in[volved must occur] . . .

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47. 100 CONG. REC. 6,549 (1964) (statement of Sen. Humphrey).

48. *Firefighters Local 1784 v. Stotts*, \_\_\_\_ U.S. \_\_\_\_, 104 S. Ct. 2576 (1984).

## EFFECT OF SET ASIDES

The effect of preferential treatment is not a settled question. Certain studies suggest that the implementation of preferential programs such as exemplified here increases the percentage of minorities and females in the workforce or in the award of contracts. For example, under the PWEA set aside, progress reports during the implementation of the program indicated 16-17% of the funds expended went to MBEs.<sup>49</sup> Under the Executive Order Program, a study by the University of California<sup>50</sup> indicated a strong increase in blacks and females.

Argument also exists, however, that such programs have either little substantial affect or that they demean the beneficiaries for whom preferences are sought.<sup>51</sup> For example, studies have indicated that Title VII class action litigation against actual discriminators has a greater impact than affirmative action goals for increasing minority levels.<sup>52</sup> Set asides have also been looked upon as the granting of special benefits to groups that are somehow less qualified<sup>53</sup>, or that these programs imply that the persons benefitted cannot compete successfully in the open marketplace.<sup>54</sup> Dr. John Bunzel of the Hoover Institute remarked that imposition of set asides and quotas will fail to improve the economic and racial position of the disadvantaged, and in fact will damage minorities' motivation, self-respect, and capacity.<sup>55</sup> Professor William Van Alstyne of Duke University indicated racial set asides stamp their recipients with a badge of inferiority, and put pressure on minority groups to subdivide themselves against each other.<sup>56</sup> Numerous problems such as nonminority "front" companies have also been found to dilute the objectives of such programs.<sup>57</sup>

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49. See Department of Commerce, *Local Public Works Program, Interim Report: Fostering the Development and Expansion of Minority Firms in Construction and Related Industries* (Sept. 1978).

50. Leonard, *The Impact of Affirmative Action (The Crump Study)*, DAILY LAB. REP. (BNA) No. 113, at A-8 (June 10, 1983).

51. See, e.g., *Small/Minority Business: OFPP Says Agencies' Automatic Doubling of MBE Goals Ineffective*, FED CONTRACTS REP. (BNA) No. 886, at A-19 (June 15, 1981).

52. See *supra* note 50.

53. See *United Jewish Organization v. Carey*, 430 U.S. 144, 173-74 (1977).

54. *Excerpts From Final Report of EEOC Prepared By Transition Team of Reagan Administration*, DAILY LAB. REP. (BNA) No. 15, at E-2 (Jan. 23, 1981).

55. See DAILY LAB. REP. (BNA) No. 117, at A-9, A-10 (June 18, 1981).

56. DAILY LAB. REP. (BNA) No. 85, at A-7 (May 4, 1981).

57. E.g., *Nearly One-Fourth of MBE-WBE Highway Contractors Decertified in New Jersey*, 30 CONSTR. LAB. REP. (BNA) 1110 (Dec. 5, 1984).

Whichever side presents the stronger case, however, is beside the point. Quotas, preferences, goals and set asides are opposed by most Americans, including Blacks.<sup>58</sup> History cannot be rewritten. To perceive that somehow the use of preferential programs will balance this society or cure the perceived effects of historical discrimination in employment, contracting, education, etc., defies reality. Our objective should be equal treatment, not equal and unobtainable results.

### ALTERNATIVES

Because set asides are an improper social mechanism to improve the status of disadvantaged groups, does not mean other alternatives are unavailable. The United States Commission on Civil Rights indicated affirmative action techniques such as training, education, counseling, recruitment programs certainly warrant encouragement.<sup>59</sup> In this regard, several concepts should be explored.

#### *Joint Ventures*

Programs could be established which encourage companies to enter into joint ventures with individuals who own minority, female or any disadvantaged business enterprise by providing tax incentives. The joint venture could be on a project basis or for a fixed period of time (hours, months, etc). The advantage of the joint venture is that this would enable the business enterprise entrepreneur to work with the company over a period of time in a "partnership-type arrangement." This arrangement would assist individuals in the development of general management skills, and specific expertise in such areas as finance, labor, bidding procedures, marketing, and bonding.

Joint ventures also allow for flexibility. The level of participation in the joint venture could hinge on the disadvantaged individual's experience, with participation on a 90/10, 80/20 or greater basis. If the joint venture extended over a substantial period of time, a greater share of the joint venture could be given to the disadvantaged individual as he or she acquired more experience. This concept would serve to improve the skills of these businesses and thereby provide greater guarantees that they will be able to compete without depriving nonminorities of opportunities to competitively bid on a portion of any project or grant.

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58. See, e.g., DAILY LAB. REP. (BNA) No. 194, at A-7 (Oct. 5, 1984)(statement of U.S. Civil Rights Commission Staff Director Chavez).

59. See *Policy Statement of the U.S. Commission on Civil Rights*, DAILY LAB. REP. (BNA) No. 12, at A-3 (Jan. 14, 1984). See also DAILY LAB. REP. (BNA) No. 189, at A-3



### *Technical Services*

Technical services could include assistance in: taking steps to become prequalified or licensed as a contractor, subcontractor, vendor, supplier or whatever requirements exist in a particular industry; understanding bonding requirements; understanding how to obtain loans and working capital, or any other matter related to a particular industry. These services could take the form of either a toll-free number which would furnish information on bidding solicitation and answer questions or in-field assistance by support personnel who would visit minority, female or disadvantaged business owners at their place of business to provide technical services. Another support service would be to compile a directory of interested MBEs, WBEs or other disadvantaged enterprises such as used by the U.S. Commerce Department's Minority Business Development Agency, which formulated a National Automated Minority Business Source list for use by companies to do business with MBE firms.<sup>60</sup>

### *Financial Assistance*

A problem in starting any business or to make it grow is obtaining working capital. Financial assistance programs, either individually or collectively with other programs, could greatly assist in increasing the number of viable minority, female and disadvantaged business enterprises. While numerous types of financial assistance is conceivable, one program could be to direct loans similar to those which the Department of Health, Education and Welfare provided to students at a reduced rate and payable at a later period of time.<sup>61</sup> Such a program applied to individuals owning or operating business enterprises could furnish needed capital at an extremely low rate which could be payable at a later time on a sliding scale of interest, thereby not placing any undue burden on the enterprise just as it is becoming viable.

### *Educational Training*

Many individuals who are socially and economically disadvantaged would perhaps like to get into a business of their own or a particular

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(Sept. 28, 1984) (statement of G. Banks, a psychologist with Human Technology, Inc.); and *Analysis of E.O. 11246 Contract Compliance Programs by Staff of Senate Labor & Human Resources Committee*, DAILY LAB. REP. (BNA) No. 82, at A-2 (Apr. 28, 1982).

60. *Small Minority Business: OFPP Says Automatic Doubling of MBE Goals Ineffective*, FED. CONTRACTS REP. (BNA) No. 875, at C-2 (Mar. 30, 1981).

61. Title IV, Part B, Higher Education Act of 1965, 20 U.S.C. §§ 1071-1086 (1976 & Supp. 1984).

field but cannot afford the money to abandon current employment to attend school and acquire the necessary skills. Thus, there exists a gap that could be filled by a program similar to that used for veterans to allow certain direct educational grants to get them into the main stream to make up for lost time. Additionally, money could be channeled to the universities to establish work-study programs which would assist individuals who own or operate disadvantaged business enterprises to acquire skill needed to effectively operate a business by learning and applying these skills in a realistic business situation. Indeed, more programs need to be explored similar to what the DOL entered into last year under the Job Training Partnership Act (JTPA) with the National Puerto Rican Forum for programs designed to help Hispanic workers, including courses aimed at developing job search skill, etc.<sup>62</sup> JTPA has also been used to teach groups business training courses and give technical assistance for starting businesses.<sup>63</sup>

#### *Assistance Through Trained Workers*

One of the greatest sources of training for persons entering into the business market for the first time is to learn from the experience of those already there or who have been there. A type of program which could be established with minimal financial assistance from the government would be a "pool" of trained individuals, e.g. business executives, familiar with the particular industry, who would be loaned to minority, female or disadvantaged business enterprises. Another source of expertise would be the utilization of retired personnel who would be willing to share with such "would be" entrepreneurs the knowledge and experience gained from their prior employment. Another method of learning from experienced individuals would be to establish an internship program to allow individuals who own or wish to own enterprises or to learn particular skills to spend time (six months/one year) with a "host" company. The purpose of the internship would be to allow the intern to acquire experience in business administration, management, estimation, bidding process, bonding, banking, particular job functions or whatever would be applicable depending on the industry.

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62. *Labor Department Enters Contract to Assist Hispanic Workers*, DAILY LAB. REP. (BNA) No. 18, at A-5 (Jan. 27, 1984).

63. DAILY LAB. REP. (BNA) No. 73, at A-4 (Apr. 16, 1984). Indeed the SBA reported that small firms provide greater employment opportunity for female and minority workers. See *Job Creation in Economic Recovery Led by Small Business*, SBA Reports, DAILY LAB. REP. (BNA) No. 57, at B-3 (Mar. 23, 1984).

*Bonding*

A major difficulty of any enterprise entering into the market is obtaining bonding. Many projects, particularly those involving the government, require companies to post bonds covering the completion of work and payments to their employees for work performed. For an existing viable company, this may not present any real problem. However, where a person is entering the market, the possibility that many bonding companies will not provide a bond at any price or are only willing to provide a bond at a very high cost must be faced. Thus, in a competitive bid situation, a MBE, WBE or other disadvantaged group might not be able to compete because he or she cannot obtain a bond. Greater assistance could be provided through government assistance programs to such enterprises to ensure that there exists a source of bonds at a fair rate.

## CONCLUSION

Where an entity has discriminated, appropriate action should be taken to eliminate the discriminatory acts and make whole those victims who have suffered actual harm. In addition, affirmative action in the form of training, education, joint venture programs, bonding, etc. should be encouraged and explored in order to assist all disadvantaged groups, including minorities and females. However, set asides, quotas, goals or preferences should not be used to remedy the effects of either actual discrimination to nonvictims or the broader concept of historical discrimination solely due to such persons' race, sex or ethnic status.

We should not, as Justice Blackmun suggested, use race "in order to get beyond racism."<sup>64</sup> Indeed, such a concept is as onerous in historical perspective as "separate but equal," and certainly should be deemed alien to our constitutional objective of equal protection for all citizens. One gets beyond racism by getting beyond it now.<sup>65</sup> Let our resolve be to eliminate racial, ethnic and sexual barriers, not create them in an attempt to rewrite history by parceling out benefits to nonvictims at the expense of innocent third parties.

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64. *Bakke*, 438 U.S. at 407.

65. See Van Alstyne, *Rites of Passage: Race, The Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979).