AFFIRMATIVE ACTION IS NOT MORALLY JUSTIFIED

by

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A dissertation submitted to the

Graduate School-New Brunswick
Rutgers, The State University of New Jersey

In partial fulfillment of the requirements

For the degree of

Doctor of Philosophy

Graduate Program in Philosophy

Written under the direction of

Douglas N. Husak

And approved by

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New Brunswick, New Jersey

October, 2008
ABSTRACT OF THE DISSERTATION

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This dissertation is a critical examination and rejection of the two principal types of moral justification, the compensatory and noncompensatory, of affirmative action involving preferential treatment (AA) for blacks, Hispanics, American Indians, and women in hiring, promotions, and admissions. Neither of these approaches to the justification of AA, I have argued, is able to defend AA successfully. AA not morally justified.

Thus, succeeding compensatory arguments for AA, individual and group oriented, are unable to evade, undermine, or disarm the objections that AA violates the principles of compensatory justice governing who is owed compensation, what compensation is owed, and who owes compensation, and that AA violates the principles of justice and fundamental individual moral rights governing the distribution of such social goods or benefits as desirable and valuable positions. The principles of justice and moral rights violated by AA govern the distribution of social benefits, including desirable positions, and burdens and systematize, unify, and
explain correct moral judgments about the injustice of actions, policies, and practices in a variety of contexts of distribution. Moreover, backward-looking or compensatory arguments for AA have the implication that unjust and morally unacceptable compensatory policies that are morally similar to AA would be justified in contexts other than hiring, promotions, and admissions. Furthermore, the noncompensatory justifications of AA, including meritocratic and utilitarian forward-looking arguments, are unable to evade or to undermine the objection that AA violates principles of justice and fundamental individual moral rights and the objection that these attempted justifications of AA have the implication that unjust and morally unacceptable noncompensatory, forward-looking policies that are morally similar to AA would also be justified in contexts other than the standard ones.
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Chapter 1

Introduction

Among the most abhorrent forms of social injustice, most people seem to agree, is systematic and pervasive discrimination directed against whole groups—e.g., racial, ethnic, sexual, and religious—of people. Blacks, American Indians, Hispanics, and women are among those who have been and have continued to be, at least until very recently, targets of systematic discrimination and injustice, it is widely believed. American society has had a history of flagrant denial of basic rights and opportunities and unjust distribution of social benefits and burdens to racial minorities and women. Black Americans are a segment of the American population that has been subjected to significant forms of injustice and has been systematically excluded from the mainstream throughout most of this country's history. Thus, blacks were subjected to slavery in the Southern states and some other places and then to a regime of segregation known as Jim Crow, which evolved after the Civil War and lasted until the middle of the twentieth century. The infamous Jim Crow practices or Black Codes excluded blacks from white public schools, denied them the franchise (such as through literacy tests and poll taxes), prohibited them from intermingling with whites in public places (e.g., hotels, restaurants, theaters, and railroad cars) and confined them to inferior and the least desirable accommodations, and
prohibited them from using the same public restrooms and drinking fountains as whites.  

The existence of racial and sexual discrimination in the past in this country is thus a matter of historical record and beyond dispute, many people insisted nearly four decades ago. However, the question that remained was, What follows for us here and now? What should the response of this society be "to such injustice in its own domain"? Some people said that nothing at all follows except perhaps that we should stop discriminating or be more vigilant about allowing any form of discrimination. Indeed, "the United States began, in the mid-1960s, an extensive assault on racial and sexual discrimination." The "Civil Rights Act of 1964 (as amended in 1972) and Executive Order 11246 (as amended in 1968) were major legislative and regulatory initiatives." The early 1960s witnessed a high degree of confidence that once the artificial barriers of segregation and discrimination were removed group disparities and inequalities would disappear. "'In the 1960s, sure, most of us thought that equal rights would lead to equal performance,'" a prominent social scientist remarks. "'For most liberals, I believe, that was considered self-evident.'" However, anti-discrimination initiatives and the elimination of the most blatant forms of discrimination that restricted employment and educational opportunities turned out to be insufficient to solve the problems of racism and sexism quickly, many influential social thinkers, government officials, and
others concluded.\footnote{10}

The advocacy of care and vigilance about allowing any form of discrimination "might look fair and aim to be fair"; but, despite appearances, critics said, it is "not fair." This approach "would simply freeze an unfairly established status quo."\footnote{11} Even with the dropping of formal or artificial barriers as a result of the assault on racial and sexual discrimination, conditions did not quickly or dramatically improve. Large group inequalities in earnings, employment, higher education, and so on, persisted. Progress in eliminating these disparities "seemed so slow relative to the standards of that optimistic era."\footnote{12} Thus, although racial disparities in earnings narrowed in the 1960s and unemployment rates fell in the late 1960s, disparities in earnings did not narrow as quickly as either blacks or whites had hoped; and the black unemployment rate remained roughly twice the white rate.\footnote{13} In addition, blacks were represented in graduate schools, the professions, high-level positions in business, and positions of social and political leadership in numbers well below their percentages of the population. This underrepresentation, critics of the antidiscrimination approach said, is a legacy of social injustice, not a consequence of a lack of interest or ability\footnote{14} or of racial differences in intelligence that are genetic in origin, as some writers have erroneously claimed.\footnote{15} Discriminatory and exclusionary practices "must bear much of the responsibility for the bleak outlook which confronts blacks
and women today,"16 a white academician wrote a little more than two decades ago. Such practices have perpetrated injustices against blacks, American Indians, women, and Hispanics so substantial that the life prospects of members of these groups have been seriously diminished, asserted politicians, judges, lawyers, academicians, social scientists, journalists, writers, and others. Such practices have made it difficult and often impossible, it was claimed, for members of these minority groups to realize values and goals which would otherwise have been attainable. Hence, to insist, critics of the antidiscrimination said, that "we now freeze this status quo and proceed 'fairly,' on a case-by-case basis, will guarantee that the white-biased social momentum will continue for at least the foreseeable future."17 The antidiscrimination approach to the problem of racial and sexual discrimination is therefore inadequate.

Critics of the antidiscrimination approach, including many blacks and whites, wanted "to eradicate the effects of past discrimination and to put an end to the bias in momentum as soon as possible."18 Hence, given the belief that antidiscrimination statutes alone would not dislodge long-standing patterns of discrimination19 and given their frustration by the slower-than-anticipated pace of integration and acceleration of the advancement of certain minority groups and women in society, these critics sought a more effective instrument in dealing with obdurate group disparities and inequalities, such as the substantial gap between
white and black test scores. This gap, they maintained, handicapped blacks in competition for college and university places and in pursuit of many types of employment using tests to evaluate candidates. These critics called for active measures to eliminate the group disparities and inequalities that they claimed are the legacy, that is, the effects, of past discrimination and to ensure that representative numbers of blacks, other minorities, and women are in quality jobs and positions of prestige and authority by facilitating the access of members of these groups to desirable employment and higher education.

Some of the active measures that evolved from the antidiscrimination initiatives begun in the 1960s permit or require businesses, colleges, professional schools, government agencies, and other institutions to give preferential treatment to blacks, women, Hispanics, and American Indians as well in hiring, promotion, and admissions decisions. Taking race, sex, and ethnicity into account and granting preferences in employment and higher education to eliminate or to greatly reduce group disparities and inequalities has become the regnant social policy, enforced by government agencies and courts and generally embraced by federal and local governments, businesses, colleges, and universities. Started in 1971 (according to most commentators), preferential treatment for the specified minority groups and women has become an integral part of selection processes in employment and higher education and "a pervasive feature of
professional life.\textsuperscript{28} Although this policy was always controversial, it survived more or less unchanged, some writers note, until the mid-1990s,\textsuperscript{29} when nationwide rethinking and reevaluation of the policy of preference was underway\textsuperscript{30} and when several political and court decisions banned or strictly limited such favorable treatment.\textsuperscript{31} A highly publicized policy change in recent times is California Proposition 209, a measure intended to "prohibit gender or racial preferences in public employment, education, or contracting."\textsuperscript{32} Approved as a referendum issue in 1996, it was temporarily blocked by a federal judge on the grounds that it likely violated the equal protection clause of the Fourteenth Amendment to the Constitution. The measure ultimately passed, and subsequent petitions to the Supreme Court to review the decision have been denied. A similar measure passed in the state of Washington in the 1998 election.\textsuperscript{33} In 1996, the Fifth Circuit Court of Appeals, in its verdict on the preferential admissions policy at the University of Texas Law School, banned racial preferences throughout Texas, Louisiana, and Mississippi.\textsuperscript{34} In 1998, the First Circuit Court of Appeals ruled that the race-based admissions policy at three of Boston's prestigious public schools was unconstitutional.\textsuperscript{35} In 1999, a federal judge ruled that the race-based admissions policy at the University of Georgia was unconstitutional.\textsuperscript{36} In 1999, moreover, the U.S. Supreme Court refused to allow the Dallas Fire Department to revive a preferential program to promote more blacks, women, and
Hispanics. Preferential treatment for the designated minority groups and women in employment and higher education, in the view of its critics, transgresses the principle of nondiscrimination established in the 1960s. However, although programs of preferential treatment have been under attack "legally and politically," as one writer observes, "they remain ubiquitous." 

The central question in the controversy is, Is the use of the criteria of race, sex, and ethnicity in hiring, promotions, admissions and the selection of minority and female applicants over better-qualified white male applicants legally and morally justified? Do programs of preferential treatment for members of the designated groups in employment and higher education have, or lack, moral, legal, and constitutional foundations? The present discussion is a critical examination of the view that these programs are indeed morally justified.

Having inspired thoughtful analysis and impassioned controversy, the debate over programs of preferential treatment has continued for more than two decades. It raged in academic circles in the 1970s and early 1980s and then exhausted itself for a decade and reemerged in the 1990s, spurred by legal and political developments. Preferential treatment has been a disturbing, divisive, and unresolved issue; disagreement on this issue has been bitter, deep-seated, and stubborn. As a result of recent attempts by referendum, legislation, and judicial action to change
current policies, emotions have intensified. Expectedly, the public debate has been intense, vigorous, and extended; and the rhetoric surrounding it has been particularly astringent. Also, a voluminous literature has accumulated in the law journals commenting on judicial and executive interpretations of the law and the Constitution. Somewhat less expectedly, as one writer remarks, the issue has become the subject of academic moral inquiry and has engendered an outpouring of writings, most of it appearing in academic philosophy journals. Preferential treatment has been controversial within philosophy, generating philosophical interest and disagreement. Philosophers produced forceful arguments on both sides of the issue in the 1970s, although their interest waned in the 1980s, when it seemed that every conceivable argument for and against preferential treatment had already been presented. However, the legal and political developments that spurred the renewal of the public debate over this policy also revived philosophers' interest in reexamining the issue. "Few other public policy controversies," one commentator writes, "have generated such a direct philosophic engagement."

Philosophical examination of preferential treatment is worthwhile and appropriate, according to some commentators, because of the moral issues that are implicated, issues that concern, for example, the evils of racism and racial discrimination, matters of compensatory and distributive justice, and the justifiability of the departure from an
exclusive regard for the qualifications of job and school applicants that this policy requires. Other issues concern the moral permissibility of the use of the categories of race, sex, and ethnicity in social and public policy; the existence of moral rights and their application to debates over the moral permissibility of social policies; the moral limits on society's pursuit of its goals; and the requirements of equality and social justice in a society believed to be striving to overcome a heritage of inequality and discrimination. "The debate over preferential treatment," one writer says, "is really a debate about the import of some of our most fundamental political ideals." Another commentator writes, "Relations among races and between sexes, assertions of individual rights, and demands for equality in distribution of society's benefits—all of which figure prominently in this issue—constitute the fundamental social problems of our era." The problem of preferential treatment is indeed an issue of contemporary practical concern, since preferential treatment as a social and public policy has profound effects on the lives and well-being of many persons. Moreover, thorough philosophical discussion of this problem is demanded, one moral philosopher writes, "not only because many persons' futures are at stake, but also as a test of ethical theory itself." If "normative moral theory cannot be tested by implications regarding solutions to real issues, then it remains academic and in all probability oversimplified." Unless moral philosophers become involved
in the discussion of social problems, "their abstract principles remain without adequate grounding." Other philosophers agree that the applicability of ethical theories and their ability to resolve practical problems provide a means of testing and improving them. "Careful reflection on practical ethical issues," one philosopher asserts, "helps drive the development of a plausible moral theory." Indeed, if a proposed moral theory generates and supports intuitively incorrect answers about real issues, "then we inclined to take this," another philosopher writes, "as a significant (or perhaps even decisive) argument against that theory." In provoking questions of philosophical importance, therefore, preferential treatment presents a serious challenge to those who believe that philosophers can use their skills and reason and argument in contributing to the solution of problems of practical ethics.

Philosophical analysis can contribute to public debate debates on issues of practical importance and to the solution of practical ethical or moral problems through, for example, the clarification of whether it is factual disputes or conflicting ethical views that give rise to disagreement over what to do, the illumination of significant philosophical questions, rigorous argument, the clarity of presentation of the issues involved, clearer insight into the central issues, and the exposure of inconsistencies and arbitrary distinctions in opposing positions. In particular, philosophical ethical analysis has made an important
contribution to deepening understanding of the problem of preferential treatment. In reflecting on this problem philosophers have made significant progress in exposing and correcting defects and deficiencies in the debate, particularly the popular and legal debate, such as confusions and misconceptions, poorly reasoned arguments, appeals to vague principles to support contradictory conclusions, and the lack of defense or justification of the principles invoked or their application to the present case. Philosophers have made progress in recognizing, analyzing, and clarifying the complexities of the issue; in articulating the diverse arguments and different substantive positions and in providing awareness of the challenging considerations offered by opposing advocates; in assessing the strengths and weaknesses of arguments and positions and in determining which side has the stronger case and seems the most plausible in the light of all the relevant arguments; and in illuminating and critically appraising the underlying assumptions and fundamental presuppositions of the arguments that can be offered in support of and in opposition to preferential treatment.62

Proponents of preferential treatment for certain minorities and women in employment and higher education offer several rationales for it. Thus, some proponents defend this policy as a form of compensatory justice for blacks and the other designated groups; they seek to justify it by invoking past injustices that have prevented
members of the designated groups from "'competing on a level playing field'" with white males. Other proponents of preference hold that a serious misconception about it is that it is primarily concerned with redress or compensation for members of the designated groups who have been victimized. Thus, some defenders of quotas or seeming preferences claim that they are a justified means of correcting normal selection procedures that are biased and discriminatory. Some proponents of preference offer a redistributive rationale. They argue that in the light of America's heritage of inequality and discrimination preferential treatment is a means of overcoming social and economic inequalities between racial, sexual, and ethnic groups; strengthening and improving the position of disadvantaged groups; expanding opportunities for previously excluded groups; undermining and eradicating an unjust racial system; and advancing the goal of an egalitarian and a just society. At least some proponents of this policy see it "as an obvious moral requirement in view of our heritage of racial injustice and hence tend to equate opposition," one commentator writes, "with a kind of moral blindness to our true situation."

Other proponents of preference maintain that it is conducive to the general welfare by, for example, benefiting not only those group members who actually gain prestigious and well-paying positions but also "the many others who take pride and pleasure in their success." integrating blacks
into all segments of society and diminishing racial division and easing racial tensions, breaking down barriers between groups and disrupting stereotypes and thereby fostering understanding and harmony, and eliminating racial and sexual prejudice. Preferential treatment is also said to have such generally beneficial consequences as reducing unemployment, removing disparities in income distribution, improving professional services (e.g., medical and legal services) in minority neighborhoods, providing minority and female role models as inspirations for other minorities and women, and enhancing the self-esteem of blacks and women. Some proponents of preference claim that in selecting minorities and women, who provide alternative perspectives on history, philosophy, politics, and social issues, this policy has beneficial effects for both education and research. Preferential treatment is generally beneficial, these proponents claim, in providing exposure to a diverse student body, which is seen by college administrators as "an integral part of 'training young people for a multicultural habitat,'" and enriching higher education and the future by providing an important forum for the expression of ideals, values, and conceptions of the good life which would otherwise remain unheard.

Opponents of preferential treatment maintain that it faces serious moral objections and that the burden of proof is on supporters of this policy to show not only that these objections are misguided or indecisive but also that the
the reasons in favor of this policy have sufficient weight to justify the departure from racial and sexual impartiality. Concerning the compensatory rationale, opponents of preferential treatment, while conceding that injustice against blacks and others has taken place, deny that this injustice could or should be remedied by preferential treatment. Some critics of preferential treatment argue that the proof that the favoring of less-qualified minority and female candidates over better-qualified white male candidates is morally unjustified is that no one has succeeded in justifying it. Some critics present strong arguments that preferential treatment is in principle unjustifiable, for example, that this policy is tantamount to reverse discrimination in allocating employment and educational opportunities on the basis of race, sex, and ethnicity "just as racist (and sexist) actions in the past did." The present system of preferences in the United States is nothing more than a variation on a very old and apparently tenacious system of discrimination." Other critics of preference, however, stress that they do not regard this policy as equivalent to past invidious discrimination, since it does not stigmatize or express contempt for white males, these critics argue, or have the same symbolic function vis-a-vis white males as the original discrimination in relation to blacks. Although these critics reject the charge that this policy constitutes reverse discrimination, they agree that in violating the principle of merit this policy is unjust.
Some critics focus their objections on the negative or undesirable consequences of this policy, such as the lowering of standards of performance and decreased societal efficiency, the undermining of society's system of higher education, damage to blacks' self-confidence, white indignation and resentment, and the reinforcement of racial prejudice and the potential for increased racism. Some critics believe that a strong empirical case could in principle still be made for preferential treatment "as an extraordinary tactic instituted in a critical time to right past and potentially future wrongs." Preferential treatment would be justified "at the very least," these critics hold, "only if there is strong reason to think it produces benefits of unusually great significance" unobtainable "through less intrusive policy options." They make it "reasonably clear," however, that "no such strong reasons are forthcoming." 88

The philosophical debate over preferential treatment, one commentator claims, is "essentially stalled." 90 The "'normative literature'" on preferential treatment is "stuck in a rut with the familiar arguments 'repeated verbatim year by year,'" another commentator writes; and "the old arguments . . . resuscitated by a new generation of philosophers with a few wrinkles added." 91 Arguments on both sides of this contentious issue undoubtedly will continue to proliferate, "but it is unlikely that a truly innovative one will sprout after a quarter century of debate." The "two camps seem as unreconciled as ever." 92 Denying that the debate can
be usefully restarted, one writer says, "Existing empirical evidence and theories of justice are not capable of breaking the deadlock." The "probability of finding new evidence or a theory or principle that will break the deadlock is remote."" It is unlikely," a commentator agrees, "that any new intellectual breakthrough capable of yielding a decisive victory will emerge at this late date." The conclusion that the philosophical debate over preferential treatment "has for some time been stalled," another commentator remarks, "seems incontestable." Philosophers on either side in the debate "appear to have found no common ground from which to convince" the other side. "But that may be due to an insistence on a standard of proof that is not appropriate to the subject." In any case, "discussion has become more muted." While concurring that the debate is stalled, however, some writers maintain that one may disagree with the assessment that "no new evidence is in the offing." Evidence that "preferential policies are often responsible for racially 'balkanizing' the campus" and that "preferential attitudes are disintegrative, breeding on many a campus 'the cultural diversity of Beirut,'" for example, may get the debate "restarted and perhaps redirected." Some writers who do not believe that the debate can be usefully restarted think that the best we can do in the present circumstances is to offer reasonable compromises that will pacify the opponents of preferential treatment while satisfying some of its proponents. After many years
of philosophical and political argument, these writers sug- gest, it is time "to seek intelligent compromises that might be acceptable to all sides." Unfortunately, these attempts "only illustrate again just how difficult compromise is to accept in this area." The "depth of disagreement" about this issue "makes compromise to which all well-intentioned parties could agree," these writers claim, "so difficult to achieve."

Both those who support preferential treatment and those who oppose it, some commentators suggest, ought to reexamine and to "rethink the bases of their opinions." They should "test their ideas" on this issue against "rigorous and informed challenge." They "may not discover grounds to modify their views, but at least they will revitalize them." Recognizing the importance of such reexamination, rethinking, and testing, I seek in this critical discussion, not simply to rehearse the details of the usual arguments for and against preferential treatment, to trace the main lines of argument on this issue, or to provide an overview of the state of the controversy, but to present a sustained rational argument for the substantive moral view that one side on this issue, the opposition to preferential treatment, is essentially right and the other side mistaken. What is needed in this debate is a clear explanation and understanding of precisely why preferential treatment is seriously unjust and why attempts to refute or to evade this fundamental objection are doomed to failure. My task in the
present discussion is to provide such an explanation and in so doing to provide a resolution of the issue that is philosophically compelling, even though ardent supporters of this policy may remain unconvinced because of their enthusiasm for the goals they fervently believe this policy serves and some opponents of this policy may shrink from affirming the "straightforward final verdict" that moral argument against preferential treatment ineluctably points toward. A policy of preferential treatment may serve certain social goals desired or deemed desirable by some or even many people, but the question here is whether this policy is morally defensible or permissible and my answer is that it is not. Hence, the unequivocal conclusion of the reasoning in the present discussion is that preferential treatment in hiring and admissions, as well as in other possible contexts, is not morally justified. In expressing reasoned disagreement with the view that preferential treatment is morally justified, I shall set out this view together with its supporting argumentation and critically examine and assess this reasoning and the principal strategies of justification of preferential treatment. In addition, I shall identify, articulate, and assess the principles appealed to, the underlying assumptions, and the important empirical claims adduced in the arguments for preferential treatment.

During the two phases of the philosophical debate, justifications of preferential treatment have been
classifiable into two main types; compensatory and noncompensatory. These types of arguments represent distinct approaches to the justification of preferential treatment. Thus, compensatory justifications are backward looking or past looking: they call attention to certain events in the past and assert that because these past events took place we have certain duties now, that is, duties to make reparation. These arguments "make essential reference to the discrimination and injustice" that blacks suffered in the past and the effects of such wrongdoing that they continue to suffer. These arguments rely on the claim that preference for blacks in employment and admission to educational institutions—two of the main areas in which previous discrimination took place—compensates and makes amends to the group or its members for this discrimination and injustice. These backward-looking arguments are extended to other aggrieved groups, namely, women, Hispanics, and American Indians, whose victimization, it is claimed, warrants their inclusion in programs of preferential treatment in hiring and admissions to make amends for or to rectify the effects of past wrongdoing, that is, "to put things right or, as far as possible, 'to make the victims whole.'" Noncompensatory justifications, on the other hand, are either meritocratic or forward looking. Thus, the meritocratic justification advocates a nonstandard view of merit or qualifications and argues that there are meritocratic reasons for favoring the specified minorities and women in
employment and admission to educational institutions. Forward- or future-looking arguments focus on the consequences of preferential treatment and look exclusively to its future benefits and the goals it serves. They make "no essential reference to past wrongdoing" and instead defend preferential treatment "entirely as a means to some desirable future goal."¹⁰⁷ What has taken place in the past, according to these arguments, is "not in itself relevant to what we should do."¹⁰⁸ Even when the goal is to eliminate inequalities or disadvantages that were in fact caused by past discrimination and injustice, the reason for eliminating them is not that they were caused by past injustice but that their continued existence is said to violate or to conflict with some moral principle or ideal, for example, the principle of utility or some ideal of equality or social justice.¹⁰⁹ These arguments rely on the claim that preference for women and disadvantaged racial and ethnic minorities in employment and admission to educational institutions will promote certain highly desirable forms of social change,¹¹⁰ such as equal opportunity, equality, social justice, and the advancement of the general welfare and the increase of overall well-being, and will help to bring about a better society.

Forward-looking or consequentialist arguments dominated debate in the 1990s, one commentator notes, just as backward-looking arguments had in the 1970s.¹¹¹ Defenders of preferential treatment "seem increasingly inclined to
eschew" backward-looking arguments, another commentator remarks, and "to cast their lot with forward-looking arguments." However, "although compensatory and consequentialist arguments are separable," one commentator writes, "the consequentialist arguments, to a great extent, depend upon the moral imperative derived from the historical, rectificatory arguments." Consequentialist justifications of preferential treatment, "absent a litany of historical outrages, would not be nearly as compelling."

In systematically examining and rejecting the various strategies of justification of preferential treatment, I shall argue that this policy is not only morally objectionable but also seriously unjust, like similar possible policies and practices, because it violates principles of justice and fundamental individual moral rights viewed as more than mere entitlements to be counted in the computation of the effects, that is, the costs and benefits, of social policy. There are considerations relevant to determining the moral rightness of actions, policies, and practices other than those having to do simply with the future and the achievement of social goals. Considerations of justice and rights place moral constraints on actions and the pursuit of social goals. Hence, the various attempted justifications of preferential treatment fundamentally and ultimately fail because they are unable to refute or to undermine the objections that this policy is discriminatory, distributively unjust, and violative of persons' moral rights—
generally the same rights blacks have that had been so frequently violated. The compensatory and noncompensatory arguments for preferential treatment are not simply inadequate to establish that this policy is morally justified; this policy is neither morally required nor morally permissible. Further, the moral problems that undermine the position that a policy of preferential treatment is justified are not problems that arise only in a particular administration or implementation of this policy or only in certain circumstances but are problems inherent in this policy.

In assessing the correctness of any philosophically interesting moral claim, it should be noted, not only must we identify carefully and explicitly the relevant arguments for the claim and attempt to determine the validity or invalidity or the strength or weakness of these arguments, but also we must determine the truth-value of the premises or grounds for the claim. In the following discussion we shall encounter two kinds of claims among the premises of the arguments for and against the conclusion that preferential treatment is morally justified, namely, factual or empirical or nonevaluative claims and normative or evaluative claims. It is important not to confuse these kinds of claims and at any point in the discussion to ask of a particular claim whether it is evaluative or nonevaluative. Factual or empirical claims (that is, those based on sensory experience or observation) concern what is, was, or will be the case or how people do act. Examples are the claims that the Earth is a sphere 7,926 miles in
diameter; a particular racial or ethnic group has a certain percentage of the places in medical school; the members of a particular racial group have been and are being excluded from certain jobs because they belong to the group; and a particular group has certain moral beliefs and acts in accordance with them. Such claims are established through investigation by the empirical sciences, for example, the natural sciences and the social sciences of sociology, anthropology, and history. Factual or empirical claims must be supported by empirical evidence.

"There is obviously a difference," a moral philosopher writes, "between how things are and how they should be, between how people act, feel, or think, and how they ought to act, feel, or think." Normative or evaluative claims do not describe how things are but recommend how they should be; they are thus resistant to empirical methods of rational inquiry. Evaluative claims include moral as well as nonmoral claims, such as the claim that ascribes goodness to something. Deontic moral claims say that a certain action or kind of action is morally right, wrong, permitted, forbidden, obligatory or required, or ought or ought not to be done; or these claims say how people should act. Aretaic moral claims speak of persons, motives, intentions, and traits of character and say of them that they are morally good, bad, virtuous, responsible, blameworthy, despicable, and so on. Clearly, claims about how people should or ought to act are not
claims about how people do act. After all, people at least sometimes fail to do, perhaps because of calculated self-interest, what they are morally required to do.\(^{125}\) Examples of moral claims are the claims that slavery is wrong, abortion is forbidden, the underrepresentation of a particular racial group in law or medical is unacceptable, and preferential treatment in hiring and admissions is just. Moral claims must be supported by reasons\(^{126}\) (not evidence, that is, facts or factual propositions supporting another factual proposition\(^{127}\)), such as the principle that killing innocent human beings is wrong, and cannot be established simply by appeal to the social sciences.\(^{128}\) All sorts of empirical claims may be relevant to defending moral or ethical claims; but substantive moral claims of normative ethics (which attempts to state and to defend these claims\(^{129}\)) should not be confused with or mistaken for descriptive claims about what people actually do or about what various groups or individuals think people should do.\(^{130}\) Furthermore, although we must have some understanding of such moral notions as discrimination and injustice to know what some empirical claims assert, for instance, the sociological claim that a particular racial group has been treated in ways thought to be discriminatory and unjust, these kinds of claims still are empirical, not moral or ethical. We have to know whether a particular claim is empirical or moral or evaluative, then, to be clear about what it asserts, how it relates to other claims, and what kind of
Some philosophers challenge the empirical/factual/non-evaluative and moral/evaluative distinction; but "there persists a sense of a deep difference between evaluating, or attributing an obligation and, on the other hand, saying how the world is" and giving purely neutral descriptions, such as those found in natural science. This distinction is related to what philosophers call the normativity of moral or ethical properties. Moral claims, unlike descriptive claims, concern "what appropriately regulates choice, desire, and feeling—what we ought to choose, want, or feel/" In this critical discussion I shall rely on the widespread intuition of a fundamental distinction between empirical/factual/descriptive/nonevaluative and moral/evaluative claims.

In addition to the failure to carefully distinguish moral from empirical claims, another pitfall to avoid is the following. As an advocate of preferential treatment points out, the problem of preferential treatment has "both legal and moral dimensions." The question whether preferential treatment is "legally permitted, prohibited or required" is "a question about laws that have been enacted and judicial decisions that have been made." The concern in this discussion, however, is with the different question whether preferential treatment is morally permissible, forbidden, or required. Determining what people morally should do is not the same as determining what the law says they should
do. The law may permit a particular action or practice even though that action or practice is immoral or morally wrong; and the law may prohibit a particular action or practice even though that action or practice is morally right or permissible or even morally required.\textsuperscript{136} A law may thus be "valid" and and yet not be "morally acceptable."\textsuperscript{137} The law is accountable to morality and subject to moral assessment; that which is morally requited, prohibited, or permissible should inform that which is legally required, prohibited, or permissible.\textsuperscript{138} To answer the moral question about preferential treatment, we must appeal to moral reasons, principles, and arguments.\textsuperscript{139} Hence, even if a policy of preferential treatment is legally mandated, constitutional, or politically expedient, it is not thereby morally justified. Indeed, since a policy of preferential treatment is not morally justified, legal and political approval of it lack moral foundation.

Unclarity about the analysis of crucial concepts and the meanings of central terms in significant and disputed claims may result in avoidable conceptual disagreement and a failure to know what is being claimed or argued about. The attempt to determine what is true or rationally defensible is then undermined at the outset.\textsuperscript{140} Thus, it is important to avoid such unclarity concerning crucial concepts and central terms in the present debate, namely, justice, distributive justice, discrimination, and affirmative action, and to have some understanding of the
circumstances in which these concepts and terms apply to an action, practice, or policy.

Justice and Distributive Justice

When discussing or analyzing the concept of justice, some social philosophers caution, writers should not broaden the concept so that "justice becomes indistinguishable from the sum of social and political values" or incorporates "all socially desirable objectives." On one approach to justice more narrowly construed, the concept of justice may be analyzed as a set of principles for assessing social and political institutions; and conceptions of justice represent differing views on the proper content of these principles. On the more traditional approach, the concept of justice is analyzed as giving each person his due, with conceptions of justice indicating what is to count as a person's due in accordance with differing moral outlooks. That justice is "rendering each person his or her due" is a frequently cited formula originally attributed to the Greek poet Simonides and later enshrined in the formula of the Roman jurist Ulpian. The traditional approach, as well as the first approach, assumes that the concept provides the meaning of justice and the conceptions enunciate the evaluative criteria used to determine that certain kinds of situations are just or unjust. The differing conceptions of justice state what justice is in concrete terms.
Using the concept/conception distinction, the specific analysis of justice which holds that there is an essential connection between justice and desert says that justice in concept is treatment in accordance with desert and that differing conceptions of justice state what counts as desert.\textsuperscript{148} Such accounts of justice, however, as some writers insist, are not intellectually sustainable. Desert, that is, worthiness, "represents only a part, and not necessarily the most important part, of the domain of justice."\textsuperscript{149} Justice cannot be understood solely in terms of desert. It is not plausible to say that justice is simply getting what one deserves, as expressed in such claims as that a virtuous person deserves to be happy, a hard worker deserves to succeed, and the best athlete deserves to win the race.\textsuperscript{150} Although justice often requires us to give people what they deserve, it does not always do so, for example, when it is beyond our power to bring about the deserved outcome or when attempting to bring about the deserved outcome would have unjust side effects (e.g., we cannot ensure that the best athlete wins the race).\textsuperscript{151} Justice is thus "more than the requital of desert," one writer affirms. It "sometimes demands," he observes, "rule-following and respect for existing entitlement, sometimes equal treatment, or distribution according to need."\textsuperscript{152}

The relatively uninformative claim that what is just is giving each person his due (which is not necessarily the same as what he deserves\textsuperscript{153}) is generally accepted; and
there is also near universal agreement among competing theories on the formal principle of justice: equals are to be treated equally and unequals unequally.¹⁵⁴ This principle is formal because it states no particular respects in which equals should be treated equally and and unequals unequally and provides no criteria for determining whether two or more individuals are in fact equals or unequals.¹⁵⁵ When expanded, the formal principle asserts that persons equal in those respects that are relevant from the point of view of justice ought to be treated the same, and that persons unequal in these respects ought to be treated differently in direct proportion to the differences between them.¹⁵⁶

Justice is not always comparative, as the distributive analysis that justice is "essentially a matter of contested unfavorable comparisons concerning the allocation of desirable and undesirable objects and experiences in a society or group," one writer asserts, "seems to imply that it must be."¹⁵⁷ Although most types of justice have to do with whether a person A has more or less than a person B or C, it is at least sometimes true that A has too much or too little of some benefit or burden irrespective of how A stands in comparison with B or C or how B or C has been treated.¹⁵⁸ Examples of noncomparative injustices are unfair punishments or rewards, failures in merit grading, and derogatory judgments. We know that these are injustices without entering into comparisons between individuals. Justice involves not only the comparison of individuals with each other but also
the comparison of individuals with an objective standard and the judgment of each individual on his merits.\textsuperscript{159}

The domain of justice is divided into distributive, compensatory, and retributive justice.\textsuperscript{160} Distributive justice is concerned with the legitimate or appropriate distribution of society's benefits and burdens (other than punishments). It is "concerned with the way in which goods are spread out among individuals."\textsuperscript{161} Compensatory justice is concerned with rectifying damage or harm caused by past wrongful action. Retributive justice is concerned with legitimate or appropriate punishment for wrongdoing. Although these divisions, branches, or contexts for discourse about justice differ in various ways, it seems that all, in specifying and applying the formal principle of justice, are concerned with the distribution of society's benefits and burdens—including, in retributive justice, punishments—and with giving each person his due within the relevant domain.

The more restricted expression "distributive justice," one writer on justice says, "refers to fair, equitable, and appropriate distribution in society determined by justified norms that structure the terms of social cooperation."\textsuperscript{162} Distributive justice provides answers to the questions concerning "what ideal standards, or norms, should govern the distribution of goods in society,"\textsuperscript{163} and "what sort of distribution of goods within a society will count as just."\textsuperscript{164} It governs policies that allot diverse
benefits and burdens, such as property, income, welfare payments, opportunities, taxation, military service, and jury service. Distributions thus take place at many levels and in different contexts or spheres. "A just distribution," one philosopher writes, "is one in which each receives her due."  

An important ambiguity in the expression "distributive justice" involves broad and narrow senses. In the broad sense, distributive justice concerns the distribution of all social benefits and burdens (other than punishments), including civil and political rights, such as the right to vote and the right to a fair trial. In the narrow sense, on the other hand, distributive justice concerns only the distribution of material goods, such as food, medical care, and shelter, as well as income and wealth. Although there are many problems of distributive justice besides justice in the distribution of wealth and income, including the issues raised in the prominent debate over preferential treatment, contemporary discussions of distributive justice deal with issues of economic justice and whether a particular set of economic holdings among members of society is just or unjust.  

Theories of distributive justice attempt to articulate, order, and justify principles that specify just distributions of social benefits and burdens and deal with the issue concerning what characteristics of persons the formal principle of justice is to be applied to. Competing
theories of distributive justice can be viewed as alternative accounts of what these principles are. Contemporary theories tend to focus on the justice of the basic institutions of society, as opposed to the justice of individual actions and justice as a virtue of individuals. Since the same principles may not be appropriate at the different levels or in the various contexts of distribution, a problem for contemporary theories of distributive justice is to provide an account of how the principles they propose for different contexts are coherently related in a single system. 169

Among the rival systematic theories proposed to determine how social benefits and burdens should be distributed are, in some classifications, egalitarian theories that hold that people should be given the same rights, privileges, social services, and material resources 170; libertarian theories, which assert that political institutions should protect property rights, enforce people's purely negative rights (i.e., rights against interference), rectify the injustice that results when these rights are violated, and otherwise leave people free to do as they please 171; utilitarian theories, which require that aggregate or per capita utility—i.e., pleasure, satisfaction, happiness, or the realization of preferences—be maximized 172; and conventionalist theories, which assert that institutions, conventions, systems of law, or shared understandings in a community should determine the distribution
of benefits and burdens.\textsuperscript{173} Classifying all theories of how benefits and nonpunitive burdens should be distributed in society as theories of distributive justice, however, undermines the important, generally recognized contrast between justice and such values as utility and equality and makes justice a derivative, purely instrumental notion concerned not with giving each person his due but with calculating what would most effectively promote some overall desirable state of affairs.\textsuperscript{174} For some of these theories, only consequences matter; the only kinds of considerations relevant to determining the distribution of benefits and nonpunitive burdens in society are those having to do with the future and with what will happen as a result of our actions.\textsuperscript{175}

Clearly, the scope or range of application of principles of distributive justice—i.e., the kinds of distributions which these principles regulate and apply to—is not unlimited. The scope of these principles does not encompass every distribution of all goods of every kind. Only social benefits and burdens, that is, those resulting from social cooperation,\textsuperscript{176} fall within the scope of distributive justice. They are the benefits and burdens supplied and distributed by institutions, organized groups, and associations in society. Distributions involving these benefits and burdens do not necessarily coincide with those governed by the law. The law may deem it desirable not to recognize, enforce, or apply these principles in certain kinds of cases or in certain areas, for instance, those which do not
involve the allocation of benefits and burdens by the major political, economic, and educational institutions in society or those in which the law would not or could not be enforced or applied.

Furthermore, principles of distributive justice do not apply to all our dealings with one another. There are many circumstances in which considerations of justice simply do not arise. In particular, in modern secular Western culture there is a presumption of a kind of liberty in the sphere of purely personal goods and relations, for example, inviting people to dinner in one's home, giving a gift to someone, making friends, and choosing a spouse. A common belief is that members of an ethnic group, race, or religion may, if they choose, select mates only from their own ethnic group, race, or religion or marry whomever they please. Here an individual's preferences are decisive, regardless of his or her reasons. Thus, if Jane chooses John over Joseph as a mate, Joseph does not have grounds for complaint of injustice, for example, that his qualifications were not properly considered. It is beside the point to ask whether there is some morally relevant difference between between the two which justifies Jane in choosing John and not Joseph as a mate. Similarly, it is not unjust for a person to choose someone of his own ethnic group, race, or religion as a friend. Purely private acts of partiality toward one's friends or family members do not violate principles of justice. In the social sphere, however, considerations of
justice do have application. There is not in the social sphere, as in the sphere of purely personal goods and relations, the elimination of any basis for complaints against discrimination and sheer arbitrariness. In the social sphere, an individual's preferences are not decisive, regardless of his or her reasons. Thus, a teacher, an employer, a parent, or even a host of a children's party can behave unjustly toward students, employees, and children respectively when teaching them, employing them, raising them, or distributing presents and other goods to them at a party. Employers' hiring or promotion only of members of their own ethnic group, race, or religion, for instance, is commonly regarded, not as an expression of personal preference or choice, but as blatant discrimination.

The problem of delimiting the scope of distributive justice by providing a general characterization of the distinction between the social and purely personal spheres (not identical with the public-private distinction, in which, as "now understood, the public comprises the political, legal, and economic" and "the private is the personal and familial," and which has been used, for example, "to justify private racial discrimination and state neglect of domestic violence") need not be resolved in the present discussion. The primary interest here is in a narrow range of treatment, namely, the bestowal of benefits and burdens by the government or as a result of government policy. Given the role of the state in programs of preferential treatment,
the focus in the present debate is thus on an issue of public policy, that is, the moral permissibility of the government's requiring or allowing racial, sexual, and ethnic preferences in hiring, promotions, and admissions. Most participants in the debate agree that the government and other major social institutions (social institutions are defined sociologically as complexes of norms and behaviors that persist over time by serving socially valued purposes; examples are practices like marriage and making promises and organizations like the United States Senate and General Motors), unlike people in their personal relations, may not exercise a preference on the basis of race, sex, ethnicity, religion, and so on, without justification.

Discrimination

The term "discrimination" is ambiguous, having two principal senses: a morally neutral sense and a morally nonneutral or objectionable sense. In the morally neutral sense, "to discriminate" basically means "to differentiate, to distinguish," or to "make a distinction," to "pay attention to a difference." In this sense, discrimination is noting, observing, or perceiving differences between things; differentiating or making distinctions in favor of or against persons or things; the ability or capacity to make distinctions; or the power to render or the quality of rendering critical judgments. Thus, one
discriminates in the morally neutral sense in perceptually
distinguishing between persons (for example, Tom and Dick),
physical objects (a pencil and a piece of chalk), and spe-
cies or kinds of animals (birds and dogs). Deciding to buy
one shirt or tie rather than another, buying a painting or
novel, and choosing a meal in a restaurant are acts of dis-
rimination in this sense. To have a discriminating palate
or ear is not merely to be able to distinguish one taste or
sound from another but to be particularly good or adept at
making such distinctions, such as in wine tasting. Further,
when a patient chooses one doctor over another or when a
child gives a present to his mother but not to his neigh-
bor, he discriminates. When a teacher assigns a high grade
to one student's examination and a low grade to another's,
he is discriminating between good work and poor work.¹⁹²
Hence, the bare idea of making a distinction in favor of or
against a person does not imply that such distinguishing is
wrong or undesirable. Discrimination in the morally neutral
sense is noncommittal about the rightness or wrongness of a
particular discrimination or of discrimination in general.
Discrimination in this sense is pervasive, inevitable, and
unavoidable in human life.¹⁹³

In the morally nonneutral sense, the term "discrimina-
tion" has a negative connotation¹⁹⁴; it "has become a word
of opprobrium, used as a term of condemnation or com-
plaint."¹⁹⁵ The term "discrimination" in this sense is var-
iously described as meaning, for example, "(roughly 'making
use of a distinction in an unjust or illegitimate way"; 
"unjustified discrimination, the morally (and logically) 
problematic practice of treating similar entities differ­
ently"; and "not only 'discrimination-against' but also 
'unfair discrimination-against.' " In general," one 
writer observes, "the word tends now to be invoked the 
moment any group finds that some policy or action is making 
it worse off than it would like to be"; but the word 
"discrimination" in the morally nonneutral sense involves 
the notion of injustice, not simply that of group or indi­
vidual disadvantage. Hence, "to label a disadvantage 'dis­
crimination' is implicitly to claim," this writer states, 
"that it is unjustified, and should be eliminated on 
grounds of injustice to the disadvantaged group." Discrimination in this sense is intimately connected with 
action and with acts and practices that involve the unjust 
differential treatment of persons.

Given the currency of both the morally neutral and 
nonneutral senses of the term "discrimination," the oppor­tunity for confusion in arguments about racial discrimina­tion and preferential treatment is enormously increased. 
That a practice may be called discriminatory is not suffi­
cient to show that it is morally objectionable, since, as 
one writer notes, not all discrimination is unjust. 
Nevertheless, there is a temptation to infer invalidly from 
the premise that a practice makes distinctions in favor of 
or against persons and hence that the practice
discriminates to the conclusion that the practice is morally objectionable.204 Although the claim that X distinguishes in favor of or against persons implies that X discriminates in the morally neutral sense, this implied claim does not in turn imply that X discriminates in the morally nonneutral sense.205

**Affirmative Action**

The term "affirmative action" is used to refer to the policy of promoting through preferential treatment racial, sexual, and ethnic diversity in such crucial sectors of this society as the academy and the workplace. More precisely, this policy of preferential treatment seeks to achieve a society in which the holders of every desirable type of job, especially prestigious and well-paying ones, and places in colleges and universities include representatives of the designated racial, sexual, and ethnic groups in rough proportion to their overall numbers or their percentages of the population.206 The term "affirmative action" is also applied to set-aside programs,207 in which governments award a specified percentage of public works contracts to firms owned by the designated minorities and women.208 Although set-aside programs are "an important form of preferential treatment," one commentator remarks, preferential hiring and admissions programs are "more significant," since "they impact many more people and seem to have provoked more passionate debate."209 Preferential
treatment in these various programs involves giving an advantage to members of the designated groups by departing from rules and criteria normally judged to be appropriate, such as the rule that jobs and places in advanced education should be awarded on the basis of competence or qualifications. This policy means that the most qualified applicant is not necessarily the person who ought to get the position or contract. The fact that a nonminority applicant is "somewhat more qualified" than a minority applicant "should be irrelevant (or at least discounted)." The effect of such treatment is to provide desirable positions to individuals and public contracts to firms that they would not receive if only criteria normally judged to be appropriate were used.

In March 1961, an executive order established a committee on equal opportunity whose mission was to end discrimination in employment by the government and its contractors. The order required every federal contract to include the pledge that "the contractor will not discriminate against any employe(e) or applicant for employment because of race, creed, color, or national origin" and that "the contractor will take affirmative action to ensure that applicants are employed, and that employe(s) are treated during employment, without regard to their race, creed, color, or national origin." In the government's call "for 'affirmative action'" the "term meant taking appropriate steps to eradicate the then widespread
practice of racial, religious, and ethnic discrimination." The goal was "'equal opportunity in employment.'" In other words, affirmative action was instituted to ensure that applicants for employment would be judged without any consideration of their race, religion, or national origin. These criteria were declared irrelevant, and taking them into account in employment was prohibited. In its original understanding, the term "affirmative action" applied to programs that would "open up employment opportunities to all without regard to race, color, or sex." Shortly after the inception of affirmative action in this sense, however, the term was transformed in meaning to "preferential treatment for members of certain racial, sexual, and ethnic groups."

Earlier in the debate over affirmative action involving preferential treatment in hiring and admissions (hereafter referred to as AA) the phrase "reverse discrimination" was used to refer to this policy. Some proponents of AA objected to the use of this phrase for placing "the burden of proof on whomever would justify preferential treatment." The term "discrimination," these proponents of AA asserted, has acquired "the connotation of discrimination on morally irrelevant and/or morally objectionable grounds." Consequently, "in common usage, discrimination is by definition unjust." Framing the problem in this way "obviously prejudges the prior question whether there is even a prima facie violation of justice involved in the
practice under consideration," and makes it very difficult, these proponents of AA claimed, to present a case for this policy. Pointing out that many proponents of AA also used the phrase "reverse discrimination" to refer to this policy, critics of AA insisted that in using this expression they were not begging any substantive moral questions but were calling attention to the fact that this policy at least appears to have certain morally problematic features, which seem to show that AA involves discrimination that goes in the reverse direction of past discrimination against the designated groups. An advocate of AA admits that "what needs to be justified is an apparently unjust mode of behavior." Proponents of preferential treatment should concede that it raises serious moral concerns and requires at the very least some weighty form of justification, critics of AA maintain, because there is an initial presumption against altering the procedural rules governing the selection of people in a competitive context in favor of some of the competitors. Such altering of the procedural rules by a policy of distribution is at variance with what would normally be regarded as fair.

In recent discussions of this disputed policy the phrase "affirmative action" has displaced the phrase "reverse discrimination," and in this discussion I shall conform to current practice. The phrase "affirmative action" has been applied to very different sorts of policies, some of which do not involve giving preference to
racial minorities and women in the competition for jobs and places in educational institutions; but I shall be concerned here with the sort of policy that does involve such favored treatment and is the subject of controversy.

An important distinction in the present debate is the distinction between minimal, weak, and strong forms of AA. Minimal AA consists in extending preference to a member of a designated group over an equally qualified nonmember. It uses membership in the designated group solely to break ties between equally qualified candidates. The weak form of AA consists in selecting a presumably qualified member of a designated group over a more qualified nonmember. This form of AA can occur in one of two ways. The first way, which may be termed "handicapping," can involve giving to a less-qualified member of a designated group bonus points or a percentage advantage in the scale of qualifying criteria used in hiring and admissions, or can involve simply taking the race, sex, or ethnicity of a less-qualified member of a designated group into consideration in the assessment of his or her total qualifications. This way does not guarantee that any fixed number or quota of group members will be selected. For example, even if blacks and members of the other minority groups designated to receive preference are given credit or bonus points for group membership, such as by having points added to their test scores in application for employment and higher education, they may still be less qualified for jobs and college and university places, all
things considered, than nonmembers. In that case, the members of the specified minority groups would not receive the jobs and college and university places allocated. Thus, although it may count in R's favor that he is black, it may not count enough to overcome the superior overall standing of W, who is white. W and not B would then receive the affected position. The second way in which the weak form of AA can occur consists simply in reserving outright a certain number or percentage of positions for less-qualified members of a specified group. Actual AA programs exemplify this form, since they typically set aside a certain number or percentage of jobs and college and university places for members of the specified minority groups and women at lower standards of qualification. A form of AA which has not been defended in serious theoretical discussions about public policy is the strong form, which consists in extending preference to unqualified members of a specified group.

Preferential affirmative action need not involve, it should be noted, blanket preference on the basis of race, sex, or ethnicity for whole groups of individuals. Properties other than these can be used in affording preference, for example, religion and social class. Further, there is no reason that preferential affirmative action, as a matter of conceptual analysis, must apply in blanket fashion to whole classes defined by the characteristics of race, sex, or ethnicity rather than more restrictedly to a limited
number of individuals who are members of these groups. Such subclasses might comprise, for example, all blacks with annual incomes below $15,000 but no blacks with annual incomes above that amount or only blacks actually discriminated against in the past in some way. Those members of the larger group who are not also members of these subclasses would not receive preference. Such restrictive policies would still qualify as preferential affirmative action even though they do not eventuate in preferential treatment for whole groups defined by race, sex, or ethnicity.\textsuperscript{226}

Preferential affirmative action is also not conceptually or definitionally restricted to requiring that those disadvantaged by it be members of the groups which practiced discrimination against the preferred groups; to affording preference to members of the designated groups only in hiring and admissions; or to incorporating justificatory grounds, such as that it is a policy of compensation for past injustice. Programs of preferential affirmative action can disadvantage members of groups that did not perpetrate injustices against the preferred groups, for example, Asian Americans. Further, we can intelligibly and coherently assert that affording preference in such areas as academic grading, political participation, taxation, and the criminal justice system also qualifies as affirmative action. Again, as already noted, preferential affirmative action need not be justified on compensatory grounds. Neither the compensatory nor the noncompensatory justifying
grounds for this policy are part of the concept or definition of preferential affirmative action.

In the discussion that follows I shall critically examine the problem of whether preferential treatment in hiring and admissions is morally justified—i.e., morally required or morally permissible—primarily concerning that form of weak AA which consists in reserving positions for members of the designated groups, since this form is the focus of controversy. I shall examine the problem of the moral justification of this form of AA in favor of blacks particularly. Controversy about AA also involves, of course, the preferential treatment of women and Hispanics, such as Puerto Ricans and Mexican Americans; but compensatory arguments are extended "with somewhat diminished force," 227 AA advocates concede, to justify preferential treatment of these groups or their members. "As descendants of slaves brought to this country against their will," a supporter of AA writes, "and as victims of the post-Reconstruction century of murderous racism, which was encouraged, practiced, and given legal sanction by our government," blacks "have a unique entitlement to special efforts to ensure their fair share of employment benefits." 228 Still, the results of the critical analysis of the problem of the moral justification of AA for blacks can be applied to AA for the other groups. Hence, since a compensatory policy of AA for blacks is not morally justified, a fortiori such a policy for women and Hispanics is not morally justified.
Even if a compensatory policy of AA for blacks were morally justified, it would not follow that such a policy for women and Hispanics is morally justified. In the present critical discussion, moreover, I shall reject the handicapping form of weak AA and minimal AA. I shall argue, in addition, that the various forms of AA are morally unacceptable even when they are directed more narrowly to subclasses of the designated groups.

The present discussion is a disquisition in applied ethics, which involves applying philosophy to and bringing it to bear on practical problems. Applied ethics is centrally described as "the attempt to apply the general principles of normative ethics to particular difficult or complex cases" or as "the more or less systematic application of moral theory to particular moral problems" and is said to be marked out from ethics in general by its special focus on issues of social and practical concern, such as abortion, embryo experimentation, capital punishment, war and violence, and matters of race and gender. This discussion involves the use of philosophical theory and methods of analysis and argument in an attempt to analyze, clarify, and resolve a specific moral problem. Thus, it includes the clarification of concepts, the critical scrutiny of various strategies used to justify certain policies, the examination of underlying assumptions, the application of moral principles to specific cases, the advancement and defense of moral reasons by recognizably philosophical...
modes of argument, and the search for a reasoned defense of a moral position on an issue of public policy.

Without a shared outlook between disputants on a moral issue either at the level of moral principles or at the level of particular judgments, such as the judgment that X's act of burning a child to death for the pleasure or to gain revenge against the child's mother is immoral, philosophers often emphasize, the attempt to resolve moral disagreement on an urgent practical issue, like AA, is blocked at the outset. I assume such an outlook and a broad base of concurrence in moral judgment in critically discussing and seeking to resolve the problem of the moral justification of AA. There is a surprising uniformity in people's intuitions about particular cases, as some philosophers note; and moral disagreements tend to increase the more we abstract from particular cases and focus instead on matters of principle or theory. Furthermore, given the importance in normative ethical thinking (which is concerned with what one should desire, be, feel, or do, either in particular cases or in general) of identifying and articulating the moral principles invoked, the various strategies for justifying AA appeal to principles that, when correctly formulated and applied, I shall maintain, either do not support the conclusion that AA is morally justified or are ad hoc, incoherent, or incompatible with the shared moral framework and with judgments in cases having similar morally relevant features. Accepting these
principles would undermine this framework and the attempt to maximize coherence in our moral beliefs and moral and social outlook. Consistency within our system of moral beliefs, of course, is not a sufficient condition for the truth of these beliefs and is therefore no guarantee that they are true, that is, that things are morally as we suppose them to be. Also, there are some moral beliefs and convictions that are so compelling, many philosophers assert, that we cannot abandon them just for the sake of greater coherence and systematicity.

In the following discussion, I shall maintain in chapter 2 that the argument for AA which is based on the simple model of compensation and which defends AA as a means of compensating members of the designated groups for past injustices committed against them by white males has among its premises unjustified empirical claims, and that a policy of AA actually objectionable on grounds of compensatory justice. In chapter 3, I shall maintain that a policy of AA is also morally objectionable on noncompensatory grounds, which undermine backward- and forward-looking justifications of AA. The various attempted justifications of AA, including compensatory justifications that diverge from the simple model as well as forward-looking justifications, I shall argue in this discussion, rely on unjustified empirical claims and are unable to overcome or to disarm the moral objections to AA that are based on compensatory or noncompensatory considerations. I shall critically
examine several attempts to modify or to elaborate the backward-looking defense of AA to meet these objections in the following chapters. Thus, in chapter 4, I shall criticize the argument that AA is justified as a means of compensating individual minorities and women for harms and disadvantages resulting from past discrimination by favoring members of the specified minority groups and women at the expense of white males, who have benefited from the effects of past discrimination. In chapter 5, I shall argue against the contentions that AA is justified not as the redressing of past privations caused by past discrimination but as a way of neutralizing the present competitive handicaps and disadvantages suffered by minorities and women as a result of those past privations. In chapter 6, I shall reject the argument which maintains that whether or not all blacks, women, and Hispanics have been harmed by discrimination, enough have to make it administratively efficient and pragmatically justified to prefer applicants according to race, sex, and ethnicity. In chapter 7, I shall reject the compensatory argument that the relationship of indebtedness holds between the community, not white males, and the specified minorities and women and that the community is justified in overriding or setting aside the rights of white male applicants in order that it may pay its debt of compensation. In chapter 8, I shall criticize the argument that AA is designed to yield compensatory justice for groups rather than individuals, thereby avoiding the
compensatory objections to an individual-oriented policy of AA.

I shall devote the remaining chapters to arguing that noncompensatory approaches to the justification of AA also fail and to showing the inability of these attempted justifications of AA to undermine the fundamental objection that AA is seriously unjust. Thus, in chapter 9, I shall criticize the noncompensatory defense of AA that there are meritocratic reasons for hiring and admitting blacks and members of the other designated groups. In chapter 10, I shall argue that forward- or future-looking attempts to justify AA as a means of overcoming America's heritage of inequality and discrimination and promoting equal opportunity, equality, and social justice cannot succeed. Finally, in chapter 11, I shall argue that the utilitarian justification of AA, which maintains that AA increases overall well-being and promotes social utility and that AA has positive consequences that can be described more specifically, such as the easing of racial tensions or the furthering of racial and social harmony, faces the intractable problems presented by nonutilitarian objections to AA as well as the problem of the negative consequences of AA.
Notes


9. This quotation is attributed to social scientist Christopher Jencks in D'Souza, End of Racism, 207.


18. Ibid.


32. Rowan, *Conflicts of Rights*, 17, n. 15.
33. Ibid., 18, n. 15; and Ali Raza et al., *Affirmative Action Preferences*, viii.


36. Ibid., viii-ix.

37. This information comes from an Associated Press report that appeared in newspapers nationally on 30 March 1999.


43. Paul, "Affirmative Action."


47. Rowan, *Conflicts of Rights*, 100; and Fullinwider, "Reverse Discrimination and Equal Opportunity," 173.


49. Ibid.

50. Richard Wasserstrom, "Preferential Treatment, Color-Blindness, and the Evils of Racism and Racial


55. Ibid.


57. Ibid., 3-4.

58. DeMarco and Fox, eds., New Directions in Ethics, 12.


63. Dienhart and Curnutt, Business Ethics, 206.


70. Wasserstrom, "Preferential Treatment," 153-68.

71. Dienhart and Curnutt, Business Ethics, 206.


74. Fullinwider, Reverse Discrimination, 6; and Hill, "Affirmative Action," 177.

75. Sher, "Diversity," 97-98.


78. See, for example, Michael Martin, "Pedagogical Arguments for Preferential Hiring and Tenuring of Women Teachers in the University," Philosophical Forum 5 (1973-74): 325-33; and Singer, "Equality," 50.


81. Rowan, Conflicts of Rights, 118.


84. Fred Sommers, "Saying What We Think," in Affirmative Action and the University, ed. Cahn, 292.


89. Sommers, "Saying What We Think," 292-93.


95. Sommers, "Saying What We Think," 291.

96. Ibid., 292.


99. Ibid., 299.

100. Cahn, ed., Affirmative Action and the University, 5.

101. Sommers, "Saying What We Think," 293.


103. Sher, "Diversity," 85.


107. Ibid., 86.
111. Paul, "Affirmative Action."
120. Katzner, "Reverse Discrimination," 68.


129. Ibid.

130. Ibid.


140. Regan and VanDeVeer, eds., *And Justice for All*, 8.


142. Ibid., 13.


146. Ibid.
148. Ibid., 6.
152. Ibid.
158. Ibid., 13; and Shaw, *Contemporary Ethics*, 212.

166. Buchanan, "Justice, Distributive."

167. Ibid.


169. Buchanan, "Justice, Distributive."


172. Buchanan, "Justice, Distributive."


174. Ibid.


183. David Archard, "Political and Social Philosophy," in The Blackwell Companion to Philosophy, 2d ed., ed. Nicholas Bunnin and E. P. Tsui-James (Malden, Mass.: Blackwell Publishers, Inc., 2003), 280. He writes that the public is "the world in which individuals work, vote and are accountable to the rest of society for their actions" and the private is "the sphere of the household in which individuals love, play and generally retreat from the world" (280). See also Virginia Held, "Feminism and Political Theory," in Social and Political Philosophy, ed. Simon, 158-59.


185. Fullinwider, Reverse Discrimination, 14.


187. Dienhart and Curnutt, Business Ethics, 8.

188. Fullinwider, Reverse Discrimination, 14.

189. Sparkes, Talking Philosophy, 243.


192. Fullinwider, Reverse Discrimination, 10-11.

193. Ibid.


195. Fullinwider, Reverse Discrimination, 11.


200. Ibid.


203. Wolff, Political Philosophy, 207.

204. Fullinwider, Reverse Discrimination, 12.

205. Ibid., 253, n. 8.

206. Sher, "Diversity," 89.


208. Mosley and Capaldi, Affirmative Action, 69 71; and Dienhart and Curnutt, Business Ethics, 220.


212. Ibid.

213. Ibid.


216. Ibid. See also Skrentny, Affirmative Action, 7.


222. Goldman, Reverse Discrimination, 8-9


234. Darwall, Philosophical Ethics, 239.


240. Rachels, ed., Ethical Theory, 18-23.
Chapter 2
Compensatory Argument for AA (1)

Many proponents of AA view this policy as an attempt to rectify or to undo past and present discrimination and injustices against blacks, American Indians, women, and Hispanics by preferring members of these groups and thus bypassing nonmembers in hiring, promotions, and admissions. Programs of preferential treatment may be construed or understood, an advocate of AA maintains, "as schemes by which compensation or restitution in the form of more desirable and valuable places in the social institutions is paid to minorities" to whom "it is owed by the whites who owe it and pay it through their replacement in the relevant social slot by the minority group member."¹

More formally and more fully stated, the compensatory argument for AA proceeds in the following way. Blacks and American Indians are disadvantaged minority groups whose members in the past, along with women and Hispanics to a somewhat diminished degree, were subjected to discrimination and unjust treatment. Members of these groups were discriminatorily denied jobs, places in educational institutions, and other goods; and these groups suffer the residual or lingering effects of past institutionalized injustice, for which white males bear the guilt and responsibility.² Compensatory justice requires that past wrongs be rectified and that when wrongful injury has been done a duty exists to make
reparation. Those who wrongfully injure others owe them compensation. Hence, blacks, members of the other minority groups, and women deserve to be compensated. Since white males are responsible for the injustices warranting compensation, they should bear the costs of compensation. AA in hiring, promotions, and admissions is a means of compensating members of the specified minority groups and women and rectifying the discrimination and injustice they have suffered. Therefore, AA is morally justified. The specified minorities and women are also victims of past discrimination in government contracting, either simple bias or other forms of discrimination that have reduced the number and size of minority and female contractors. Consequently, set-aside programs are also justified as means of rectifying past injustice and remedying such effects of past discrimination as the reduced minority and female participation in government contracting.

Initially, a defense of AA rooted in an appeal to compensation seems attractive, according to some commentators. This defense of AA promises to connect preferences to the firmly held and widely shared moral conviction that justice requires that past wrongs be rectified and that there is a duty to compensate for wrongful injury. "When conjoined with our society's history of flagrant denial of basic rights and opportunities to blacks and women," a social philosopher writes, "this deep conviction suggests a powerful claim for the legitimacy of giving preferences to blacks and
women. Preferential programs yield to blacks and women what they are owed." Blacks, women, and Hispanics—the groups who are the primary recipients of preferential treatment—have been subjected, proponents of the compensatory argument insist, to racist or sexist laws and practices and to legally enforced denial of their basic rights. Blacks were subjected to legal slavery, the most extreme form of exclusion from the mainstream of society; to the denial of citizenship; and to legally sanctioned segregation and discrimination, which persisted, it may be recalled, into the middle of the twentieth century. Women were denied the vote and were not admitted to full citizenship until the early twentieth century; and even thereafter women labored under legal restrictions and liabilities that greatly narrowed the range of opportunities open to them.

Pervasive racially and sexually discriminatory practices, AA advocates say, have existed in, for example, employment, education, political participation, housing, and the criminal justice system. Not only blacks but also American Indians, women, and Hispanics have been deprived of equal opportunities to develop their talents and to fulfill their aspirations. These minority groups and women have been denied admission to exclusive social institutions of power—the university, corporate world, and the political realm—and have been prevented from entering the professions. Even in the twentieth century these groups were systematically excluded from quality jobs and were restricted to menial,
low-paying jobs. Blacks were still segregated into low-wage jobs into the 1960s; they worked, for example, as janitors, elevator operators, bellboys, porters, and domestics. For Hispanic Americans, employment opportunities remained seriously restricted into the 1970s. "Whole industries were, in effect, all white, all male; women and minorities were forbidden to apply." Further, blacks were compelled to attend inferior, racially segregated schools; and Hispanics were legally barred from attending some public schools. Minorities were excluded from college and university places; and "women were systematically excluded from some private and state-funded colleges, universities, and professional schools well into the 1970s." Minorities and women were subjected to racial and sexual quotas that prevailed at many colleges and universities and that effectively limited their access to the most desirable graduate and professional schools. "In higher education," an advocate of AA writes, "most African Americans attended predominately black colleges, many established by states as segregated institutions"; and "most black colleges concentrated on teacher training to the exclusion of professional education." Another supporter of AA wrote in the 1970s that "higher education in many states has been until quite recently organized along explicitly racial lines" and that "while many blacks have pursued higher education only because publicly supported black colleges existed, "the range of offerings, quality of faculties and facilities, and extracurricular
opportunities typically do not match those of the major white institutions." Moreover, "quite apart from the perpetuation of segregated public systems, blacks have until recently been denied graduate and professional opportunities that exist only in predominantly white institutions." Indeed, "well into the 1960s some private university law schools still excluded blacks."\(^{22}\)

Proponents of the compensatory argument for AA cite data which provide ample evidence, they claim, of the effects of past institutionalized injustice suffered by blacks, American Indians, Hispanics, and to a lesser degree, women. Thus, the significant disparities between the groups designated to receive preference, particularly the minority groups, and whites in income, representation and participation in the professions and other desirable positions, tests of cognitive skills, academic achievement, educational attainment, and social problems (such as poverty, unemployment, breakdown in family structure, and crime) are the result of past discrimination and injustice. Some of the data cited reveal wide economic differentials between the specified minorities and whites and between women and white males. In the 1970s, before AA programs could have a significant effect, the median incomes of black, American Indian, and Hispanic families were much lower than the median income of white families.\(^{23}\) Women and the specified minority groups had lower earnings than white males. Thus, at all occupational levels women made less money than men, even for the
same work, AA advocates say, despite legislation prohibiting
discrimination on the basis of sex. In the late 1970s,
women's earnings were 58.9 percent of men's. The differences
were not existent simply after a certain time on the job but
frequently began as soon as men and women left school. For
example, the starting salary offered to female college gradu­
ates majoring in marketing, the humanities, and the social
sciences was less than that offered to their white male
counterparts.24 Comparative figures concerning the earnings
of minorities versus whites reveal similar disparities.25
Among earners in today's workforce, blacks, Mexican Ameri­
cans, Puerto Ricans, and American Indians rank at the bot­
tom.26 The annual income of blacks employed in full-time
jobs is only about 60 percent that of whites.27 Although
blacks make up more than 12 percent of the population, a
writer remarks, they end up with "only 7.8 percent of the
monetary pie."28 Proponents of AA also call attention to the
"startling fact,"29 in the words of one writer, that black
households have a median net worth (measured in terms of
home ownership, interest-bearing accounts in banks and other
financial institutions, stocks, mutual funds, and so on)
less than one-tenth that of white households.30

The preceding disparities cannot be accounted for by
educational levels, proponents of AA argue. Consider that,
in 1977, a white head of household with one to three years
of high school earned more than a black head of household
with one to three years of college.31 A decade earlier, the
average lifetime income of black college graduates was less than that of eighth-grade white dropouts. Also, AA proponents say, in 1977 the typical male full-time worker with only a grammar school education earned nearly as much as a female full-time worker with a college degree. In the 1990s, Hispanic men earned only 57 cents for each dollar equally educated white men earned; and college-educated black women earned less, and such white women slightly more, than white men who have earned only a high school diploma.

Another body of statistics cited reveal an unequal distribution of positions and a participation by the designated groups in the professions and other desirable positions in percentages well below those in the population. In the 1960s, black employment was concentrated in semi-skilled and unskilled jobs. In 1977, the most desirable occupations (in management and administration, technical jobs, sales, and crafts) were dominated by blacks, Hispanics, and other ethnic minorities. Before the entrenchment of AA programs, blacks and the other specified minority groups were grossly underrepresented (in proportion to their percentages of the population), AA advocates declare, in such high-status and high-paying fields as law, medicine, business, science, engineering, and academia, as well as in the student bodies of colleges and graduate and professional schools. Even in the early 1990s, Hispanic men and American Indians also were still much less likely than white men to
hold executive, administrative, managerial, or professional positions. While nearly 90 percent of full-time faculty members at colleges and universities were white, only 3 percent were black, 2 percent were Hispanic, and 1 percent were Native American. In 1989, blacks earned fewer than 5 percent of the bachelor's degrees awarded to men; a similar disproportion existed between blacks and whites at the master's degree level. In 1996, blacks were half as likely as whites to have completed four or more years of college. The percentages of black and Hispanic high school graduates now attending college are much less than the percentage of their white counterparts.

Further, in 1977, according to data cited by AA advocates, women predominated in the worst-paying jobs in America: librarian, nurse, elementary-school teacher, sales clerk, secretary, bank teller, and waitress. Men, on the other hand, predominated in the best-paying jobs: lawyer, doctor, sales representative, insurance agent, and so on. Women held a relatively small percentage of the high-status and high-paying positions. According to a business report issued in 1980, women filled only 17 percent of the top positions at companies with 100 or more employees; and private surveys of the top U.S. corporations revealed just 400 women with jobs paying $40,000 or more a year, with none of these firms having a female chief executive officer. Women still hold only 3 to 5 percent of top senior positions in the workforce. Even today, moreover, although women are
not significantly underrepresented in the lower ranks of the professoriate, they still are far less well represented among tenured and full professors in major research universities. They constitute only about 20 percent of the faculty members at research universities, AA advocates say, and are not well represented among faculty members in mathematics and the natural sciences. Women have also been significantly underrepresented among those holding graduate and professional degrees. Indeed, although women now earn nearly 50 percent of all bachelor's and master's degrees, they earn only one-third of doctoral and first professional degrees, according to AA advocates, and continue to lag in mathematics, engineering, and the natural sciences at both the undergraduate and doctoral levels.

Hence, as various statistical studies indicate, proponents of AA claim, on the basis of median income and proportional representation in the highest-paying occupations or in the lowest, the specified minority groups and women have not been treated "as equal to white males." Were it not for past discrimination, proponents of AA also hold, participation by minority- and female-owned businesses in government contracting would have been greater.

"Because of past discrimination," defenders of AA argue, "women and minorities in general lack the skills of white males" and were grossly underrepresented in the more prestigious and higher-paying jobs and other desirable positions and would still be thus underrepresented in these
positions were it not for the intervention of AA programs. Because society has deprived them of the necessary skills, blacks, for example, have lower academic achievement and educational attainment and score lower than European (white) Americans on vocabulary, reading, and mathematics tests, as well as tests that claim to measure scholastic aptitude and intelligence. The typical American black still scores below 75 percent of white Americans on most standardized tests, proponents of AA acknowledge. Indeed, on some tests the typical American black scores below more than 85 percent of whites. Studies reveal similar cognitive inequalities when either Hispanics or Native Americans (American Indians) are compared with whites. The substantial gap between these minorities and whites in test scores, AA advocates insist, has handicapped these minorities in the competition for college admissions and in the pursuit of many types of employment which use tests to evaluate candidates.

Social problems afflicting contemporary blacks, furthermore, such as the destruction of the family, single-parent and female-headed families, illegitimacy, poverty, unemployment, school dropouts, poor health, crime, and violence, are, AA advocates claim, a legacy of slavery and racism. Slavery, along with segregation and discrimination, they say, is responsible for many of the social pathologies in the black community. "The effect of slavery," a black writer asserts, "continues to exert its brutal presence in the untold sufferings of millions of
everyday folk." One of them says, "Must it be admitted at the close of the twentieth century, that residues of slavery continue to exist? The answer is obviously yes." Thus, nearly 50 percent of all black families are headed by single women, and more than 65 percent of black children born each year are illegitimate. About 33 percent of blacks are poor, compared with just over 10 percent of whites; about 50 percent of all black children live in poverty. The black unemployment rate is nearly double that of the whole nation. The infant mortality rate for blacks is more than double that for whites; and the life expectancy of black men is sixty-five years, a rate lower than that of any other group in America. Blacks are vastly overrepresented among criminals today. Indeed, the average black person is between three and six times more likely to be arrested for a crime than the average white. More young black males are in prison than in college, and homicide is the leading cause of death for black males between the ages of fifteen and thirty-four. Black violence is understandable, an AA advocate writes, because it is perpetrated by people "in order to survive and retain their sanity and equilibrium in impossibly unjust situations." Proponents of AA "see no reason why" the negative cultural traits manifested in the social pathologies in the black community "should not be classed as unjust injuries." Many social pathologies in other minority communities, these AA defenders claim, are the consequences
of discrimination and injustice against these minorities.

In the next several chapters I shall argue that the compensatory defense of AA fails and that a policy of AA is morally objectionable on both compensatory and noncompensatory grounds. In the compensatory defense of AA, however, there are not only moral but also empirical claims among the premises; and these empirical claims require critical examination. The truth of empirical claims concerning the exclusion of persons from social goods on the basis of group membership is too easily assumed or accepted by proponents of the compensatory justification of AA and other participants in the debate over AA. Indeed, as I shall argue, there are strong grounds for skepticism about these claims. These empirical claims therefore do not provide the evidentiary support for the conclusion that AA is morally justified that proponents of the compensatory defense of AA suppose.

In arguing that AA is morally justified on grounds of compensatory justice, advocates of AA make claims about who has been excluded from social goods, in what way they have been excluded, and what the effects of this exclusion are. A key empirical claim in the compensatory argument for AA is that the gross disparities between the designated groups, particularly the minority groups, and whites or white males not only in representation in the desirable and valuable positions in society and in cognitive skills but also in income, socioeconomic status, and so on, have been caused by and are sufficient evidence of past discrimination. Since
this claim, as well as other claims in the attempted compensatory justification of AA, is empirical, it must be established through empirical investigation. It cannot be established through a priori theorizing or armchair reflection. However, proponents of this attempted justification of AA do not subject this claim to critical scrutiny; nor do they provide evidence to substantiate it and the other empirical assertions that have a prominent role in the compensatory defense of AA.

The claim that the relevant disparities between the designated groups and whites or white males are, or are best explained as, the effects of discrimination, past or present, is ubiquitous in the debate over AA. There seems to be a tendency to treat this claim as though it were immune from empirical refutation or disconfirmation. Even if the statistical data cited by proponents of AA as undeniable evidence of discrimination are accurate, these data are not sufficient to establish that this claim is true. These advocates of AA have to present evidence for this claim other than, for example, data showing lower incomes and underrepresentation in the desirable positions. Statistical data revealing significant disparities between the designated groups and whites or white males in income, representation in the desirable positions, and so on, may create a suspicion of discrimination and may warrant further investigation. Independent evidence is needed, however, to establish that these disparities and inequalities are the effects of past or
present discrimination, as AA advocates tend merely to assume, and not the result of other factors. Proponents of AA cannot simply limit the possible explanations of these disparities to discrimination and random accident and then rule out the latter. In the following chapters, I shall not try to provide alternative explanations of the disparities at issue; but I shall argue that key empirical claims by AA advocates about the residual effects or the consequences of past or present discrimination are not supported by the evidence.

A deeper, more thorough analysis of the pertinent data concerning differences between racial, sexual, and ethnic groups reveals that AA advocates' reading of group statistics is superficial and deficient. AA advocates draw incorrect inferences about discrimination against the designated groups from uninterpreted, unanalyzed, and inadequate statistical data. A more penetrating analysis of data about group differences therefore undermines AA advocates' assumption that the statistical disparities they focus on can straightaway be attributed to past or present discrimination against the designated groups. The conclusion of this analysis is not that this discrimination has not taken place or is nonexistent but that the facile assumption that the occurrence or extent of such discrimination can be correctly inferred from group statistics should be rejected.

Historically, commentators agree, nonwhites have encountered more economic and social barriers than whites
have in the United States. The "pervasive Jim Crow laws that confronted generations of blacks in the South were unique"; but "the worst years if anti-Asian laws and policies on the west coast were a close second," one researcher writes, "featuring vigilante violence as well as legal discrimination and hostility." Surprising perhaps, however, is the lack of a general correlation between the degree of discrimination in history and groups' level of economic well-being today. Contrary to the claim that statistical disparities between the specified minorities and whites have been caused by and are proof or sufficient evidence of past discrimination, the contemporary socioeconomic position of groups often bears no relation to the historical injustices they have suffered. "Groups may be subject to very similar treatment by society at large," a researcher writes, "and differ enormously in their economic achievements." AA critics' claim that "many ethnic minorities overcame discrimination and achieved extraordinary affluence in America," a prominent social scientist asserts, "is clearly correct." Another noted social scientist remarks, "Some groups—even those bearing the badge of discrimination—have achieved more than equality." Indeed, despite having suffered discrimination for at least a substantial part of their history in the United States, various nonwhite groups are doing as well or better socially and economically than various white groups. Nonwhite groups who are successful present a problem for those who assume that the lower
socioeconomic position of nonwhites in the same society is a consequence of discrimination by whites.\textsuperscript{80}

Data on the mean household income of different American ethnic groups as a percentage of the national average show not only that Asians are far better off than blacks, Mexicans, Puerto Ricans, and Native Americans\textsuperscript{81} but also that there are notable similarities and differences between the specified minority groups themselves. Thus, it would be difficult to claim that Puerto Ricans have encountered as much discrimination in America as the Japanese, yet the Japanese have more than twice their incomes.\textsuperscript{82} Also, although Mexican and Japanese Americans came to the United States in large numbers about the same time (early 1900s), settled in the same region (Southwest), and endured discrimination in education and employment, Japanese Americans have about twice the incomes of Mexican Americans.\textsuperscript{83} In fact, the Japanese suffered more—being legally denied citizenship and land ownership for many years, for example, and being interned with great loss of property during the Second World War. The Japanese were also much easier targets of racism, since they are physically different and many Mexican Americans are physically indistinguishable from European Americans. In addition, the Japanese language is farther from English than the Spanish language is.\textsuperscript{84} Further, although blacks are poorer than Native Americans, according to recent data, they are not as poor as Puerto Ricans\textsuperscript{85}; and no one would seriously claim that Puerto Ricans have suffered a level of
discrimination greater than or comparable to that of blacks. Indeed, black West Indians have much higher incomes than Puerto Ricans have. Blacks also have higher incomes than Mexicans have. Moreover, even though Hispanics have not been victimized nearly to the degree that blacks have in this country, data from the Bureau of the Census compiled over the past few decades reveal that Hispanic families have a median net worth approximating the relatively low median net worth of black families.

Blacks, Mexicans, Puerto Ricans, and Native Americans are worse off economically than European (white) group; but Asians are doing better than any European group except Jews, including the Irish, Italians, British, Poles, Germans, Dutch, and Scandinavians. Earlier data indicate that second-generation black West Indians also had higher incomes than Americans of Irish, Italian, Polish, German, or Anglo-Saxon ancestry. Recent data show that blacks of Jamaican descent exceed the national average in income.

Given the claim that social and economic disparities between the designated groups and other groups are a consequence of past discrimination, a reasonable expectation is that these group differences would be discovered to have been greater at a time when discrimination and its effects were more severe and not to have increased over time. Empirical evidence concerning group differences, however, contradicts this expectation as well as the specific claim that the disparities in income between the designated groups and
other groups are a consequence of past discrimination against the designated groups. For example, among young husband-wife families outside the South, black family income was 91 percent of white family income in 1969 and 96 percent of white family income in 1970.\(^\text{92}\) When husband and wife in both races worked, the black couples earned 4 percent more than the white couples in 1970\(^\text{93}\) and 5 percent more in 1971.\(^\text{94}\) In 1969, according to research by an economist at Harvard, there were no differences in the average incomes of blacks and whites with the same backgrounds.\(^\text{95}\) Further, investigators estimate that the typical young black male graduate with a B.A. earned 4 percent less than his white counterpart in 1973 and 1979-80; but additional data show that this black earned 8 percent more than his white counterpart in 1975-76 and 15 percent less than his white counterpart in 1987-88, suggesting falsely that discrimination and its effects worsened a decade later.\(^\text{96}\) In 1990, black women college graduates on average earned more than white women college graduates,\(^\text{97}\) but even in 1960 black women college graduates earned more than their white counterparts.\(^\text{98}\) In 1979, all black women, whatever their qualifications, earned 8 percent more than white women of equal qualifications.\(^\text{99}\) Again, a study comparing the salaries of black and white academics reveals that although whites had a higher average salary than blacks about twenty years ago, blacks had higher salaries than whites in the social and natural sciences, while whites had higher salaries in the
humanities. When blacks and whites with Ph.D.'s from highly rated departments were compared, data show that blacks earned more than whites in all three areas. Among academics with Ph.D.'s and five or more articles published, blacks had higher salaries than whites in all three fields when both had their doctorates from institutions of the same quality. 100

Concerning women versus men, although some data show, for instance, that in the late 1970s women's earnings were only about 60 percent of men's earnings, critics question whether "these percentages were percentages of what men were being paid for the same numbers of hours for the same kinds of work." 101 Other data show that more than twenty years earlier the average full-time female wage earner received a higher percentage of the full-time male male worker's wage. 102 Further, although some data show, for example, that in the 1970s married male academics had larger incomes than married female academics, additional data show that full-time female academics who were never married earned more than male academics who were never married. 103 Data on the incomes of single, never-married women who are fully employed show that "the really big difference in income" is "not between men and women but between married women and everyone else." 104

Variations in income among European groups are also noteworthy. Although there may be controversy about which European groups encountered the most discrimination in
America, a social scientist writes, few would argue that European non-Jews had a harder time than their Jewish counterparts, that Irish Catholics were able to exclude Americans of British origin from high-level positions, or that social stereotypes helped Italians obtain jobs that the Dutch and Scandinavians deserved. Nevertheless, Jews are far better off financially than any other major American ethnic group. Indeed, the substantial income advantage of Jews over non-Jewish European groups is greater than the income advantage of most of these non-Jewish groups over blacks, Mexicans, Puerto Ricans, and Native Americans. Not many would conclude, however, that the income advantage of Jews over non-Jewish whites is a consequence of discrimination in favor Jews and against these whites. Moreover, Irish Catholics are now more affluent than the white Anglo-Saxon Protestants who were once said to control the country, and Italian Americans are doing better than their Dutch and Scandinavian competitors.

Empirical evidence concerning group differences, furthermore, reveals that there is not a general correlation between historical discrimination and later job and academic success of groups, that is, group's representation in quality positions, academic achievement, and educational attainment. Thus, according to data from the 1970s, about 14 percent of employed Americans were in the professions or comparable technical fields; but at least four nonwhite groups—Chinese (25 percent), Filipinos 23 percent), Japanese (18
percent), and black West Indians (15 percent)—had higher than average representation in these high-level occupations. Although black Americans had below-average representation in these occupations, Puerto Ricans had even lower representation.\textsuperscript{108} Notably, blacks did not have the lowest occupational status.\textsuperscript{109} Further, despite a history of exclusion and discrimination in professional sports, blacks have achieved significant overrepresentation in such prestigious, high-paying sports as basketball and football. Indeed, in track and field in this country, blacks predominate in the short-distance running events; but whites have predominated in the field events, such as the shot put, discus, javelin, and pole vault. What reasonable inferences about previous discrimination can we draw from such differences in performance in track and field?

"The low percentages of women on university faculties and the high concentration of them in the lower academic ranks, prevalent up to the time when affirmative action programs began to take effect," a commentator writes, "cannot be passed off as statistical accident,"\textsuperscript{110} or as the result of free choice. Studies show, however, that in academia in the early 1970s single women with a Ph.D. achieved the rank of full professor more often than other academics with similar years of experience, although married female Ph.D.'s achieved that rank far less frequently.\textsuperscript{111} Women held about 10 percent of all Ph.D.'s, but they were more than 20 percent of the academics.\textsuperscript{112} Noteworthy also are such
statistics as that the percentage of Ph.D. degrees received by women between 1920 and 1929 was much higher than the percentage of Ph.D. degrees received by women thirty years later, when discrimination against women presumably was not as great. Further, empirical evidence supports the belief, according to some investigators, that women have not been well represented among tenured, full professors in major research universities largely because of their preference for teaching over research.

Blacks, Mexicans, Puerto Ricans, and American Indians have below-average quantities of education and lower-quality education. However, blacks of Jamaican descent exceed the national average in years of education. Further, although the proportions of black and Hispanic recent high school graduates enrolled in college are significantly lower than the proportion of white high school graduates enrolled in college, about thirty years ago the college-bound rate for blacks who recently graduated from high school was about the same as that for white high school graduates and the college-bound rate for Hispanic high school graduates actually exceeded the rate for white graduates. Moreover, blacks do not have the lowest educational levels. Hispanics, not blacks, rank below the rest of the population in educational attainment. Mexican Americans, for instance, send a smaller proportion of their children to college than blacks do. Again, lower percentages of American Indians than blacks earn bachelor's degrees and have completed four
or more years of college.\textsuperscript{121} In contrast to the specified minorities, Asians have above-average quantities of education and higher-quality education.\textsuperscript{122} Indeed, the percentages of Asians who have completed four or more years of college and who have recently earned doctorates in science and engineering are many times higher than the percentages of whites who have.\textsuperscript{123} Asians are also greatly overrepresented among students in the selective and elite colleges and universities.\textsuperscript{124} In the 1990s, for instance, Asians were only 2.9 percent of the population but represented 20 percent of the entering class at Harvard, 15 percent at Yale, and 24 percent at Stanford; they even outnumbered whites at the major campuses of the University of California.\textsuperscript{125} Further, at the undergraduate and postgraduate levels, blacks, Puerto Ricans, Mexicans, and American Indians perform below whites and Asians, whether measured by test scores, attrition rates, or the difficulty of fields of specialization chosen.\textsuperscript{126} Studies reveal significant disparities in tests of cognitive skills when the specified minorities are compared with Asians and whites.\textsuperscript{127} Asians' academic qualifications, for instance, performance on the SAT\textsuperscript{128} (the Scholastic Aptitude/Assessment Test\textsuperscript{129}), are superior to those of the other minority groups. The gap in cognitive achievement between Asians and blacks exceeds that between whites and blacks.\textsuperscript{130} Asians even outperform whites academically.\textsuperscript{131} In school, a noted social scientist writes, "most Asian
Americans learn more than European Americans. Thus, their performance in mathematics and science classes is statistically superior to that of whites, they have higher grades, and they have higher scores on such achievement tests as the widely used SAT (recently, for instance, the percentage of Asians who scored in the 700s in mathematics was more than double the percentage of whites who scored that high) and on sections of the GRE (Graduate Record Examination). Consider also that the percentage of Asian students in California high schools who meet the basic entrance requirements of the University of California system is more than twice that of their white counterparts. In addition to their educational achievement, Asians are much more highly represented than whites in high-level occupations, such as those in the difficult and well-paying fields of mathematics and the natural sciences.

Even among white groups there are significant differences in educational attainment and representation in desirable and high-level positions in society. Thus, Jews, like Asians, have above-average quantities of education and higher-quality education. Jewish students are greatly overrepresented in the more selective and the elite colleges and universities and specialize in such demanding and high-paying fields as law, medicine, and biochemistry. "Jews learn more in school than gentiles," a social scientist remarks. Jews are vastly overrepresented not only among the nation's lawyers, doctors, and scientists but also among
editors, advertising and other business executives, professors, TV producers, and investment bankers. Even when universities in general and medical schools in particular discriminated severely against them, Jews were significantly overrepresented in the medical profession. Such white ethnic groups as the Irish, Italians, Poles, Greeks, and Slavs have been statistically underrepresented in high-status and high-paying fields like law and medicine as well as in higher education and the academic departments of universities. For instance, Jews and Asians, who together make up about 6 percent of the population, make up about 50 percent of the undergraduates at Harvard; but Italian Americans, who constitute about 8 percent of the population, compose only 3 percent of the undergraduates at Harvard and 1 percent of the professors there, and are similarly underrepresented elsewhere, for example, the City University of New York. In the early 1970s, a writer notes, there was not only a scarcity of blacks (in comparison with their percentage of the population) among Harvard undergraduates but an even more striking scarcity of second-, third-, and fourth-generation white ethnics.

Despite having suffered discrimination and injustice in this country, then, various white and nonwhite groups have achieved relative affluence and relatively high representation in the desirable positions in society. Although Jews, Asians, Irish, Italians, Poles, and other poor immigrant groups have not endured the mistreatment and injustice
that blacks historically have endured in this country—but, as indicated earlier, the worst years of mistreatment suffered by Asians were a close second—these groups have had to rise from farther down in society than contemporary blacks and Hispanics who, unlike the former groups in the past, have the advantages not only of a legally enforced policy of nondiscrimination and a vast system of social services but even of a legally mandated or approved policy of preferential treatment. Indeed, Chinese Americans, for example, have achieved economic, academic, and occupational success despite a history of unjust treatment that persisted at least into the middle of the twentieth century.

"Just as Africans were brought to America as slaves," an Asian writer says, "Chinese were dragged here as indentured laborers" and "were forced to work in inhuman conditions to build the railroads."\textsuperscript{147} Not only did they endure mob and vigilante violence and hostility, but also they were not allowed to become naturalized citizens until 1943,\textsuperscript{148} although blacks became citizens in 1870.\textsuperscript{149} Chinese in America were legally prohibited from purchasing or renting property in areas outside Chinatown,\textsuperscript{150} and they were denied the opportunity to attend public schools in white neighborhoods.\textsuperscript{151} They were legally prohibited, in addition, from working in the professions and many other occupations. In New York state, for instance, twenty-seven occupations were legally off-limits to the Chinese, including lawyer, engineer, doctor, bank director, dentist, veterinarian, CPA,
realtor, teacher, plumber, and security guard. The only areas of employment open to the Chinese in this country, a social scientist writes, "were domestic servants or work in the Chinese ethnic niches in the various Chinatowns." U.S. Chinatowns, "in fact, are testimonies of racial discrimination." Therefore, since some groups—particularly nonwhite groups like the Chinese and Japanese—with a history of suffering discriminatory and unjust treatment have nevertheless been able to achieve relative affluence and relatively high representation in high-level occupations and other desirable and valuable positions in society, the failure of blacks and Hispanic groups to achieve similar success in America cannot straightaway be ascribed to a history of discrimination against them.

The claim that the gross underrepresentation of the specified minority groups in the desirable and valuable positions is ascribable to and is evidence of previous "racial discrimination against the underrepresented groups" depends on the reasonableness and plausibility of the statistical assumption that were it not for past discrimination these minority groups would be proportionally represented across society, that is, in the various disciplines, professions, areas of work, and other desirable positions. There is no evidence, however, showing that in the absence of previous discrimination the percentages of black and Hispanic undergraduate and graduate students, doctors, lawyers, engineers, scientists, professors,
and so on, would reflect their percentages of the population as a whole. The assumption that in the absence of past discrimination the specified minorities would be occupying significantly higher, even proportional, percentages of quality jobs and college and university places derives from the statistical assumption that all racial and ethnic groups—or only the designated minorities—would be proportionally represented in the desirable and valuable positions in society in the absence of racism and discrimination. There is no historical warrant, however, or "not a shred of evidence" for this assumption. In fact, as the preceding discussion shows, racial and ethnic groups may be proportionally represented, underrepresented, or overrepresented in the desirable positions in society in the presence or absence of discrimination against some groups and in favor of other groups. Sociologically, groups are not represented in various positions and at various levels in percentages equal to or closely approximating their percentages of the population. Numerous studies conclude that "nowhere in the world, regardless of the presence or absence of particular forms of discrimination, do the assumptions of proportional representation hold true." Sociological evidence indicates that "uneven representation across racial, ethnic, and cultural groups is the norm." One study by a scholar from Duke University concluded that "few if any societies" ever approximated the proportional representation of groups at different levels and in
different sectors. Similarly, a study by a scholar from MIT found that "all multiethnic societies exhibit a tendency for ethnic groups to engage in different occupations, have different levels (and often types) of education, receive different incomes," and thus "occupy different places in the social hierarchy." Large statistical disparities between racial and ethnic groups have been commonplace both in the presence and the absence of discrimination.

Underlying the preceding assumption about the proportional representation of all racial and ethnic groups is the further statistical assumption that all these groups possess the same talents and interests in the same proportion as their percentages of the population. However, "there is absolutely no evidence" for this "extraordinary statistical assumption," one writer comments. In fact, the empirical evidence shows that groups differ in talents, culture, interests, and preferences. Racial and ethnic groups have different values, skills, and traditions that they brought with them to this country. Indeed, one of the "very important" differences between groups, a researcher writes, "has to do with culture, tradition, values, and work skills." "Human beings do not constitute a homogenized mass," a writer observes, "in which interests, ambitions, historical and social traditions are equally shared." In reality, "family, national, regional traditions, and allegiances as well as the accidents of history," he says, "incline some groups toward some
occupational activities rather than others even where there are no legal obstacles to the pursuit of any."

Racial and ethnic groups may be underrepresented or overrepresented in the desirable positions in society, then, for reasons unrelated to discrimination. In places in which some groups are overrepresented (such as Jews in law and medicine and the Chinese and Japanese in mathematics and the natural sciences) for reasons unrelated to discrimination in their favor and against others, it logically follows that some groups are underrepresented. Moreover, since Asians are much more highly represented in high-level occupations than white Americans are and blacks are greatly overrepresented in some lucrative professional sports, the logic of the kind of statistical reasoning in the compensatory argument for AA suggests that social institutions here have discriminated against whites in favor of Asians and blacks.

Furthermore, the evidence of scholarly research shows that there is not a general correlation between a history of slavery, racism, and discrimination and the incidence of social problems and pathologies for groups. Given that racism was more potent and more pervasive in the past and assuming that disparities between the designated groups and other groups are a consequence of past discrimination, this evidence also contradicts the reasonable expectation that social problems and pathologies in the black and the other minority communities would be discovered to have been more severe in previous decades and not to have increased over
time. Thus, contrary to the claim that slavery destroyed
the black family, most black children were raised in two-
parent homes, according to the evidence of research, even
during the era of slavery and for generations thereafter. In Harlem between 1905 and 1925, researchers found, there
were few female-headed families. In the early twentieth
century, blacks had higher rates of marriage than whites; and by 1960, 78 percent of all black families were headed by
married couples. Today, that figure is less than 40 per-
cent. Since 1950 the percentage of black families headed
by a single parent has increased dramatically. The cur-
rent high levels of female-headed, single-parent families
among blacks is a relatively recent social problem that has
afflicted other groups, such as Puerto Ricans, who have not
suffered the historic wrongs that blacks have. Indeed,
blacks do not have the highest levels of female-headed fami-
lies. Notably also, although Mexican and Japanese Ameri-
cans have similar histories in the United States, the rate
of broken homes for Japanese Americans is only a fraction of
the figure for Mexican Americans.

Consider also the evidence of research concerning
illegitimacy, unemployment, labor force participation,
school dropouts, substandard housing, and crime and vio-
ence. For instance, in 1959 only 15 percent of black births
were illegitimate. In 1988, 61 percent were; and by the mid-
1990s, the figure was approaching 70 percent. Further,
although the black unemployment rate now is about double the
white rate, blacks had higher rates of labor force participation than whites in every census from 1890 to 1950. In 1954, the proportion of blacks in the workforce was not only higher than it was in 1987 but also higher than the 1954 figure for whites. Also, although the proportion of school dropouts is much higher among blacks and Hispanic groups than among whites, the ratio is nowhere near the differences between some white groups in the early part of this century. For example, the proportion of schoolchildren who completed high school was more than one hundred times greater among the Germans and Jews than among the Irish and Italians in the early twentieth century. Interestingly, American Indians, not blacks, have the highest dropout rate of any racial or ethnic group. Moreover, Mexican Americans live in substandard housing to a greater extent than blacks do. Again, in the 1950s, black crime rates were higher than the crime rates for whites; but they were vastly lower than they are today. In 1992, in fact, the violent crime rate for blacks was among the highest ever recorded. In addition, we would reasonably expect to find that a black's chances of being in prison, though higher than those of a white, are lower than they were fifty or sixty years ago. According to the evidence, however, although a black was four times as likely as a white to be in prison sixty years ago, he was eight times as likely as a white to be in prison about twenty years ago. The proportion of blacks in prison has continuously increased, and a
larger proportion of blacks are in prison today than virtually any time in the twentieth century. Notable also are data indicating that the crime rates for Japanese Americans are only a fraction of those for Mexican Americans and are lower than the crime rates for whites.

An advocate of AA asserts that moral philosophers' analyses of public policy issues should "rely on investigations carried out by social scientists-sociologists, historians, and economists" because these analyses "should be relevant to social reality. Social science investigations serve as a check on a biased perception of that reality from which none of us is free." It is true that philosophers dealing with practical issues and engaged in applied ethics must take empirical matters seriously and must often rely on experts using the methods of the social sciences to provide them with the relevant data. However, critical analyses of the data cited by some AA advocates and consideration of other data provided by social scientists challenge these advocates' reading of group statistics, contradict their empirical claims about the occurrence and the effects of discrimination, and undermine their own perceptions of social reality. For AA advocates who draw inferences about discrimination against the designated groups from group statistics, serious problems arise from the failures of the expected correlation between the degree of discrimination in history and groups' later or contemporary social and economic
position. These problems involve explaining the success of Asians, the similarities between Hispanic groups and blacks in some social phenomena, the advantages of blacks over Hispanic groups in other social phenomena (given that the historical injustices suffered by Hispanic groups do not exceed or equal those suffered by blacks), the similarities and differences between the specified minority groups and whites and between women and white males in certain social phenomena in earlier and more recent decades, and variations among white groups. If, contrary to the contention of proponents of the compensatory justification of AA, the statistical disparities between the designated groups and other groups that are the focus of discussion are not, or are not best explained as, the effects of past discrimination, the removal or elimination of these disparities cannot, then, be demanded or required by compensatory justice.

In the remainder of this chapter I shall argue that a policy of AA, though supposedly a form of compensation for individual victims, it is objectionable on grounds of compensatory justice.

First of all, it must be noted that the term "compensation" is used in different senses in the literature on AA. Thus, some writers use it more or less synonymously with the terms "restitution" and "reparation" to mean "making good on damage or harm caused by wrongful action." Compensation in this sense rectifies past injustice. Here the term is used to refer to the same backward-looking practice as that
encompassed by the term "reparation." Some writers distinguish compensation in this sense from restitution, in which the X that A returns to B is numerically the same as the X he deprived B of. Restoring the object to its proper owner, one writer says, is "what we (and the Oxford English dictionary) call 'restitution'" and is not the same as compensating the person for its loss. Such compensation is characteristically a matter, not of restoring the object itself, but of providing "something else altogether." Sometimes, however, the term "compensation" is used by writers in its generic sense, in which it means simply "making up for or counterbalancing some lack or deficiency." Compensation here contrasts with reparation and is a forward-looking device for alleviating disabilities "however these disabilities may have come about"; it "seeks to remedy them to secure some future good." Many believe, for instance, that we ought, perhaps as a requirement of distributive justice, to provide assistance to the poor, sick, elderly, mentally and physically handicapped, and so on, and thus to compensate them in the generic sense for their lesser ability and undeserved disadvantages and disabilities that prevent them from competing on equal terms with others or from participating in important activities. Thus, compensation schemes provide the blind with talking books, readers, and audible street-crossing signals; provide invalids with home help or with a special allowance to enable them to hire it; and provide the disabled with
rehabilitation and retraining.\textsuperscript{203} Since the term "compensation" is used in different sense in the literature relevant to the discussion of AA, some commentators advise readers to take care when encountering the terms "compensation" and "compensatory."\textsuperscript{204} I shall use the terms "compensation" and "reparation" interchangeably to refer to "a practice that looks back to a wrongful action or deed producing harm."\textsuperscript{205}

Participants in the debate over AA agree that injustice has taken place and that victims of injustice deserve compensation.\textsuperscript{206} Not only does it seem obvious that someone who has been treated unjustly has a right to compensation, one writer argues, but "the psychologically obvious has a logical basis. For the existence of the right to compensation can be inferred immediately from the existence of the violated right. . . ."\textsuperscript{207} Another writer argues that the principle that victims of injustice should be compensated follows from the original adoption of the distributive rules that have been violated. He writes:

That this follows from the adoption of any distributive rules means that no independent justification need be given for this much of the compensatory principle; the same reasons that govern the initial adoption of the distributive rule, that render distributions according to it just, also make corrections of its violations just. Distributive rules create rights of certain individuals to certain goods.\textsuperscript{208}

Failing to add a principle of compensation implies that "such rights are canceled through their violation, which is to imply that they are not rights at all, which is inconsistent."\textsuperscript{209} To say, for example, that "'B has a property
right'" in his car "'but no right to compensation by A for damage which A does to it' is illogical."\textsuperscript{210}

Although there is agreement among participants in the AA debate that injustice has taken place, that the individuals whose preferential treatment engenders the controversy belong to groups many of whose members have been victims of injustice, and that victims of discrimination and injustice deserve compensation, disagreements arise, some commentators note, in specifying who has suffered injustice and what is appropriate compensation.\textsuperscript{211} Thus, according to critics of AA, the case for compensating members of a certain racial or ethnic group who were discriminated against, such as black athletes who were barred from competing in the major leagues in the past, does not imply that other members of the same previously discriminated-against group, such as present black players vying for positions in the major leagues, should be evaluated in any other way than on the basis of competence and performance.\textsuperscript{212} These critics deny that past injustice warrants preferential treatment as compensation for members of previously discriminated-against groups. As some critics of AA remark, the present compensatory argument for AA seems merely content to exploit moral intuitions through reliance on the simple principle of compensation that one who wrongs another owes him compensation. Although this principle generally commands assent, the present compensatory argument does not establish that this principle applies in the present instance, that is,
that it applies to the programs it is supposed to justify.\textsuperscript{213} Beginning with the simple model of compensation, attempts to construct a compensatory justification of AA fail, I shall argue in the following chapters. Modifications and elaborations of the compensatory defense of AA based initially on the simple model do not successfully assimilate "preferential-treatment-as-compensation to extensive and well-understood compensation and restitution practices already in place" by "showing how these practices reflect widely accepted principles of justice"—a defense that, according to one commentator, "would carry great weight" and "might well compel assent."\textsuperscript{214} Arguments for AA that diverge from the simple model also do not refute or undermine the principal compensatory objections to the deployment of this model, I shall maintain, and indeed are bound to fail to justify AA by appeal to compensatory justice.

In the assessment of a mode of compensation in any case of compensation, three crucial questions have to be asked: Who is owed compensation? What compensation is owed? Who owes compensation? These questions are implied by any compensatory claim.\textsuperscript{215} The simple model of compensation invoked by the present argument for AA provides answers to each of these questions. This model "contains four elements related thus: (1) an agent, (2) acting wrongfully, (3) causes injury or harm, (4) to a victim."\textsuperscript{216} Thus, as a result of his acting wrongfully toward some individual, the
agent owes compensation; and the victim is owed compensation. The counterbalancing benefits provided to the individual who has been wrongfully injured must bring the victim up to the level of wealth and welfare that he would now have if he had not been disadvantaged and not, as in an Aristotelian account, simply restore the victim to his pre-injury condition.  

This broader view of compensation, some commentators observe, is more in harmony with the modern tort law version of compensation in which the victim is compensated for the actual injury, pain and suffering, loss of earnings, sometimes psychological losses, and so on. Especially with the passage of considerable time between the injury and the compensation, restoring the individual to his pre-injury condition will not fully erase the injury. The modern tort law reflects a more adequate attempt to make the victim whole once again and to balance the harm done so that the victim is not left worse off overall. The idea is to put the victim in the position that he or she would have been in had the tort, that is, the injury or harm, not taken place.

As I shall argue, however, the simple model of compensation does not directly match the circumstances in which AA is practiced. AA programs do not conform to the answers to the three crucial questions about a mode of compensation that the simple model gives and do not satisfy the requirements of compensatory justice, which compensatory programs and policies, including AA, have to satisfy to be justified on grounds of compensatory justice. These requirements
govern the recipients of compensation, the kind and amount of compensation, and the compensators. They explain, illuminate, systematize, and unify moral judgments about particular cases of compensation. Compensatory justice on the simple model requires a specific response in the form of redress to a specific individual who has been wrongfully injured by another party, from whom compensation is to be exacted. Preferential treatment in AA programs as a form of compensation for individual injury, however, cannot be justified.

Initial problems confronting the present compensatory argument for AA and the compensatory defense of this policy generally are to indicate what the past injustices were that give rise to demands for compensation for the specified minorities and women and to explain precisely why the treatment in question was unjust, not merely morally wrong, and why AA provides appropriate compensation. If the claim is that the past injustices involved the loss of tangible goods and the denial or deprivation of specific rights, opportunities, and advantages, critics can challenge proponents of the compensatory argument for AA to say not only what the goods lost and the opportunities and advantages denied were but also why these losses and deprivations were unjust and what the rights denied were.

Who Is Owed Compensation?

One of the principal objections to a compensatory policy of preferential hiring and admissions is that it does
not satisfy the requirement of compensatory justice that the recipients of compensation be those who have been wrongfully injured. AA confers compensatory benefits on an arbitrarily selected segment of the designated groups, that is, on those minority and female individuals who happen to apply for the affected positions and who are qualified above some threshold but who are not themselves victims of discrimination in, for instance, employment, higher education, or primary and secondary education. Rather than compensating victims of past discrimination, AA dispenses compensatory benefits on the basis of racial, sexual, and ethnic group membership to individuals who are mere proxies for victims of past injustice.\textsuperscript{223} Even newly arrived immigrants who have never suffered discrimination in this country and whose ancestors had never suffered such discrimination are immediately eligible for preference.\textsuperscript{224} Compensation cannot plausibly mean benefiting some blacks, for example, for earlier injustices to other blacks.\textsuperscript{225} In detaching compensation from identifiable victims and awarding alleged compensation arbitrarily, AA subverts the original intention of rectifying past injustice.\textsuperscript{226} Although the preferential treatment of individual blacks, women, and Hispanics is supposed to be justified because of the injustices they have personally suffered, AA does not require, urge, or recommend finding out whether the particular individuals who receive preference have actually suffered the injustices that, according to proponents of AA, would warrant compensation.\textsuperscript{227} AA does not
systematically attempt to distinguish between those group members who have been discriminated against and those who have not and contains no feasible way of identifying victims of past injustice. It merely assumes that since a particular individual is a black, a woman, or an Hispanic he or she has been unjustly treated.

Programs of preferential treatment on the basis of group membership are not justified on grounds of compensatory justice even when they are established in institutions that have a history of discrimination and that explicitly seek to remedy their own past discrimination. Even under these conditions programs of preferential treatment do not satisfy the requirements of compensatory justice, since they still treat individuals as members of groups rather than as ones who have personally suffered injustice and break the link connecting compensation to victimized individuals. The particular individuals who receive benefits here are not the individuals discriminated against in the past.

Set-aside programs also violate the requirements of compensatory justice governing who is owed compensation in dispensing benefits to minority- and female-owned businesses that never applied for government contracts, that applied successfully for these contracts, or that applied for but did not obtain these contracts for reasons other than discrimination against them, and in leaving out businesses that were denied government contracts even though
they were the lowest bidders. Not only are set-aside programs established when there is no evidence of previous discrimination against the specified minorities and women in the awarding of construction contracts, but these programs are also not narrowly tailored to remedy specific discrimination and entitle any firm or business owned by a black, a woman, or an Hispanic to preference over businesses owned by nonmembers of the designated groups based solely on race, sex, or ethnicity.

Consider the actual operation and administration of AA and the circumstances in which AA is being practiced, as opposed to how rhetoric portrays them. In businesses, colleges, universities, and other institutions, the operation of AA programs results in the hiring, promotion, and admission of minorities and women who are deemed or said to be at least minimally qualified for the affected positions but who would not be selected if race or sex or ethnicity "were not a non-negligible factor in the decision" process and if the decisions were made purely on the basis of job and academic qualifications. Despite the official line since the late 1960s that not much weight was given to racial and ethnic considerations in the employment or admissions process, some commentators say, the evidence indicates that "the weight given to racial and ethnic considerations was in fact extremely substantial." Seeking to increase racial, sexual, and ethnic diversity in the workplace and in educational institutions, employment and admissions
officials apply these group classifications in selecting minority and female applicants with lower qualifications than the white and Asian males bypassed. These officials have in mind target percentages they would like to meet for minorities and women hired, promoted, and admitted. For the specified minorities, the target percentages are approximately proportional percentages of the total quality jobs available, the total positions in desirable job classifications or categories, and the places in colleges and universities. For women, the goal is to increase dramatically their representation in the desirable and valuable positions in society. Employers search for suitable minority and female candidates; and their mindset is to choose the best-qualified minority and female candidates for the affected jobs and to consider nonmembers only if no minimally qualified minority or female candidates can be found at a reasonable search cost. Not only do employers preferentially hire minority-group members and women, but they also promote members of these groups ahead of white males who have surpassed these group members in performance on promotion tests, which in some cases members of the designated groups do not even have to pass.

Examples of AA programs in employment include a company deciding to hire fifty or a hundred black workers within a specified time or to set aside 50 percent of openings in certain job classifications for blacks, a school committee deciding to hire one black for every white in
filling teaching positions, and a police or fire department deciding to fill 50 percent of the job vacancies with black applicants or to ensure that a certain percentage of the promotions in each job classification be given to black workers. Other examples include a university deciding to hire one black for every academic department, to reserve half of its academic appointments over the next five years for blacks, to select any minimally qualified minority applicant over all others in filling certain faculty positions, to fill a position only if a suitable minority or female candidate is found, and to hire nonblack and non-Hispanic males for certain positions only after a thorough search for candidates belonging to the designated minority groups and female candidates. Similarly, schools (e.g., Boston Latin, a prestigious and highly selective public school once renowned for its commitment to academic excellence), colleges, and graduate and professional schools screen minority applications for admission through separate selection committees; use merit criteria (such as grades and test scores) only to measure differences in academic preparation within the specified minority groups; and offer admission to black and Hispanic (and a small number of American Indian) students, as well as female students, with—often significantly—lower academic qualifications than the white and Asian males rejected. Race-conscious and preferential admissions policies at the high school and undergraduate level are thus carried over into such
policies at the graduate and professional school level.\textsuperscript{241}

Set-aside programs may involve an inflexible require-
ment to set aside a certain percentage of the total dollar
value of contracts for minority- and female-owned busi-
nesses or may involve financial incentives for general con-
tractors to do this.\textsuperscript{242} These programs may even take the
form of "'bid-rigging' by government agencies"\textsuperscript{243} (such as
the addition of 10 percent to the bid submitted by a non-
minority firm so that it would be underbid by the minority-
owned firm) to ensure that minority- and female-owned busi-
nesses are awarded the contracts.\textsuperscript{244}

 Programs of AA are established in businesses, govern-
ment agencies and departments, colleges, universities, and
government contracting whether or not previous discrimina-
tion by the institutions affected has either been proved or
alleged. Furthermore, the recipients of preferential treat-
ment may receive preference not once but several times and
at different levels—high school, college, graduate and pro-
fessional school, hiring, and promotion. To reach the tar-
get percentages of the specified minority groups, moreover,
institutions sometimes select minority-group members over
better-qualified white and Asian women.

AA programs in employment and higher education have
become deeply entrenched\textsuperscript{245} in this society. According to
commentators, preferences are now a part of the daily rou-
tine of American business\textsuperscript{246}; they are widespread in gov-
ernment agencies and departments\textsuperscript{247}; and almost all
colleges pursue preferential policies in hiring and admissions. In most universities, some academics admit, affirmative action is "a regularized part of the process of recruiting faculty" and is "an established fact." However, some commentators note, academic and nonacademic institutions do not generally specify whether or not they engage in preferential selection by race, sex, and ethnicity. They seem unwilling to announce or to state candidly that preferential policies are being used and hence that, for example, almost certainly a minority-group member or woman will be hired or there is only a remote possibility that a white male will be hired, membership in a designated group will be given decisive weight in the selection process, or a position will be filled only if a qualified member of one of the designated groups can be found. This reticence about acknowledging that preferential policies are being used, some writers maintain, raises moral problems of unfairness to applicants who are encouraged to make the effort to apply but who have the truth concealed from them.

AA programs are routinely carried on not only in the absence of probative evidence that the recipients of preferential treatment, including even recent immigrants and individuals who merely have Spanish surnames, are themselves victims of past discrimination but also in the face of disconfirming evidence. Proponents of the compensatory argument for AA do not show that—any of—the recipients of
preferential treatment are victims of past discrimination. Historical claims about discrimination against blacks, women, and Hispanics do not establish that the recipients of preferential treatment have been injured by discrimination and are owed compensation. In fact, according to the empirical evidence, they have not been excluded from opportunities to develop and to profit from their qualifications; nor have they been prevented by racist or sexist exclusions from developing their potential into even minimal qualifications. They have not been discriminated against in employment; that is, they have not been unjustly excluded from desirable or high-status jobs or have not been unjustly restricted to low-skilled, menial, and low-paying jobs. Further, the empirical evidence contradicts claims that the black or other direct beneficiaries of AA have been discriminatorily denied places in college or professional school. The empirical evidence also contradicts claims that these beneficiaries of AA have suffered discrimination at lower levels in the educational system and have been unjustly denied an opportunity for a decent primary or secondary education, for example, by being forced to attend inferior, racially segregated schools. While each member of the past generation "might be able to support" a claim of the discriminatory denial of a job or chance at a decent education, one commentator wrote more than twenty years ago, "there are now at least a few blacks coming through the educational system who have not suffered this
overt and glaring kind of denial." He continued, "And among women graduating with advanced degrees, it is certainly not difficult to think of some who have attended superior or exclusive schools at every level." Indeed, there are minority-group members receiving preferential treatment in hiring or college or university admissions, who also have attended academically selective and socially exclusive primary or secondary schools, which only a relatively few white males have had the opportunity to attend.

The direct beneficiaries of AA have had the opportunities to acquire and to develop the qualifications requisite for the affected positions, including those in advanced fields like law, medicine, engineering, and physics. For skilled labor and white-collar positions these qualifications will be substantial, requiring considerable skill, achievement, and experience. For high-level positions, the qualifications required will be very substantial. Especially for positions requiring a high degree of knowledge, skill, and competence, such as places in professional school, serious or plausible candidates, one writer observes, "will have done quite well in education, etc." "To be preferentially admitted to law or medical school," an advocate of AA concedes, "a black or woman must usually have attended a good college and earned good grades." Another advocate of AA acknowledges that "to even qualify as a candidate for a position in, say, law or medical school, individuals must already possess a good
first degree. Further, to acquire the information, knowledge, skills, and judgment to qualify for or to be deemed capable of succeeding in good or high-level jobs, a writer notes, candidates must have held other jobs that are nearly equally good.

The selection of the best-qualified and most competent minority-group members and women in AA programs "seems necessary," it is claimed, "to protect efficiency and to give them a reasonable chance of succeeding in their positions." Distributing compensatory benefits on the basis of relative competence or qualifications, however, is independent of and irrelevant to the basis on which compensation is owed. This way of distributing compensatory benefits is arbitrary in the sense that it is unrelated to the professed compensatory aim of AA, though it may not be unrelated to the achievement of some goal.

Pointing out that to benefit is not necessarily to compensate, critics of AA can reasonably object that although AA programs undoubtedly benefit the individuals who receive preference they do not really compensate the recipients of preference, since these individuals have suffered no injury for which compensation should be made. The contention of AA advocates that this policy is morally justified as a means of remedying past discrimination, when conjoined with the statement that blacks suffered discrimination in the past, does not justify on compensatory grounds benefiting blacks in AA. What are AA programs
benefiting these blacks for? For what happened to other blacks? Do we pay Jones for what we buy from Smith? Do we pay Peter when we have defrauded Paul?

In conferring compensatory benefits on individuals who are not themselves victims of past discrimination, AA is not only substantively unjust (i.e., has unjust outcomes or results) but also procedurally unjust because its way of distributing compensatory benefits is not one that conduces in general to just results. In straightaway distributing these benefits without any inquiry into actual backgrounds and any demonstration that the recipients deserve compensation, AA stands in stark contrast to genuine attempts to compensate victims of injustice. It lacks administrative procedures designed explicitly to guarantee its application to real victims of discrimination and lacks the safeguards to avoid the morally unpalatable consequences that few or none of those who directly benefit from AA are owed compensation.

Not only do AA programs directly benefit blacks, as well as women and Hispanics, who are not themselves victims of past discrimination, but also they disregard and leave uncompensated blacks and members of the other preferred groups who have been severely injured by discrimination. AA programs are not designed or structured to assist these victims, since these individuals are the ones who have been deprived by discrimination of the opportunities not only to acquire and to develop the skills to succeed in the
affected positions but also to become the best-qualified minority or female applicants for these positions, particularly high-level positions in such fields as law, medicine, and engineering. These individuals lack the requisite education and training for such positions. They lack adequate reading, writing, and reasoning skills; and they lack experience with and mastery of difficult written material. Even some advocates of AA concede that "the individuals who have suffered" from discrimination "will usually not qualify as serious candidates for," for example, "the positions in the most desirable professional schools."

There is a fundamental incoherence in the argument that AA is a morally justified method of remedying past discrimination. That is, if the descriptions of severe or serious injury from discrimination, such as the lack of education or training as a result of educational or employment discrimination, that are contained in the premises of the compensatory argument for AA apply to a black or member of the other specified minority groups, he will not be capable of directly benefiting from AA since he will lack the academic preparation and qualifications for the affected positions. On the other hand, if a black or member of the other minority groups is capable of directly benefiting from AA, these descriptions will not apply to him since he will not have been so injured by discrimination, such as by having been forced to attend racially segregated and grossly inferior schools, that he will have been
deprived of an adequate education and the opportunities to acquire the requisite skills. Hence, proponents of AA cannot reasonably assert of a recipient of preference both that because of discrimination he has had inferior academic preparation and inadequate education and training and hence has lower competitive skills and that he is a serious candidate for and has the skills and competence to succeed in the affected positions, including high-level ones.

Not only is there an incoherence in the premises of the compensatory argument for AA, but there is also an inconsistency between these premises and the actual practice of AA that these premises are supposed to justify. Part of the proposed compensatory justification of AA is the claim that blacks and members of the other designated groups have been severely or seriously injured by discrimination; but AA directly benefits members of these groups to whom the descriptions of injury from discrimination do not really apply. In these premises the focus is on those members of the designated groups who have been severely or seriously injured by discrimination. In the actual practice of AA, however, the focus is on those group members with the best qualifications.

AA is morally objectionable not only for the way it distributes compensatory benefits within the designated groups but also for ignoring the valid compensatory claims of nonmembers who have been victimized by social injustice, including white males. AA restricts eligibility for and
the provision of compensatory benefits to certain minority groups and women, even though members of other groups satisfy the criteria of desert of compensation. Although proponents of AA claim that blacks and Hispanics have suffered educational discrimination, for example, nonmembers of these groups who have attended the same schools as or schools of the same or even lower quality than those attended by minority recipients of preferential treatment are ineligible for preferential treatment. Being black, female, or Hispanic is neither necessary nor sufficient for being a victim of injustice and deserving compensation. The class of victims of discrimination and injustice also includes, for example, the physically handicapped, small persons, Asians, Arabs, Jews, Catholics, Irish, Italians, and Poles. Decrying the exclusion of Asians from AA programs, one writer declares, "'Asian Americans have as valid a claim of racial victimization as other minorities.'"268 A policy of AA, however, seems to imply, falsely, that every member of the designated groups has been more seriously victimized than any nonmember and is more deserving of compensation or that a nonmember of the designated groups who has been seriously injured by social injustice has a weaker claim to compensation than a black, a woman, or an Hispanic who has been only minimally injured.
What Compensation Is Owed?

Even if it were granted that every black, woman, and Hispanic is a victim of past discrimination and that AA evades the objections regarding who is owed compensation, this policy still could not be adequately defended in the name of compensatory justice. AA disregards the crucial questions concerning the compensation that is owed and the connection between compensation and injury; and it is at variance with the requirements of compensatory justice governing the kind and amount of compensation, that is, that compensation match or equal the losses suffered by the injured party. If the injured party is given more than the equivalent of the losses suffered, "we would say he has been 'over-compensated'; if less, 'under-compensated.'" In the words of one writer on compensation, "the notion of compensation per se clearly implies the providing of the exact equivalent—neither more nor less." What compensation a victim of injustice is owed depends on and is determined by the kind and degree of injury suffered. Not all victims of past injustice are owed the same compensation, since not all were injured in the same way or to the same degree. Hence, even if it were granted that every member of the designated groups has been injured by discrimination, it could not be correctly inferred that every member is owed the same compensation, since not every member of these groups has been injured in the same way or to the same degree. Thus, minority-group members and women who have not
been discriminated against in employment or higher education, such as current recipients of preference in AA programs, but who have been discriminated against in less serious ways, for instance, by having been denied service in a store or a ride in a taxi, have relatively weak compensatory claims and are owed less compensation than group members who have endured discrimination in employment or higher education. They would not be owed the preferential award of a quality job or a place in college or graduate or medical school even if a principle of compensation in kind that requires preference in hiring and admissions were accepted. Only those minority-group members and women who were discriminatorily denied positions would be owed compensation in the form of preference in hiring or admissions.

AA does not provide as compensation what particular victims of past injustice have been denied or deprived of and are owed. It neither rectifies nor seeks to rectify the specific injuries particular victims have suffered by matching compensation to, or providing the equivalent of, the injury or loss. Thus, AA does not adequately compensate those who have been injured by discrimination through the denial of goods other than desirable jobs or places in colleges and universities, for example, a decent primary or secondary education. Preferential admission to college is not appropriate compensation to those who have been discriminatorily denied a decent primary or secondary education.
education. A good tertiary or college or university education is not the equivalent of a good primary or secondary education, and the natural consequence of depriving someone of the latter is to render him incapable of benefiting from the former.272

According to the proportionality principle of compensatory justice governing the distribution of compensation, the strength of an individual's claim, as well as the quantity of compensation owed, is, ceteris paribus, proportionate to the degree of injury suffered.273 The greater the injury an individual has suffered, the more compensation he is owed; the lesser the injury he has suffered, the less compensation he is owed.274 Therefore, equal injury gives rise to compensatory claims of equal strength. Thus, if two individuals were injured to the same degree or extent and deserve compensation for their injury, then, ceteris paribus, they have compensatory claims of equal strength and are owed equal compensation.275 In selecting the most competent minority and female job and school applicants, however, AA distributes compensatory benefits according to qualifications and ability, not kind and degree of injury suffered. It simply dispenses these benefits to individuals who have the qualifications and ability to be seriously considered for and to be deemed capable of succeeding in the affected positions. For example, given this mode of compensation, three members of previously victimized groups who have been injured to the same extent may receive highly
disparate positions. One may secure a professorship in a prestigious department of a leading university, another may receive a much less desirable position, and the third may not receive any position at all. 276 Regarding members of these groups who have been injured to a different extent, some may receive far more and others far less compensation than they are owed. When compensation is distributed according to market principles, it is only accidentally fitting in view of the injury suffered. 277 "'Compensation according to ability' or 'compensation according to marketability,'" one commentator writes, "surely are dubious principles of compensatory justice." 278 This mode of distributing compensatory benefits, as one critic of AA remarks, is hardly a satisfactory way of making amends to the victimized. 279

On the assumption that every blacks, woman, and Hispanic has been victimized by discrimination, moreover, AA is objectionable not simply for not apportioning benefit to degree of injury suffered but for actually reversing the proportionality of benefit to injury that, as a requirement of compensatory justice, compensatory practices should exhibit, that is, that those most victimized should receive more compensation than those least victimized. 280 AA singles out for preference those individuals who least deserve compensation relative to other group members and thus establishes an inverse ratio between present benefit and past injury. 281 In affording preference to minorities and
who happen to be seeking jobs, making requests for promotion, or making application to college or graduate or professional school, AA programs directly benefit disproportionately younger individuals who have been least injured by discrimination. It is reasonable to assume or to generalize that minority-group members and women who are younger, who have the best education, who perform the best academically, who have the best job skills, and who receive the most desirable positions in AA programs have been least victimized by discrimination. If members of the designated groups tend to be less qualified for various positions because of previous patterns of discrimination, as advocates of AA claim, those group members who are now most qualified for desirable, higher-level positions will tend to be those who have been discriminated against least. "Preferential hiring will provide little or no benefit," a critic of AA writes, "to those most harmed by racial discrimination" and "most deserving of compensation." He continues:

Surely the most harmed by past employment discrimination are those black men and women who were denied an adequate education, kept out of the unions, legally excluded from many jobs, who have lived in poverty or close to it, and whose income-producing days are nearly at an end. Preferential hiring programs will have virtually no effect on these people at all.

A philosopher who endorses preferential treatment but who criticizes the compensatory justification of this policy agrees that blacks who directly benefit from it probably are not the ones who have suffered most from
discrimination. 'Those who don't have the qualifications even to be considered' for the affected positions do not gain directly from preferential programs. Although programs of preferential treatment may indirectly benefit to some degree group members other than the recipients of preference, these programs are not directed toward benefiting and compensating those most seriously injured by discrimination and most deserving of compensation.

"Of course, AA preference does not help blacks obtain very desirable employment if they lack the qualifications even to be considered for such positions," a defender of AA replies. "But preferential treatment in diverse areas of the public and private sector has benefited not only highly skilled but also poorly educated workers." The jobs that these blacks receive, however, are lower-quality jobs and have much less compensatory value than the desirable, higher-level jobs that, along with college and university places, are the primary interest of AA programs and AA advocates and that group members who have been discriminated against least receive preferentially. Moreover, these lower-quality jobs are jobs for which, unlike jobs that require delicate or refined abilities or a high level of skill, the competence to perform them "can be acquired by anyone within a broad range of ability" and equal competence to perform them can be expected to be widespread among racial and ethnic groups. Applicants for entry-level jobs
in, for example, carpentry and construction, "are not apt to be disadvantaged" by discrimination. Consequently, the compensatory rationale for preferentially awarding such jobs to members of the minority groups designated to receive preference lacks force.

Proponents of AA claim that it is a means of remedying, that is, of eliminating or overcoming, such effects of previous discrimination as the gross underrepresentation of blacks and Hispanics in the desirable and valuable positions in society. However, this contention obscures or ignores an important ambiguity in the reference of the term "effects" as it is used in the current debate. In this debate we can distinguish between individual and group effects of discrimination. Individual effects are the specific injuries suffered by members of a group, such as the unjust denial of a job or decent education. Group effects, on the other hand, are the losses or disadvantages suffered by the group as a whole, such as (in addition to underrepresentation in desirable positions) high poverty and welfare rates, high unemployment rates, low educational levels, and high crime rates. These effects of discrimination are the consequences of discriminatory practices directed against members of a group. AA programs in fact concentrate on eliminating or overcoming certain supposed group effects of past discrimination and achieving proportional outcomes or racial, sexual, and ethnic diversity by directly benefiting proxies for genuine individual victims of injustice.
Since, according to advocates of AA, the aim of reme-
dying the effects of past discrimination is in conformity
with compensatory justice and AA seeks to eliminate or to
overcome these effects, this policy appears to many to be
justified on grounds of compensatory justice. This appear-
ance is illusory, however, even if it is granted that the
statistical disparities made use of in the argument for AA
have been caused by, or can be best explained as the
effects of, past discrimination. Compensatory justice is
concerned with rectifying the specific effects of discrimi-
nation on those who have been victimized, and thus with
compensating individuals for the specific injustices they
have suffered, not with eliminating group effects of dis-
crimination or overcoming statistical imbalances. The goal
of proportional outcomes or racial, sexual, and ethnic
diversity has no obvious relation to compensating genuine
victims of past injustice.\textsuperscript{291} A mode of compensation can
eliminate such effects of past discrimination as statisti-
cal imbalances without benefiting any individual victims in
accordance with the requirements of compensatory justice.
If, for example, a racial group is underrepresented in the
legal and medical professions because a large percentage of
its members were not permitted to have an education beyond
elementary school, a compensatory program can help to elim-
inate this effect of discrimination by increasing the per-
centage of members of the group in professional school
through preferences in admission for group members who were
not discriminatorily denied a secondary or college education. Further, if as a result of discrimination in admissions there are fifty fewer members of a certain racial group in a college or university than there would otherwise have been, a compensatory program can eliminate this group effect of discrimination by increasing the number of members of the group by giving preference in admission to fifty members of the racial group who were not discriminated against. Again, if a racial or ethnic group has a lower average income than other groups because of discrimination in pay, a compensatory program can eliminate this group effect of discrimination by increasing the incomes of members of the group who were not discriminated against. Like AA, these programs are not methods of rectifying the specific effects of discrimination on the individuals who have been unjustly treated. A compensatory program that is in accord with the requirements of compensatory justice, unlike AA, need not produce group outcomes or results that some deem desirable, such as the proportional representation of blacks and Hispanics in law and medical school and the legal and medical professions.

Who Owes Compensation?

Another principal objection to AA in hiring and admissions is that it violates the requirement of compensatory justice that, according to the simple model of compensation, those made to bear the costs of compensation be
responsible for the wrongful injuries caused. They are responsible not only in the sense that they are answerable for the injuries caused and can be called on to explain and to justify their actions but also in the sense that they are culpable, can be blamed for these injuries (to blame is both to attribute responsibility and to censure\textsuperscript{292}), and are liable to make compensation for them.\textsuperscript{293} The party on whom the obligation to compensate falls is "the perpetrator of injustice, the violator of the victim's rights," not "'innocent bystanders.'"\textsuperscript{294} In AA, however, the burden of compensation falls not on all white males responsible or only those white males who practiced the original discrimination but solely on those white males who apply for quality jobs or places in colleges and universities which blacks, other minorities, and women are applying for at the same time. AA arbitrarily imposes the burden of compensation on white male job and school applicants who would have obtained the affected positions if not for AA and who have not perpetrated or engaged in acts of racism and injustice and have not contributed to and are not complicit in the injustice that AA purports to remedy, namely, "the legislatively enacted and judicially enforced discrimination supported by social custom."\textsuperscript{295} AA assigns the burden of compensation to a relatively small subclass of white males who are not guilty of any wrongdoing, while others who have engaged in discriminatory practices pay no costs or bear no burden whatsoever. The effect, even if not the stated
purpose, of AA is to punish or to penalize individual white males by denying them desirable jobs and opportunities for advanced education and sometimes even absolutely depriving them of their chosen careers. For every direct benefit provided by AA there is a corresponding harm or loss inflicted on white males—many of whom are young persons first entering the job market or seeking admission to college or graduate or professional school—who are penalized so that members of the designated groups can receive the benefits. Similarly, set-aside programs impose the burden of compensation on and hence penalize parties who have not engaged in discriminatory practices by barring them from competition for certain government contracts.

A policy of preferential treatment in hiring and admissions does not mandate, urge, or recommend finding out whether the particular individuals it penalizes are culpable or share responsibility for injustices to blacks and the other groups. AA inquires of each of these individuals, not whether he has contributed to injustice, but only whether he is a white male. It does not systematically attempt to distinguish between those who have contributed to injustice and those who have not and contains no feasible way of identifying those who have. AA merely assumes that because a particular individual is a white male he has contributed to and shares moral responsibility for the injustice that, advocates of AA claim, preferential treatment intends to remedy. The assumption that all white males
are thus responsible, however, is not supported by the empirical evidence. "It is implausible to think," one commentator writes, "that all whites (or even most) are responsible, even inadvertently, for the discriminatory harm suffered by blacks," although "some are no doubt guilty of engaging in the most overt acts of racism, including—but not limited to—the context of employment."\textsuperscript{296} Even some strong proponents of AA concede that "certainly no one has demonstrated that all whites, or even a majority, are responsible for racism."\textsuperscript{297}

AA thus permits government, business, and college and university officials who are demonstrably guilty of racial, sexual, and ethnic discrimination to expiate or to assuage their guilt and to seek to remedy injustices that they and their predecessors are responsible for by penalizing innocent white males through the denial of desirable and valuable positions. Those who are made to bear the burden of compensation often are members of groups who came to this country relatively late in its history and who not only did not perpetrate or participate in the historic injustices against blacks and other groups but also were themselves the victims of discrimination and mistreatment.

It can hardly be "quite wrong-headed,"\textsuperscript{298} as one advocate of AA declares, or irrelevant to object that the white male applicants who are forced to bear the burden of compensation by suffering the loss of desirable positions and even careers have not contributed to and are not
complicit in the injustice that, according to AA advocates, warrants preferential treatment as compensation. Since these white males are innocent, they have not incurred a debt of compensation. Hence, the principle relied on by the compensatory argument for AA under discussion, namely, that he who wrongs another owes him compensation, is not applicable to the present case.

The standard reply to the present objection to AA is to insist that "all white society shares the guilt for systematic discrimination and hence the liability for its compensation." Since white males are collectively guilty and therefore responsible for injustices to blacks and the other groups, it is argued, none can claim injustice in being compelled by a compensatory program to pay compensation by relinquishing a desirable position.

The initial problem for supporters of this line of defense of AA is to establish a sense in which all white males are jointly guilty and hence liable for injustices to minorities and women. One sense in which a group can be jointly responsible for injustice and therefore liable for resulting injuries is that in which the guilt of the group dissolves into that attaching to the separate actions of each member of the group. The collective guilt of the group here is nothing more than an aggregate of the individual guilt of the members of the group. An example of collective guilt in this sense is a case of rape in which several men take part by separately attacking the victim or a case
in which each member of a university academic department sells cocaine to students. A second, related sense of collective guilt involves an action that is more literally a collective action, that is, one whose description is not analyzable into a description of the separate actions of the participants. People perform actions not only separately but also jointly or collectively, to achieve some goal. An example of collective guilt in this sense is a bank robbery in which several men participate by performing distinct criminal actions. For instance, one gang member is the getaway driver, another plans the robbery and organizes the gang, another supplies the weapons, and two others execute the plan. All the members of the gang are equally guilty, legally and morally, of the crime of armed robbery. Each member plays a direct causal role in bringing about the collective result. In all these examples the guilt of each member is implied by the guilt of the collective. In neither of these senses, however, are all white males guilty—though perhaps some white women are if some white males are—of injustices to blacks and the other designated groups. It is not true that every white male has discriminated against a black or member of these groups at some time or that every white male has directly causally contributed to such an injustice, for example, as a member of a hiring, promotion, or admissions board. The majority of white males, especially the younger ones now harmed by AA, have never even been in a position to play such direct
contributory roles. Similarly, "the vast majority of German citizens" during the Second World War "played no role in the events which led to the deaths of countless Jews," a writer on the notion of collective responsibility asserts, "and hence do not bear responsibility as individuals for the Holocaust." 

Another model or sense of collective guilt involves situations in which "a practice or an attitude is common and self-reinforcing among a group of individuals, creating pressures to conform. Such practices or attitudes render certain faulty or criminal actions practically inevitable." Although these actions are really committed only by certain members of the group, other members can be said to be morally blameworthy as well. An example is a common practice in which people drink at parties and then drive above posted speed limits at night. Consider a party at which all the guests share this flaw. If one of them causes an accident and if the resultant harm would have been caused by any of the other guests had they been there, it is argued, all are morally at fault. An example involving shared attitudes is the racism of many American soldiers in Viet Nam, which has been thought by some to have made atrocities against the Vietnamese inevitable. People who share certain attitudes, such as racist attitudes, some writers argue, share responsibility for harms that result from their attitudes; these attitudes make harm more likely to occur. Thus, widespread racist and sexist
attitudes among white males, it can be argued, made discri-
mminatory acts inevitable.\textsuperscript{312} The constant and widespread
acts of violence against blacks in the South may be consid-
ered actions for which "the Southern whites bear collective
responsibility (because) the brutality . . . is partici-
pated in, actively or with passive sympathy, by the entire
white community." The harm here is "to be ascribed to some
feature of the common culture consciously endorsed and par-
ticipated in by every member of the group."\textsuperscript{313} Hence, the
individuals who maintain and express racist attitudes share
responsibility for racially motivated violence and racial
harm s perpetrated by those in society who share the racist
attitudes.\textsuperscript{314} These individuals would have acted in the
same way as the perpetrators if they had the power to do
so, it is argued; and they promoted the environment which
pressured others to act as they did.\textsuperscript{315}

Critics reply, however, that even if it is granted
that attitudes lie within the proper domain of moral
assessment\textsuperscript{316} and that all whites are morally blameworthy,
moral blameworthiness or moral fault does not constitute
reasonable grounds for legal liability and legal con-
straints, as in AA, even against Southern whites. To hold
people legally liable and to subject them to penalty for
what they might have done rather than only for what they
have done is something that we are justifiably unwilling to
do.\textsuperscript{317} Indeed it is often true that \underline{feeling} guilty or
responsible is what should properly be the response" of
those who have racist attitudes, one writer says, "rather
than being held guilty or responsible." Even writers
manifestly sympathetic to AA concede that "it would be
unjust to hold a person legally liable for something he did
not do because he is a member of a racial group whose
actions have been faulty." Furthermore, it is not true
that all whites hold racist attitudes or advocate racial
harm, continue to hold these attitudes even after similar
attitudes in others are known to have produced racially
motivated harm, or have done nothing significant to make it
less likely that these attitudes will directly cause
racial violence and racial harm. Also, not all whites
are unconscious or "visceral" racists, that is, those who
are "normally classified as unprejudiced" but whose atti-
tudes "indicate that racism still colors their conception
of social facts," who live in a "protective cocoon of
ignorance and distortion" and thus "refuse to recognize
certain social inequalities," and who "support institu-
tions that oppress black people in nearly every area of
social life." In addition, critics of AA can reasonably
ask whether defenders of AA would be prepared to accept the
implication of the present view that guilt and blame can be
justifiably imputed also to all white women for racism and
to all black males for sexism.

Paradigm cases of the kind of shared guilt considered
here, some critics observe, involve close-knit collectives,
that is, collectives with group loyalty and solidarity.
Solidarity involves a sense that all group members share interests or have an interest in one another's interests, feel pride when one of the members of the group acts in a praiseworthy way, and feel shame when one of the group members acts in a blameworthy way. Some writers claim that such solidarity is an important and necessary condition for assigning moral responsibility to groups. Critics of AA can point out, however, that "all white men" are "a motley group" or that "white society is an amorphous collection," not "an 'organization'" or a close-knit collective, such as perhaps a corporation or small town. Further, not even all whites in the South were responsible for the injustices committed against blacks, critics can argue, since there were whites who lacked solidarity with other whites and who did not condone these injustices or associate with whites who perpetrated them. This argument applies a fortiori to contemporary whites, many of whom certainly feel no bonds to slaveholders, Klansmen, or segregationists. If group solidarity is taken as a necessary but not sufficient condition for group responsibility, not all contemporary whites are morally responsible for past injustices even if they satisfy the solidarity condition.

Another view which holds that responsibility can be properly assigned to members of groups for the harmful actions of fellow group members focuses on the benefits which accrue to members of certain groups, such as
professional groups, as a result of group membership. Professional groups provide their members with such benefits as increased social status and recognized expertise; but along with such benefits of group membership there may be various burdens, including the burden of being assigned responsibility for the harmful consequences of the actions of fellow group members. The benefits received from being a group member create responsibility for the actions of fellow group members. Group members who do not act to prevent fellow group members from doing harm or who do not distance themselves from the harm in some way may then share responsibility for the harm. According to the present view, all the members of some groups may identify themselves with their group sufficiently to be collectively responsible for the harm done by some members in the name of the group. Loosely structured groups, such as racial or ethnic groups, can provide enough benefit to their members to make the members identify with their group. If members of such a group, for example, whites in this country, recognize the benefits they get by group membership, they should also recognize corresponding burdens of their membership and a duty to prevent fellow group members from doing harm or "to clearly disassociate" themselves from a group that serves as their "primary form of identification, when some members of the group in the name of the group engage in blameworthy behavior."
To begin with, however, critics of AA can reasonably ask whether proponents of AA are prepared to concede that members of the groups designated to receive preference can be similarly judged morally responsible for harms done by fellow group members. Further, even if it is granted that, on a principle of fairness, for example, benefits that are sought or accepted, such as those in professional groups, rather than unsolicited or provided whether they are wanted or not have corresponding burdens and generate obligations or duties, advocates of AA cannot correctly conclude that all whites who "fail to take certain steps" to prevent injustices committed by some whites are "morally liable for the negative consequences that result from their omissions." Critics of AA can reasonably deny that all whites or even a majority identify themselves primarily in racial terms and that these whites, unlike members of professional groups, seek out, recognize, or accept rather than merely receive benefits from being a group member or even receive such benefits. Moreover, whites who do not fail to act to prevent fellow group members from doing harm, who dissociate themselves from the group by distancing themselves from the harm in some way, or whose failure to dissociate themselves from the group is "part of a reasonable strategy to prevent further or greater harm" can relieve themselves, as some AA advocates acknowledge, of a share in the group's collective responsibility for harmful behavior.
One view suggests that responsibility ascriptions made concerning random collections of individuals provide a model for assigning responsibility to all white males for past injustices against minorities and women. The random collections here are groups of individuals who have come together at a particular time and place simply as a result of each individual's pursuit of his own ends and not for any special common purpose, and groups of individuals who are not together in space and time but who can perform an action. 342 There are cases, some writers maintain, in which people who can form a group to prevent a harm from occurring fail to act. These putative groups can be judged collectively responsible for their inaction or for the harms they fail to prevent. 343 According to those who deny any intrinsic moral difference between acts and omissions, persons are as responsible for harms which they could but do not prevent as they are for harms which they actively bring about. 344 Thus, passengers in a subway train, passengers in railway compartments, bystanders on a beach, and people on an isolated street who come upon the victim of an accident can, it is argued, meet the requirements for correct judgments of moral responsibility—i.e., that X be aware of the nature of an act and that X could have acted otherwise—and be held responsible for not doing what any reasonable person would think they should do, such as coming to the aid of an assault or a drowning victim. 345 "When the action called for in a given situation is obvious to the
reasonable person and when the expected outcome of the action is clearly favorable," a writer says, "a random collection of individuals may be held responsible for not taking a collective action." Even if a group lacks an organizational structure and is currently unable to do anything but remain passive, there might still be justification for holding the group responsible for not forming itself into the kind of group capable of taking the required action. To hold a random group responsible for a harm is to judge that every member of the group is morally responsible for the harm because the actions which are necessary to prevent a social harm are those which only a group can take as a group. The moral responsibility of a random collection, as opposed to an organized group, some writers assert, is distributive; that is, if a random collection of individuals, such as passengers in a subway train who witness an assault before them but do not move to assist the victim, is morally responsible for the failure to do A, every member of the collection is morally responsible for the failure to do A.

A possible implication of responsibility ascriptions made regarding such random collections as passengers in a train concerns collections that involve groups of individuals who are not together in space and time but who may be morally responsible for the inaction of the random group of which they are members. That is, if a reasonable person judges that the overthrow of a racist or sexist social
system is an action that is obviously called for, he may consider himself morally responsible for the failure of the random collection of which he is a member, such as whites in this country, to perform that action.\textsuperscript{350} To avoid claiming simply that all white Americans, including children, are thus responsible, proponents of AA who want a white group of which they can say that every member is morally responsible or bears some responsibility for racial injustice in this country, a writer suggests, might try to make the description more precise by saying something like "'mature, rational white Americans who know what the racial situation is, and who either take actions to perpetuate or worsen it, or who fail to take actions to alleviate it.'"\textsuperscript{351} Some advocates of AA hold that "every person has a duty to struggle against injustice wherever it exists" and hence that "anyone not currently fighting for equality is a perpetrator of injustice." As one advocate of AA expresses it, "'everyone who acquiesces in a racist or sexist system helps to \textit{cause} discrimination.'\textsuperscript{352}

However, each individual in this society is, some writers observe, a member of many random collections since there are countless harms that he, acting with others, could have prevented, for example, homelessness and world hunger. Indeed, the array of groups individuals could form and the multiplicity and diversity of social harms which could be prevented by individuals acting as a group are immense.\textsuperscript{353} An extreme implication of some views on
collective responsibility is that each human being shares responsibility for all the world's harms, for every wrong or injustice in the world. On such views, not only could whites be said to be responsible for injustices to blacks, but also whites and blacks could be said to be responsible for poverty in this country and the world, blacks for injustices to other minorities, other minorities for injustices to blacks, and so on. Middle- and upper-class blacks and women could be partly blamed for an unjust social and economic system that oppresses not only lower-class blacks and women but also lower-class whites. Surely, some writers insist, we would want to limit the random groups that can be morally responsible, for example, to those which have come together at a particular time and place simply as a result of each individual's pursuit of his own ends, and not hold responsible merely any collection of people which could act.

Even in cases in which we would hold random collections of individuals defined by spatial and temporal contiguity morally responsible for the nonperformance of an action, it need not be true that every member of the group is responsible. It is not true that every member is responsible whenever the group is. Consider first the case of twenty people, safe in their separate apartments, who all witness a deadly attack by an armed criminal on a woman outside their apartment building and do not even make a call to the police, even though each has ready access to a
telephone and such a call would probably result in saving the victim's life. Here it does seem clear, as some writers observe, that each member of the random group is morally responsible for the unfavorable result which he could have prevented at practically no risk or cost to himself. This case differs, however, from the cases which the present reply in favor of AA considers. These cases involve some joint action that is both possible and necessary for the favorable outcome, such as the case of passengers in a subway train who witness an attack before them. It is obvious, let us suppose, that no individual alone could subdue the attacker but the group would succeed in subduing him if it tried. Here the failure of the group to act is not a sufficient condition for attributing moral responsibility to every member of the group. An individual who tries in vain to get others to act with him to stop the attack cannot be held responsible for the failure of the group to act. He can relieve himself of the responsibility which other group members have because of the group's responsibility.

It would not follow, therefore, that every white male is guilty at least of apathy or "sins of omission" even if the random collection of white males can be held responsible for the nonperformance of action against racial or sexual injustice. In fact, it is not true that every white male or even every mature and rational white male bears such guilt. Regarding this claim of universal guilt, one
commentator wrote in 1979, "The present generation of young white males generally filling the job market includes those who took part in the civil rights activities of the sixties, sometimes at their own sacrifice and risk." In AA programs, "a white person who fought for civil rights for blacks may be passed over for promotion or displaced," another commentator wrote about the same time, "while a Ku Klux Klan man at the top of the ladder pays nothing." More than twenty-five years later, AA programs continue to penalize individual white males who are not morally responsible either for taking actions to perpetuate or to worsen racial injustice in this country or for failing to take actions to alleviate, and for acquiescing in, racial injustice they have knowledge of.

Attempts to defend AA by establishing a sense in which all white males are guilty and morally responsible for injustices to blacks and the other designated groups and therefore liable for compensation are, then, unsuccessful. It is noteworthy that in AA programs Asian males are also forced to bear the burden of compensation even though proponents of AA do not generally claim that they too are culpable and therefore liable for compensation.

In penalizing individuals in effect on the basis of their racial group membership, AA is a policy of racial indebtedness and punishment. It is redolent of morally abhorrent blood feuds and tribal practices which thrive on attributing to all in a group the guilt for the crimes of
some of its members. When a Hatfield kills a McCoy, a McCoy will take any Hatfield as a suitable object of retaliation; and Hatfields will look at McCoys in the same way. Again, during the partition of India, when some Muslims in one part of the country persecuted Hindus, another group of Hindus would take retributive actions against some other Muslims in another part of India; the Muslims would then take retributive actions against the Hindus. Such feuds and tribal practices completely disregard individual guilt, responsibility, and desert. A leading tendency of modern moral thinking has been to reject such feuds and practices and the associated notions of group guilt and group punishment or retribution. AA is akin to such feuds and practices since it in fact penalizes individual whites not because they have been shown to be guilty and morally responsible for racial injustices but because they are white. "However emotionally satisfying it may be for blacks to believe that all whites owe some sacrifice simply because they are whites," one commentator writes, "it would be a terrible irony if we were to endorse this view as respectable." The view that all whites are culpable for racial injustices and deserve to have some penalty inflicted on them involves "the same kind of typecasting and 'tainting' which lies at the very core of racism itself." 

Furthermore, insofar as a policy of AA assumes that all white males are culpable and deserve to be penalized,
it is also judgmentally unjust. Judgmental injustice consists in making false or unwarranted derogatory judgments about persons or their works. The judgments involved are "imputations of guilt, demerit, and responsibility for wrongdoing, of characteristics or actions that are somehow substandard." AA derogatorily misrepresents individual white males and impugns them as the individual persons they are. Are not judgments by some advocates of AA that all whites are racists, either conscious or unconscious or visceral, similar to derogatory judgments about blacks? Would AA advocates say that such judgments should be condemned as unjust when they are about blacks but not when they are about whites?

Even if it is granted that every, or practically every, white male in this society is at least indirectly responsible or bears some responsibility for injustices to blacks and the other designated groups, AA is objectionable for distributing the burden of compensation arbitrarily and unjustly. Most theorists seem to agree that responsibility can be divided unevenly. There are degrees of guilt and blame for given injustices. That is, agents guilty of different acts that constitute participation in injustices or crimes are not all equally blameworthy. Thus, a witness to a murder who could have prevented the crime is not guilty of the murder, nor is he as blameworthy as the murderer. According to the proportionality principle of compensatory justice governing who owes compensation, the burden of
compensation should be distributed in proportion to the degree of responsibility. The greater the injury a wrongdoer has caused, the more compensation he owes; the lesser the injury he has caused, the less compensation he owes. Hence, those who have done the greatest injury should pay the most compensation. AA, however, violates this moral principle and actually reverses the required proportionality in the distribution of the burden of compensation. It inverts the ratio of past guilt to present burden, imposing the heaviest burden of compensation on white males who are guilty at most of acts of omission and who are least responsible for injustices to blacks and the other groups and least deserving of having this burden imposed on them. AA will have no effect on those other, more responsible white males who are guilty of engaging in acts of racism or discriminatory practices and who are already entrenched in secure positions or whose vocations are noncompetitive.

Furthermore, moral culpability or blameworthiness is not sufficient grounds for legal guilt and legal constraints and sanctions in the case of omissions, in the case of solidarity with a group some of whose members in the name of the group engage in blameworthy conduct, or in the case of identification with such a group by membership in it. Thus, someone who surmises that a bank robbery is about to take place but "does nothing out of simple reluctance to 'get involved'" is "not legally guilty," although he is "certainly subject to blame" or "morally guilty." Moralists
can afford to have stricter standards of culpability than lawyers, some writers keenly observe, since no formal punishment or legal sanctions will follow as a result of their judgments. Proponents of the present argument for AA seem to be urging or recommending the adoption of stricter standards of culpability and liability to legal constraints and sanctions in the AA contexts than they and others are prepared or willing to approve of in other contexts. An approach to compensation modelled on AA would apparently countenance the official action of singling out some whites in a predominantly white neighborhood for payment of compensation to a black family in the neighborhood whose house was severely damaged one night by a group of other whites. The rationale for this action would be that the first group of whites are guilty at least of acquiescing in or failing to take action to change the racist environment that led to the harm, even if they did not perpetrate the crime or share or foster racist attitudes.

A different strategy for defending the imposing of the costs of compensation on individual white males in AA responds to the foregoing criticisms by arguing that the presence or absence of guilt or fault on the part of white male job and school applicants is irrelevant because AA programs should be viewed more on the model of strict liability systems, in which liability, that is, the obligation to compensate for harm caused, is "imposed without regard to injurer fault," or the model of no-fault insurance or
compensation schemes. The law "can intelligibly (even if not justly) hold people responsible for their involuntary and thus faultless conduct," some legal philosophers write; and "in the law this is called strict or absolute liability." Liability is strict "in the sense that it does not depend upon mental states or character defects and does not allow excuses—does not, in short, require that the person who caused the harm be in any sense morally at fault for what was done." Fault is described as conduct that is "negligent, reckless, or intentionally and unjustifiably harmful." Contemporary tort law imposes liability on persons who have caused not only intentional but also unintentional harm to other persons. The standards of liability potentially applicable to unintentional harm are those of negligence and strict liability. Traditional moralists have held that an agent who has voluntarily performed an injurious action owes compensation to the injured party when "the injury was caused by that action and not by the injured party's own actions" and "the agent's action was wrongful or negligent." However, recent strict liability theories hold that liability may be imposed even on agents whose actions are not willful, reckless, or negligent. An agent who acts willfully, deliberately, or intentionally in causing harm or injury desires to bring the harm about or is substantially certain that the harm will ensue as a side effect of his action. An agent acts negligently only if he knows, or could or should have realized, that his action
might foreseeably cause harm and that he could avoid that risk by acting differently. Such an agent should have taken care regarding the harm caused; the negligence standard of liability requires a person "to act with 'due' or 'reasonable' care if her activities might foreseeably harm" another person. For harmful conduct that is not faulty and for unintentional harm to which the negligence standard is not applicable, the standard of liability is that of strict liability. Examples of the application of the strict liability standard are products liability actions, that is, actions brought against a manufacturer or seller of a product for harms caused by a defect in the product, whether or not the defect was known about or should have been known about, and liability actions regarding harms caused by certain ultra-hazardous activities. Hence, diverging from the simple or debt model of compensation, according to which someone who has acted wrongfully in causing harm to another owes the victim compensation, the present defense of AA seeks to justify imposing the burden of compensation on white males by appealing to the notion of liability, not that of fault. Liability, it is pointed out, is simply the obligation to do or to refrain from doing something; it does not imply guilt or fault. Liability is transferable or assignable without fault, whereas guilt is not transferable and presupposes fault.

On the model of vicarious liability, which is said to be a "subspecies" of strict liability, the fault for a
wrongful action is properly ascribed to one party; but the liability is ascribed to a different party, who is systematically or officially related to the first party. The individual who caused the harm is not the one who is called on to answer for it.\(^{393}\) Hence, an individual need not commit a particular act to be liable for obligations arising from it.\(^{394}\) For example, a parent may be held liable for the behavior of his minor children, and a guardian of an insane person's estate may be held liable for that person's behavior. The application of vicarious liability in such cases is justified, one writer says, "partly because someone must be held liable to protect the rights of potential victims to compensation."\(^{395}\) Similarly, an employer may be held liable to compensate victims of the negligence or deliberate wrongdoing of his employees, even when an employee is acting without or in direct defiance of the explicit orders of the employer and the employer committed no negligence in hiring, supervising, or instructing the employee.\(^{396}\) Official bodies—such as governments, corporations, and universities—may be held liable for the actions of their official representatives.\(^{397}\)

Applying the notion of vicarious liability, one argument for AA maintains that every white male owes compensation to the specified minorities and women for past discriminatory practices even if he is not morally at fault since the community—i.e., its government (which may be regarded as the people's representative\(^{398}\)) and institutions—owes
compensation and therefore the members of the community owe compensation and every white male is a member of the community.\textsuperscript{399} The present white male population ought to be considered as members of a company that incurred debts before they joined, a variant of the preceding argument contends; and they ought to bear such debts.\textsuperscript{400}

The preceding argument for AA, however, fails to establish that every white male is personally liable for compensation to the designated groups in virtue of his membership in the community.\textsuperscript{401} This argument and its variants cannot justify imposing obligations of compensation on individual white males by appeal to distributive liability. To begin with, the claim that the present white population ought to be considered as members of a company that has incurred debts is not justified. Further, even if it is true that since the community owes compensation its members collectively owe compensation, it does not follow that its members distributively owe compensation.\textsuperscript{402} It is not true that because an individual is a member of the community he acquires its debts and liabilities.\textsuperscript{403} Liability does not generally distribute from a corporate entity to each of its members;\textsuperscript{404} distributive liability does not generally hold between organized groups, such as companies, and their members.\textsuperscript{405} If, for example, General Motors owes damages to the owner of a defective Pontiac, an employee in Flint, Michigan, does not thereby owe the Pontiac owner anything.\textsuperscript{406} The same point applies to community obligations. Thus, when the
government acquires a debt to companies for imposing an illegal surcharge, none of the individual members of the community acquires a personal debt to the companies. 407

Moreover, since members of the groups designated to receive preference also are members of the community, the present argument for AA implies that not only every white male but also every black, woman, and Hispanic is liable for the community's obligations.

Although every white does not acquire a personal debt to compensate blacks and members of the other designated groups in virtue of his membership in the community, it does not follow, some writers stress, that every white male does not acquire an obligation to support the community's fulfillment of its legitimate obligations,408 such as by providing a fair share of the tax revenues from which the community pays its debts. If it is assumed, however, that the community as a whole has an obligation to compensate blacks and the other groups and that the costs of compensation should be assessed against the community as a whole, AA clearly is an unsatisfactory mechanism for distributing these costs. In AA, the community as a whole does not pay compensation; the costs of compensation do not fall on all members of the community. There is a clear distinction between a "direct loss to individuals and a general social loss in which they would share with everyone else,"409 and AA causes a direct loss to individuals.
Some obligations of the community, it might be objected, must be fulfilled in ways that necessarily place unequal burdens on members of the community, for example, drafts in time of war. In some situations, philosophers may agree, placing burdens on or assigning costs to a smaller group than the community as a whole may be necessary. In these situations the distribution of costs to a relatively small group of members of the community is unavoidable. There simply is no other way to meet the obligation or to achieve the essential objective. However, programs of preferential treatment as compensation to blacks, other minorities, and women do not satisfy this description. The costs of programs instituted to fulfill community obligations, including compensatory ones, can fall on the community as a whole, such as the reparations program for Jewish victims of the Nazis that was established in West Germany after the Second World War, and need not fall on a relatively small group of members of the community, such as some workers and university students.

Viewing a policy of preferential treatment in hiring and admissions on a model of no-fault insurance or compensation or strict, though not vicarious, liability, it is suggested, can provide a way of assigning the costs of compensating the specified minorities and women to white male job and school applicants who are innocent of complicity in wrongs to these groups and do not share the responsibility for these wrongs. This defense of AA focuses on cases in
which individuals other than those at fault for intentionally or negligently inflicted wrongful harms help to pay the costs of compensating the victims, for instance, cases in which the wrongdoer has not secured a wrongful gain at the expense of another. Once it is agreed that the victims of injustice in such cases should receive compensation, the question then is, Who shall pay the costs of compensation?

In cases of purely accidental damages, such as those resulting from nennegligent automobile accidents, there seems no reason, from the point of view of justice, one writer says, that compensation for the victim must come from the other party, as opposed to institutions that spread the costs widely. However, even in cases of intentionally or negligently caused injuries to individuals in which typically no benefit accrues to the offender, such as acts of discrimination against minorities by hiring and admissions officials (other than the benefit of the desired nonassociation with minorities) and negligent automobile accidents (apart from the benefit resulting from negligence itself), no corrective or compensatory injustice is done, in some writers' view, if someone other than the faulty injurer fully compensates the victims. On this conception of corrective or compensatory justice, corrective justice is concerned with the category of wrongful (i.e., undeserved, unwarranted, or unjustified) gains and losses and requires the annulment or elimination of both wrongful gains and losses. The overriding concern of compensation is the
nullification of the victim's losses to make him whole again and thus to put him in the position he would have been in had the injury not taken place. The obligation to make him whole again, the annulment conception of corrective justice holds, may or may not be the injurer's responsibility.

If the faulty injurer's duty to repair the victim's loss is a matter of corrective justice, that entails, on this view, that he has secured a wrongful gain. If someone else discharges the duty on his behalf, that is, compensates the victim, an injustice remains, since the injurer's wrongful gain is left unrectified. On the other hand, if the faulty injurer's duty does not derive from the principle of corrective justice (and derives instead from some other principle or source), it follows that the victim's loss does not translate into his wrongful gain. If someone other than the faulty injurer fully compensates the victim in such cases, no corrective injustice is done, since there is no wrongful gain that is left unrectified. When there is no wrongful gain correlative to the wrongful loss the faulty injurer inflicts on the victim, there is no reason, as a matter of corrective justice alone, for imposing the victim's loss on the injurer.

The debt of repayment a faulty injurer who does not gain by his wrongful action owes his victim is one that can, consistent with the principle of corrective justice, be discharged by another. Although principles of compensatory justice would not support a no-fault allocation of losses resulting from certain
intentional harms when there is wrongful gain, as in fraud or theft, they would not prohibit such an allocation when there is an absence of wrongful gain, as in negligent automobile accidents,\textsuperscript{421} for example, a scheme that calls for the losses from automobile accidents to be shared among all persons in a certain category (e.g., drivers) without regard to whether they caused injury or a particular injury.

The distribution of the costs of accidents under a no-fault scheme seems troubling to those who think that justice requires imposing the costs of accidents on those whose fault caused them. On this view, the fault liability rule promotes justice and the rule of stricy liability abandons justice.\textsuperscript{422} Deciding liability on the basis of fault is inextricably linked to justice, which is regarded as requiring that burdens due to individual fault be allocated according to the criterion of fault. This conception of justice supports a fault system and prohibits contracting for no-fault liability coverage.\textsuperscript{423} Proponents of the annulment conception of corrective justice respond, however, that to require that fault-related burdens be distributed according to the criterion of fault is to rule out all traditional forms of insurance, since these forms of insurance allocate burdens in part among individuals who are not at fault and who have not caused harm as well as among past and present wrongdoers.\textsuperscript{424}

The present defense of AA appeals to approaches to corrective justice that treat it, some writers on tort law
maintain, as a form of distributive justice. Thus, the concern of the annulment theory, which calls quite simply for wrongful losses to be eliminated or annulled, is with distributive rather than corrective justice, since "reasons for annulling losses" pertain, "in effect, to everyone, rather than to individual injurers." A satisfactory theory of corrective justice, these writers suggest, cannot be grounded solely in the victim's suffering a loss rather than in responsibility for the consequences of one's actions. "In general, corrective justice requires A to compensate B for loss suffered by A's conduct (in a faulty-based theory, by A's faulty conduct)." Corrective justice "purports to impose an obligation to pay compensation on persons who have caused harm in certain ways to others"; and "those who suffer harm are viewed as having a correlative right, held against their particular injurers and no one else, to recover for their losses."

Some writers whose primary interest is in morality and compensation rather than tort law hold that in some cases the costs of compensating victims of injustice should be spread widely or distributed among the entire community, for instance, when it is not possible to identify the perpetrators of injustice. Most of us will agree and it will seem unfair to deny, these writers say, that these victims of injustice are entitled to and ought to receive compensation if other victims of injustice are entitled to and ought to receive compensation. The claim of these victims of
injustice to receive compensation should depend on the nature of the injustice they have suffered and the effects of that injustice, not on whether it is possible to locate the perpetrators of injustice or on whether the perpetrators have secured a wrongful gain at the expense of the victims of injustice. Further, on the present view, that the costs of compensation should be borne by institutions that spread the costs widely or should be distributed among the entire community is the most plausible and most equitable, or perhaps least inequitable, solution to the problem of who shall pay the costs of compensation when it is not possible to identify the perpetrators of injustice—i.e., "we have no knowledge about them, or our knowledge is not sufficiently certain, or we know the class to which they belong but cannot identify particular individuals." The costs should be distributed in such cases, in other words, in the way the costs of any public good are distributed, namely, through progressive taxation. In choosing among alternative modes of compensation, according to the present view, the possibility of dividing costs among the entire community should be an important consideration. Indeed, distributing costs among the entire community may be, proponents of this maintain, an overriding consideration. It may be enough to tip the balance in favor of a mode of compensation that is in all other respects second best. No-fault compensation arrangements that operate along the lines of a state-funded or compulsory or private insurance system, such as one that
distributes the costs of compensating victims of automobile accidents without regard to fault, spread the costs of compensating victims thinly and widely and thus reduce the relative impact of these losses on individuals. As a simple example, contrast the compensation scheme that takes $1 from each of 100 individuals, all of whom have $100, with the scheme that takes $100 from just one of those individuals. Even if in some situations compensation by innocent parties or parties who have not caused harm—e.g., individuals in various no-fault compensation schemes or Germans born after World War II who, "though in no way responsible for the injustices against Jews during the Holocaust," made monetary payments in a reparations program for Jewish victims—appears to be morally acceptable, as defenders of AA argue, AA is not morally acceptable. Programs of preferential treatment in hiring, promotions, and admissions do not distribute the costs of compensation evenly or thinly and widely and cannot be made to do so. Payment of compensation by a randomly, an arbitrarily, or a racially selected relatively small group of individuals in the community, as in AA programs, is different from and morally inferior to payment by the entire community or by institutions that spread the costs as thinly and widely as possible. Large-scale compensatory programs that satisfy the principle or criterion of an even or a thin and wide distribution of costs most easily, such as German
reparations to Jewish victims of the Nazis and American reparations to citizens and permanent residents of Japanese ancestry interned in camps during World War II, are programs instituted by governments involving monetary compensation extracted from all taxpayers in the country. Hence, even if no-fault compensation schemes can be satisfactorily defended against objections that making a party who has not caused harm intentionally, who is not blameworthy for harm caused, or who has not caused harm at all the source of compensation constitutes an injustice, AA programs cannot be adequately defended in the name of compensatory justice. They do not conform to the no-fault model of limiting compensatory benefits to nullifying the losses suffered by the injured parties; focusing on making the injured parties whole again; and distributing the costs of compensating the injured parties for their losses thinly and widely, such as by drawing on general tax revenues.

In response, some defenders of AA concede that there is a significant difference between the burden borne by individual white male job applicants in AA programs and the "not exorbitant monetary assessment" paid by individuals in such reparations programs as the German and American programs. Someone must bear the burden of compensation; but, these defenders of AA admit, AA does seem to distribute this burden unfairly. Whites who lose jobs through preferential treatment for minorities and women do appear to be singled out for sacrifice while other whites, among whom are
perpetrators of racism and injustice, pay nothing. Rather than concluding, however, that AA programs are unjust, these defenders of AA hope to blunt this charge by arguing that the costs of compensation can be diffused over a larger group, for example, through monetary awards to these whites funded by the government through a progressive tax. Monetary compensation to these whites appears to be a reasonable measure, these AA defenders claim, since it will distribute the costs and spread the burden of a racially (and sexually) preferential remedy throughout the society. Taxes levied according to ability to pay, they maintain, best conform with the principle of fairness. Those whom payment hurts the least pay more.

However, although it is not true that on the foregoing proposal some whites bear the burden of compensating members of the specified minority groups and women while others, including perpetrators of racism and injustice, pay nothing, the proposed program does not distribute the costs and spread the burden of compensation equitably throughout the society. The unfairness and injustice of AA in the distribution of the costs of compensation do not consist solely or primarily in the fact that relatively few whites pay these costs and the others pay nothing. The whites who are not directly affected by AA pay, on the foregoing proposal, only a relatively small monetary assessment; but the whites who are directly affected by AA continue to pay an especially heavy price in having to relinquish strategically important
social goods, even if they receive monetary awards. Monetary compensation to whites displaced by AA does not make them as well off as they would have been had they not suffered the loss through AA and does not remove from them grounds for complaint of injustice to them. These whites have often devoted years to acquiring the specialized skills and training needed in the competition for high-level positions, such as faculty positions in colleges and universities. They may have only one opportunity to attain the type of position they want and have the maximal qualifications for. The deprivation or loss of a specific career opportunity, unlike the loss of money, is personal. The career a person chooses is a part of him, of his self-identity and self-image, in a way that money is not. "One's career directly affects his or her self-concept," a proponent of AA acknowledges in condemning discrimination against minorities and women. Some whites alone pay the price of being prevented from achieving desirable positions and chosen careers; the others pay, on the foregoing proposal, a price that is comparatively insignificant, whether or not taxes are levied according to ability to pay. Indeed, advocates of AA programs themselves do not regard monetary awards of the kind envisioned in this proposal as an adequate substitute for the desirable jobs given to minority-group members and women in AA programs at the expense of better-qualified white males. On the proposal under discussion, moreover, white school applicants who are forced to relinquish opportunities for advanced education do
not even receive monetary awards.

In this chapter I have criticized the central empirical claims in the argument for AA based on the simple model of compensation and have maintained that this argument and modifications which appeal to the notions of strict liability and no-fault compensation do not successfully defend AA against the objections that AA violates the requirements of compensatory justice concerning who is owed compensation, what compensation is owed, and who owes compensation. Further modifications and elaborations of the initial compensatory argument for AA, I shall argue, are likewise unable to refute or to undermine these objections. Indeed, a seemingly insuperable problem for attempted compensatory justification of AA is to construct a defense of this policy that does not allow that the recipients of compensatory benefits need not themselves be victims of past injustice; that compensatory benefits need not match or be proportionate to the injury suffered; and that those made to bear the burden of compensation need not be responsible for or have some morally objectionable connection with injustices against blacks and the other designated groups.
Notes


9. Ibid.


16. Ibid.

17. Ibid.
18. Ibid., 6.
19. Ibid.
25. Ibid., 286.
32. Mosley and Capaldi, Affirmative Action, 3.
34. Eisaguirre, Affirmative Action, 125.
35. Ibid., 123.
43. Ibid., 124.
44. Ibid., 14.
47. Katzner, "Reverse Discrimination," 73.
56. Ibid.
59. Ibid., 3.
60. Paul, "Affirmative Action."
62. Ibid.


64. D'Souza, End of Racism, 67.


72. Rowan, Conflicts of Rights, 124.


74. Sowell, Race, 196.


76. Thomas Sowell, "Myths about Minorities," Commentary, August 1979, 34.

77. Jencks, Rethinking Social Policy, 29.


81. Jencks, Rethinking Social Policy, 28; and Sowell, "minorities," 34-35.

82. Jencks, Rethinking Social Policy, 28; and Sowell, Race, 186.

83. Jencks, Rethinking Social Policy, 28; and Sowell, "Minorities," 34-35.

84. Sowell, "Minorities," 35.


86. Sowell, Race, 186.

87. Ibid.


89. Ibid., 28-30.


104. Flew, *How to Think Straight*, 100.


107. Ibid., 29.


111. Sowell, "'Affirmative Action' Reconsidered." 121.

112. Ibid.


115. Sowell, Race, 196.
118. Sowell, Race, 185.
123. Eisaguirre, Affirmative Action, 126; and Tomasson et al., Affirmative Action, 207.
125. Eisaguirre, Affirmative Action, 126.
129. D'Souza, End of Racism, 719.
132. Jencks, Rethinking Social Policy, 140.
133. Rowan, Conflicts of Rights, 124.


136. Herrnstein and Murray, Bell Curve, 459.

137. D'Douza, Illiberal Education, 262.


139. Sowell, Race, 196. and Tomasson et al., Affirmative Action, 192, 199.

140. Jencks, Rethinking Social Policy, 140.


144. The data concerning Harvard University were reported on NBC's "Meet the Press" on 14 March 1999; and the data concerning the City University of New York are alluded to in Cahn, "Two Concepts of Affirmative Action," 355.


149. Ibid., 109.

Press, 1992), 201.

151. Ibid.
152. Ibid., 198.
153. Ibid.
154. Ibid., 197.
165. Ibid., 78.


174. Taylor, *Good Intentions*, 82, citing the relevant research data.


188. D'Souza, End of Racism, 283.


190. Ezorsky, Racism and Justice, 5.


198. Ibid., 263-64.


205. Ibid., 187, n. 1.


209. Ibid., 69-70.


214. Ibid., 179.

215. Ibid., 175.


218. Ibid.

219. Ibid.


227. Ibid., 198-99.
230. Dienhart and Curnutt, Business Ethics, 222.
234. Ibid.
235. Taylor, Good Intentions, 132-33.
236. Dienhart and Curnutt, Business Ethics, 221.
237. Taylor, Good Intentions, 129-37, 165-67; and D'Souza, Illiberal Education, 36-37.
240. See, for example, Hill, "Affirmative Action," 172-73.
243. Ibid.
244. Ibid.
247. Ibid., 292.


256. Mosley and Capaldi, Affirmative Action, 37.


258. Fullinwider, Reverse Discrimination, 55.


262. Jencks, Rethinking Social Policy, 58.

263. Goldman, Reverse Discrimination, 90.


271. Ibid.


276. Ibid.

277. Ibid.

278. Ibid.

279. Ibid.


286. Ibid.


290. Sher, "Preferential Hiring,"


300. Ibid.

301. Ibid., 103–104.

302. Ibid., 104.


305. Ibid.


308. Ibid.

309. Ibid., 106–107.
310. Ibid. 107.


316. May, Sharing Responsibility, 5.


328. Ibid.

329. Feinberg, Doing and Deserving, 238.


337. McGary, "Groups, Moral Status of."


344. Duff, "Responsibility."


348. Ibid.


353. May and Hoffman, eds., Collective Responsibility, 8.

354. Mellema, "Collective Guilt."


356. Ibid.


358. Ibid.


360. Ibid.


362. Fullinwider, Reverse Discrimination, 43.


364. Fullinwider, Reverse Discrimination, 44.


366. Ibid., 328-29.


368. Goldman, Reverse Discrimination, 105-106.

369. Fullinwider, Reverse Discrimination, 54, 56.

370. Sher, "Reverse Discrimination," 73.

371. Feinberg, Doing and Deserving, 245.

372. Ibid., 245-46.


376. Ibid., 17.
377. Ibid., 126.
378. Ibid., 202.
380. Velasquez, "Compensatory Justice."
382. Perry, "Tort Law," 58.
384. Duff, "Responsibility."
386. Ibid.
387. Ibid.
390. Ibid., 57.
393. Ibid., 225-26.
398. Ibid., 111-12.


402. Ibid.

403. Fullinwider, Reverse Discrimination, 35.

404. Ibid.


407. Fullinwider, Reverse Discrimination, 35.

408. Ibid.


414. Ibid., 374, n. 6.

415. Ibid., 185.

416. Murphy and Coleman, Philosophy of Law, 159.


418. Ibid., 201.

419. Ibid., 187.

420. Ibid.

421. Murphy and Coleman, Philosophy of Law, 160-61.

422. Ibid., 149.

423. Ibid., 153.

424. Ibid.


428. Ibid., 74.

429. Ibid., 72.


431. Ibid.

432. Ibid.

433. Ibid.

434. Ibid.

435. Ibid., 98.

436. Perry, "Tort Law," 68.


438. Ezorsky, Racism and Justice, 84.


440. Ibid., 97.

441. Ibid., 101.

442. Ezorsky, Racism and Justice, 85.

443. Ibid.

444. Ibid., 86.


446. Rowan, Conflicts of Rights, 117.

Chapter 3

Compensatory Argument for AA (2)

Having argued in the preceding chapter that AA is morally objectionable on the compensatory grounds that it violates principles of compensatory justice governing who is owed compensation, what compensation is owed, and who owes compensation, I shall argue in the present chapter that AA is morally objectionable on the noncompensatory grounds that it violates principles of distributive justice and nondiscrimination and fundamental individual moral rights. As I shall also maintain, the compensatory argument for AA is vulnerable to the objections that make use of the idea of a vicious regress, the method of rational moral argument which involves the exposure of logical inadequacies in a moral position, and the moral distinction between means and ends in the assessment of actions and policies.

In assigning jobs and college and university places to blacks and members of the other designated groups and denying them to white (and Asian) males with superior qualifications, AA is discriminatory and unjust, even if it is practiced in the name of compensation. It is discriminatory in actually basing the allocation of jobs and college and university places on race, sex, and ethnicity—properties that are generally irrelevant from the point of view of distributive justice. AA violates principles of distributive justice and the fundamental moral rights of those bypassed—the rights to equal opportunity, equal consideration, equal
protection of the laws, procedural fairness, treatment as an individual, and respect as a person—in making membership in the designated groups, a consideration that is unrelated to competence and the ability to perform well in desirable positions, the decisive criterion of selection in hiring, promotions, and admissions. The objection here is not merely that AA arbitrarily denies white males positions which they are entitled to under existing and publicly declared rules and regulations or that administrators of AA deviate from the preestablished rules and standards currently in effect, as some commentators on the debate over this social policy suggest, but that the preferences in AA violate principles of justice and individual moral rights governing the distribution of desirable positions. AA denies white and Asian males positions which they are entitled to and deserve because of their satisfaction of the conditions for prevailing in the competition for the affected positions that are specified by distributively just rules and because of their demonstrated preeminent possession of the characteristics and skills that, according to principles of distributive justice, constitute the basis of the competition for desirable positions.

The present objection to AA, then, is not simply that it makes white males worse off than they would like to be, as some AA advocates imply, but that it treats them unjustly. Thus, when businesses and government agencies preferentially hire or promote blacks by adopting such
schemes as one black for every white and when police and fire departments hire or promote blacks and Hispanics over white and Asian males who have outperformed them on written tests or on the job, these institutions discriminate against white and Asian males. Similarly, when colleges and universities initially appoint less-qualified minority and female candidates for certain faculty positions and award tenure to minority and female candidates whose level of combined achievement—in teaching, research, and service—is below that of the white and Asian males rejected, they discriminate white and Asian male candidates. When they reserve a certain percentage of seats (for which white and Asian males cannot compete) in each entering class for members of the designated groups or admit black, female, or Hispanic students over academically more-qualified white and Asian male students, they discriminate against and treat unjustly these white and Asian males. Whites are victims of discrimination and injustice when, for example, as recent data show, elite colleges and universities accept only 19 percent of whites with combined SAT scores in the 1200-1249 range but 60 percent of blacks with similar scores; accept 24 percent of whites but 75 percent of blacks in the 1250-1299 category; and reject over 33 percent of whites but accept every black applicant in the 1500-or-better category. At the University of California at Berkeley, virtually all black and Hispanic applicants who meet the minimum admissions requirements, such as a grade point average (GPA) of 2.78, are admitted;
but white and Asian male applicants are rarely accepted
without a GPA of at least 3.7 or 3.8 (on a 4.0) scale. The
University of Michigan graded applicants on a point scale
and gave blacks, Hispanics, and a few American Indians 20
points, a number equal to raising their GPAs a full point on
a 4.0 scale. Recently, the UCLA School of Medicine admitted
27 blacks, but no whites or Asians, with GPAs of 3.24 or
below and MCAT (Medical College Admissions Test) biology and
chemistry percentile scores of 93.4 and below. The Berkeley
School of Law admitted every black applicant with a GPA of
3.5 and LSAT (Law School Admissions Test) score of 90.0 or
above, but it admitted only 42 percent of similarly quali-
\[\text{fied whites.} \]
Recent data indicate that 396 of 420 places
given to black applicants to the best law schools would
have gone to nonblacks, primarily whites and Asians, if the
admissions decisions had been made on the basis of grades
and LSAT scores.

The following actual case is an instructive illustra-
tion of the way AA programs in college and university admis-
sions operate to discriminate against, to violate the rights
of, and to treat unjustly white and Asian male applicants:

UC Berkeley made decisions on two of its students this
past year, both Californians. Student A was ranked in
the top third of his class, student B in the bottom
third. Student A had College Board scores totaling
1,290; student B's scores totaled 890. Student A had a
good record of citizenship; student B was expelled
last winter for breaking a series of major school
rules. Student A was white; student B was black.
Berkeley refused student A and accepted student B.

Clearly, student A was denied admission on the basis of
race. If he had been black, he would have been accepted straightaway; and if B had been white, he would have been summarily rejected.

AA is thus a social policy that legitimizes institutionalized discrimination in favor of blacks, as well as women and Hispanics, and against white and Asian males. The injustice of AA is similar in certain respects to the injustice of the previous discrimination against the designated groups. A policy of AA likewise uses the categories of race, sex, and ethnicity in favoring and benefiting members of some groups and depriving and disadvantaging members of other groups; both the original discrimination and AA are dismissive of the goal of treating all persons fairly and justly. AA programs are not condemned as unjust on the grounds that they give special benefits to certain individuals, sophisticated critics of AA hold, "simply because they are women or blacks" in the sense that "the fundamental reason, purpose, or justification of the policy is nothing more than 'this individual is black (or female),'" that is, nothing more than an "utterly arbitrary preference" for the black race or female gender. Rather, even though it is not true that AA programs are instituted "for no other reason than personal taste," these programs unjustly deny to particular individuals on the basis of race, sex, and ethnicity positions which they normally would have earned so that less-qualified members of the designated groups can receive them. In awarding supposed compensation to members of the
designated groups at the expense of white and Asian males, AA creates new victims of discrimination and injustice. Ironically, many of the individuals victimized by this policy belong to racial and ethnic groups whose members were themselves discriminated against in the past in employment and advanced education. Jews, for example, were often denied prestigious, high-paying jobs and admission to elite colleges and graduate and professional schools because of ethnic quotas that were gradually abandoned only after the end of the Second World War.\textsuperscript{14}

The common objection that AA programs discriminate is "very superficial as it stands," it is replied, because "any policy must discriminate on some grounds. The university admissions office ought to discriminate between the clever and the not-so-clever, for example."\textsuperscript{15} Recognizing the distinction between the morally neutral and nonneutral senses of the term "discrimination," however, critics charge that AA programs discriminate in the morally nonneutral or objectionable sense.

A related objection is that implicit in the compensatory argument for AA is a commitment to inconsistent moral claims. As one commentator phrases it, "the policy is self-contradictory. After all, affirmative action programmes are supposed to be a remedy for discrimination but all they seem to do is discriminate on different grounds."\textsuperscript{16} According to this argument, the disadvantaging of members of the designated groups and the denial of such goods as jobs and
college and university places to them on the basis of race, sex, and ethnicity in the past was discriminatory, unjust, and morally impermissible and therefore warrants compensation; but disadvantaging white males and depriving them of desirable positions on the basis of these characteristics in the present is not discriminatory, unjust, or morally impermissible. "There is one general principle" applying to a policy of AA "that is hard to refute," a moral philosopher writes, namely, that "if discrimination is wrong, then it must be wrong to use discrimination to counter discrimination; and if racism and sexism are wrong, it must be wrong to use racism to counter racism or to use sexism to counter sexism."\(^{17}\) In condemning the previous discriminatory practices that disadvantaged blacks and the other designated groups while approving of a policy of AA, advocates of AA seem to be committed to the view that apparently discriminatory treatment is really discriminatory, unjust, and morally wrong when blacks, along with the other minorities and women, are the victims, but not the beneficiaries, of such treatment.

Principles of justice govern the distribution of social benefits, including desirable positions (i.e., competitive ones, as opposed to political appointments), and burdens. The dictates of distributive justice can thus be viewed as constraints on the actions, practices, and policies of governments and other institutions involving such distributions. Principles of distributive justice identify
the morally salient features of, explain, illuminate, systematize, and unify correct judgments about the justice of particular actions, practices, policies, and social arrangements concerned with the distribution of social benefits and burdens. These principles generate and support intuitively correct answers to questions about particular cases of distribution, and the application of these principles leads to intuitively sound judgments in concrete cases.¹⁸

If defenders of AA deny, however, that principles of justice and nondiscrimination or fundamental individual moral rights govern the treatment of persons in the distribution of social goods like jobs and college and university places, and hence deny that white males can rightly complain of injustice to themselves through AA, what is the basis for compensating blacks and members of the other designated groups through programs of preferential treatment in hiring, promotions, and admissions? Critics of AA can reasonably ask what injustices were committed against these groups that purportedly warrant preferential treatment in employment and admissions as compensation. If there are no just or unjust, but only socially desirable or productive or beneficial and socially undesirable or unproductive or harmful, ways of distributing social goods like jobs and college and university places and thus if it is not unjust to allocate desirable positions on the basis of race, sex, or ethnicity, "there is no wrong to redress," as one critic writes, "and the moral ground is cut"¹⁹ from the proponents of the
compensatory argument for AA. The alleged discrimination against the designated minorities and women in employment and admission to educational institutions in the past was not then unjust because it violated principles of distributive justice or fundamental individual moral rights. Members of these groups were not deprived of jobs or college or university places that they deserved or were entitled to according to principles of distributive justice. Therefore, they have no compensatory right to these goods. Hence, AA programs cannot be compensating blacks, members of the other minority groups, and women for past distributive injustices and previous violations of moral rights in the allocation of jobs and places in educational institutions.

If, on the other hand, defenders of AA believe that principles of justice prohibit excluding blacks and members of the other designated groups from employment or higher education or other activities because of their race, sex, or ethnicity and that blacks and members of these groups have a right not to be excluded or ruled out on these grounds, consistency demands that they believe the same regarding members of other groups, including white males. The belief that blacks, women, and Hispanics were wronged or treated unjustly unjustly in hiring, promotions, and admissions in the past when their qualifications were ignored or discounted is inconsistent with the further belief that ignoring or discounting the qualifications of white (or Asian) males is not unjust or morally problematic.20 If victims of previous
discrimination had the moral protection of principles of
distributive justice and nondiscrimination and had a right
not to be excluded from or denied employment or higher edu­
cation because of their race, sex, or ethnicity, then others
now, including white males, have this protection and this
right. If defenders of AA believe that ignoring or discount­
ing the qualifications of minority-group members and women,
but not those of white or Asian males, is unjust, their
position is not principled or consistent. A serious problem
confronting proponents of the compensatory justification of
AA, therefore, is to provide an account of past injustice
against the designated groups which does not undermine the
denial that AA treats white males unjustly in employment and
higher education.

The task of a theory of distributive justice is to
articulate and to defend material principles of justice, where
which specify the properties on the basis of which social
benefits and burdens should be distributed. These principles
identify the relevant properties or characteristics which
individuals must possess to qualify for a particular distri­
bution. A large variety of criteria have been proposed for
just distributions, for example, need, effort, social con­
tribution, and merit. Some writers think that just distribu­
tions are a matter of how certain distributions came
about. It cannot be assumed, however, that the same mate­
rial principles apply in different circumstances or contexts
of distribution or that one principle, as opposed to an
irreducible number of distinct principles, governs the dis-
tribution of such disparate goods as social security, 
income, health care, welfare payments, employment, and edu-
cation. Indeed, the appropriateness of criteria and the 
specification of what counts as just vary with and depend on 
the context of distribution and the type of goods in ques-
tion—i.e., on whether we are allocating goods like income 
and medical care, assigning grades, conferring awards, or 
imposing burdens like taxation and military service. Since 
the relevance of criteria is heavily determined by the con-
text of distribution, there are many different criteria that 
are relevant to and may be properly invoked in different 
contexts of distribution. Hence, a criterion relevant to one 
context may not be relevant to other contexts. For instance, 
individual need is relevant to the provision of welfare pay-
ments but not to the allocation of academic grades or pro-
fessional licenses. A problem for theories of distributive 
justice is to find higher-order material principles that 
illuminate and systematize the lower-order or secondary 
principles that govern the different levels or contexts of distribution. 25

In many contexts of distribution the determination of 
relevant criteria and the specification of material princi-
pples of justice are relatively straightforward and uncontro-
versial. In these contexts the social practice or objective 
dictates the relevance of certain criteria, although not all 
ongoing practices and the traditional or entrenched criteria
they embrace are thereby morally acceptable, since some properties that have often served as the basis of distribution, such as race, national origin, and social status, should not, as a matter of justice, be considered relevant properties. There is seldom any difficulty in deciding what is relevant, one writer observes, when the task is to assign grades or to award prizes, for example, or to determine the justice of a grade already assigned or an award already given. When we have a clear idea in advance of what the goods in question are being allocated for, we have a clear idea of which criteria are relevant. If we are awarding a prize for distinguished work in physics, for instance, the profundity, subtlety, and utility of a scientific theory are relevant; but the physical features of its author obviously are not. Again, if we are allocating teaching positions, knowledge of the subject matter and the ability to impart that knowledge are relevant. Concerning hiring and admissions, there is widespread agreement that the relevant criterion is merit, that is, the demonstrated potential for success or capacity to do the work in question, and hence that jobs and college and university places should be allocated in accordance with qualifications or competency. These positions should be awarded on the basis of merit in the sense that the candidates who show the greatest capacity to fill these positions or who maximally satisfy the criteria used to assign them should be awarded them. Writers on the concepts of merit and desert distinguish between moral
merit (the kind displayed in acts that are morally praiseworthy and in character traits that constitute moral virtues) and nonmoral merit, one form of which is displayed in the contexts of hiring and admissions. Other forms of nonmoral merit are displayed when, for example, people work especially hard; are especially productive; excel at artistic, literary, mathematical, or scientific endeavors; and outperform rivals in athletic or other kinds of contests.

In some contexts of distribution, such as economic contexts, stating the standards or criteria of relevance is difficult, not relatively straightforward or uncontroversial. Here the criteria judged to be relevant are not narrowly determined or dictated by or, one writer says, "internally connected to," the context of distribution or the type of goods in question. In such contexts appeal must be made to moral deliberation and argument; moral argument is needed here to support the choice of distributive criteria. Thus, concerning the justice of distributions of economic resources or benefits, some theorists claim that the preferred distribution of society's material wealth is strict equality among the citizens. Others propose different criteria, such as need, labor, effort, moral merit, and societal contribution. Still other views argue that economic distributions should make the worst off as well off as possible and that a just set of economic holdings is one that came about by the correct procedure.
Distributive injustice takes place when the criteria that should be used in determining the distribution of social benefits and nonpunitive burdens are not followed or when these benefits and burdens are distributed for reasons other than these criteria. An example of distributive injustice involves a society in which all social benefits and burdens, such as social roles and positions (for instance, factory owner, laborer, and teacher), grades and prizes, scarce medical resources, and taxation, are distributed solely on the basis of a periodic lottery. This random distribution system simply disregards criteria that, according to principles of distributive justice, are relevant to certain contexts, such as training, experience, skill, intellectual or physical achievement, medical need, and income. A society in which social benefits and burdens are distributed on the basis of such factors as place of birth, hereditary social class, and parent's occupation provides another example of distributive injustice. Further, when a university official grants admission to or appoints as professor an individual who is less qualified than other candidates because he is the son of a friend or the school president, a member of a wealthy and influential family, or the relative of a government official and his admission or appointment will please his whole family, or because he shares the university official's religion or ethnicity, the official violates the distributive principle that we act unjustly if we fail to select the best-qualified
candidate. Distributive injustices also result, and the average person's sense of fairness is offended, when, for example, A is selected over B in the award of a prize for work in physics even though B's work is more distinguished; C is selected over D, who is more skilled, for a place on the high school football team; and E is selected over F for the high school's honor society even though F has better grades and a more impressive record of extracurricular accomplishments. 

The formal principle of justice that in the allocation of social benefits and burdens, including punitive ones, persons who are equal in the morally relevant respects should be treated the same and persons who are unequal in these respects should be treated differently in and direct proportion to the differences between them encapsulates in its first component a principle of nondiscrimination. The principle of nondiscrimination prohibits treating differently persons who are equal in the morally relevant respects or treating persons differently on the basis of morally irrelevant characteristics. This principle says how not to allocate social benefits and burdens; it does not say how they should be allocated. Material principles of distributive justice, such as the principle that employment opportunities and opportunities for advanced education should be distributed on the basis of competence, prescribe how social benefits and nonpunitive burdens ought to be allocated.
Proponents and opponents of AA hold that there is an essential connection between discrimination in the morally nonneutral sense and morally irrelevant characteristics. Thus, proponents of the compensatory defense of AA and writers sympathetic to AA say that discrimination consists in using a characteristic that "is morally irrelevant as a ground for treating persons in a certain way"; that "for differential treatment to be discriminatory (and unjust for that reason) it must be based on a morally irrelevant characteristic"; and that "objectionable discrimination" consists in "choosing on non-relevant grounds" or on the basis of "excluded characteristics." Again, "to discriminate against someone is, roughly speaking, to deny that person some advantage (food, lodging, a job, admission to a university)" he is "otherwise qualified" for "(by willingness to pay, ability to do the job, scholastic attainments) on the basis of some improper consideration such as 'race, sex, ethnic origin [or] or family background.' Discrimination is taking account of people's group membership "in ways that disadvantage them," that is, "taking account of a person's race, ethnicity, or other group membership in denying a good or service," or imposing a burden. A critic of AA agrees that discrimination consists in basing "the treatment of an individual on membership in a morally irrelevant group" or in making "a moral distinction on morally irrelevant grounds." Another critic of AA writes that A discriminates against Fs "when and only when (1) A deprives Fs more
than Fs because Fs are G; and (2) Gness is irrelevant to Hness, where Hness is some property that appointees ought to possess or not to possess." What are the ranges of the variables A and F? They are "persons-in-roles," since "discrimination is one kind of interpersonal transaction" and it "occurs in institutional and hence rule-governed settings, such as competitions." Thus, "typical values of A are appointers, selectors and governments"; and "typical values of A are applicants, candidates and citizens."48

Differences in treatment should not be based, then, on criteria that are arbitrary, irrelevant, or trivial; the criteria for given differences in treatment should be morally relevant.49 The morally irrelevant criteria or characteristics, non-relevant grounds, excluded characteristics, or improper considerations that form the basis of discrimination do not involve all those and are not confined to those that are immutable or not within individuals' control (e.g., race), those that are historically prominent, or those that involve groups deemed "generally to have deep social significance."50 Thus, traits or characteristics that are not within individuals' control are often used to ground differences of treatment not generally considered discriminatory, for example, when professional sports teams select athletes on the basis of skills that largely derive from genetic endowments and when casting directors consider or invoke racial membership in selecting black (white) actors for the roles of black (white) historical figures.51 On the
other hand, a hiring official in a bus company "discriminates against many Sikh applicants if he appoints none of them because they are long-haired, and being long-haired is irrelevant to being a bad conductor." Likewise, if an employer uses a Muslim's beliefs as a reason in deciding not to hire the job applicant and a large firm refuses to hire members of a minority religious group or gives preference to nonmembers in order to promote harmony and efficiency among workers because of their religious unity, the employer's decision not to hire the job applicant and the large firm's hiring practices would be regarded as discriminatory and unfair. Discrimination also takes place when an employer hires or promotes less qualified individuals because they are his friends or the sons and daughters of his friends, and when a black (Asian, Jewish, Italian, and so on) managerpreferentially hires or promotes blacks (Asians, Jews, Italians, and so on) out of loyalty to his own group. Again, discrimination takes place when a high school fails black and Hispanic boys above the ninth grade because they are black or Hispanic; a professional school excludes Jews or those who have freckles or restricts their admission; a committee awards a prize for achievement in physics or mathematics to A over B, whose work is superior, because few members of A's racial, ethnic, cultural, or religious group have received such awards or because the committee wants to inspire other members of A's group to notable achievement; or a sports team selects a white candidate over a black
candidate, who is a better player, because the team's management seeks to have greater racial and ethnic diversity on the team by reducing the overrepresentation of blacks. Discrimination is "unfair," then, a philosopher writes, "because it breaks part of Aristotle's Rule of Justice, "to treat alike (equally) those who are the same in the relevant respects.'"\textsuperscript{55}

As the critical discussion of forward-looking justifications AA will show, writers have understood discrimination in various ways. Some writers have understood discrimination to be conduct that displays or expresses contempt for or prejudice against a group. The core evil of discrimination, on this view, is treating people as moral inferiors by virtue of their group membership, not simply taking account of a person's race, ethnicity, or other group membership in denying a good or imposing a burden.\textsuperscript{56} Some writers have viewed discrimination as a complex concept and have attempted to expand the scope of discrimination to embrace various sorts of phenomena.\textsuperscript{57}

An initial characterization of rights, according to a consensus of writers, is that they are ways of acting or ways of being treated that are appropriately determinate; equitably distributable on an individual basis to each and all of those who are said to be rightholders; and beneficial for the rightholder and, more generally, for society.\textsuperscript{58} The idea that rights always involve "some sort of normative direction of the behavior of others,"\textsuperscript{59} that is,
that rights impose duties and duties are normative constraints on others' freedom, might also appear to have universal agreement; but "there are problems with alleging consensus on this particular point." Claim-rights, or rights in the strict sense, do imply or have attached to them correlated duties of others, that is, things which the others, persons or society, are supposed to do or to refrain from doing when some given person is said to have a right to something.

There is a significant variety of contemporary opinion, however, regarding assertions that a right exists, that is, concerning what a right is and whether rights, in order to be rights, require social recognition and social maintenance. A common characterization of rights is that they are essentially claims; and this characterization can be taken as a way of emphasizing, like classical natural rights theorists and contemporary advocates of human rights, that rights hold irrespective of whether they have been acknowledged, either in the society or by that person against whom the claim is made. While some writers have said simply that rights are claims, others say they are entitlements; and still others say they are valid claims. The opposing view is that rights are socially recognized practices. Rights, even human rights, are basically established ways of acting or being treated. According to the social recognition view, the theory of rights as valid claims in any of its formulations, in emphasizing that rights hold irrespective of
whether they have been acknowledged, does not provide an adequate generalized notion of rights. This theory cannot satisfactorily account for legal rights and thus does not capture both legal and moral rights under a single generic heading, since it suggests that practices of governmental recognition and enforcement in law are dispensable concerning legal rights. The notions of authoritative recognition, explicit or implicit, and governmental promotion and maintenance, the social recognition view argues, are themselves part of the standard notion of a legal right.\textsuperscript{65}

Even if the social recognition view is correct in its criticism of the theory of rights as valid claims regarding legal rights, however, this view encounters difficulties in contending that all moral rights not only can but must be construed as involving established practices of recognition and maintenance. As commonly understood, moral rights are functions of morality rather than law or any other conventional system.\textsuperscript{66} Moral rights are the kinds of rights we use to criticize or to justify a system of conventional rights.\textsuperscript{67} Some moral rights derive from the special roles or relationships people have, such as the right to the fulfillment of a promise; but other moral rights are independent of such roles, relationships, or situations and are possessed by everyone at all times and places, such as the right to life.\textsuperscript{68} Contrary to the positivist view that "a right is only something that is laid down in a legal system,"\textsuperscript{69} moral rights are independent of law. They are not derived from any
political enactment or defined, created, or conferred by any legal, institutional, or conventional rules. They are discovered rather than invented or created, and they are vindicated by moral argument. Moral rights are rights that persons have even if they are not recognized or assigned to persons by a legal system, such as the right of slaves to be free. Appeals to them are made regardless of what the law happens to be. Legal rights, by contrast, follow from contingent decisions made by the government regarding people's entitlements; these rights depend on the rules, laws, and judicial principles of a given legal system. Neither legal nor moral systems formally require reference to the other for understanding. One may have a legal right to do what is patently immoral, or one may have a moral right without any corresponding legal guarantee. Further, moral rights are not subject to alteration by human volition; they cannot be abolished, modified, added to, or eroded by legislative or judicial action. They can, however, be recognized, ignored, or violated by law. They may or may not be legal rights as well. Examples of moral rights that are not also legal rights are the right not to victimized by discriminatory, though constitutional, legislation and the right of slaves in a slave society to be free. Legal rights that are arbitrary and unsupported by moral reasons, such as the right to own slaves, are legal rights only. That moral rights exist independently of any legal, institutional, or conventional rules explains how
they can form a basis for criticizing or justifying legal rights and for evaluating laws and the actions and policies of governments and other institutions, as well as the mores and positive morality of one’s society.

So-called human rights, which are universally claimed or ascribed rights and are "entitlements that claim to exist regardless of what government policy happens to be,"79 are frequently appealed to in discussions of ethical issues connected with a wide range of social concerns. The term "natural rights" often has the same meaning but tends to be used less frequently.80 The term "moral rights" is used in academic contexts and "does not suffer from the unfortunate baggage (much of it political) that tends to accompany the previous labels."81

There are several senses, according to rights theorists, in which certain moral rights may be fundamental, for example, that the justification of other rights ultimately involves appeal to them or that other rights are derived from them and they are not derived from other rights, that they are the preconditions or necessary conditions of all other rights, and that their objects (i.e., what they are rights to) are of overriding importance.82 The sense in which certain moral rights may be fundamental that most closely reflects the sense primarily intended in the present discussion is that in which these rights are more important to the recognition and achievement of certain very highly esteemed ends or values—such as agency, autonomy,
dignity, and respect for persons as ends in themselves—than other rights. Moral rights that are fundamental impose stringent limits on morally permissible action and on what governments and other institutions may do to promote or to achieve social goals.

In the following pages I shall attempt to provide a specification of the content of the rights—the content of a right is what it is the right to do or to have done, such as that the state provide subsidized public education or health care—appealed to in the criticism of AA that is detailed and that yields a reasonably and fairly determinate set of rights underpinning the rights objection to AA. I shall indicate not only how one respects these rights but also how one violates them and how AA in particular violates them. Against skeptical objections and denials, I shall maintain that there are strong reasons in favor of recognizing or acknowledging the existence of these rights.

Content of Moral Rights

The ideal of equal opportunity has rhetorical appeal. Americans—politicians, businessmen, social theorists, rights activists, and others—profess to believe in equal opportunity; and it is rarely subjected to intellectual challenge. "Everyone agrees, " one writer observes, "that opportunities should be equal." However, the assertion that all persons have a right to equal opportunity seems quite vague, according to one complaint. What is equal
opportunity? In saying that a person has a right to equal opportunity what precisely are we saying that he has a right to? 87

A systematic analysis of the concept of equal opportunity proceeds in the following way. 88 Equal opportunity is a "verbal formula" 89 consisting of four simple, recurring elements. Three of the elements concern the term "opportunity" and are covert; the fourth element concerns the term "equality" and is derivative. Before attempting to say what equality of opportunity is, a writer notes, "one must say something about what an opportunity is." 90 Thus, every statement of opportunity consists of the three covert elements. The first covert element is the agent or class of agents whom the opportunities belong to. Opportunities "do not float freely about, unattached to persons." 91 Opportunities, by definition, belong to persons—whether they are blacks alone, blacks and whites together, women, rich people, poor people, older people, children, and so on. 92 The particular agent or class of agents differs from one opportunity to another, but every opportunity entails an agent or a class of agents. "We may therefore always ask about an opportunity," as "we may always ask about any liberty or freedom," one writer remarks, "to whom it belongs." 93

The second covert element in all statements of opportunity is the goal or set of goals which the opportunities are directed toward. An opportunity is a relationship of some agent to some desired object. "All opportunities are
opportunities to do or to enjoy some benefit or activity. 94 The goal of an opportunity may be a place in college or law or medical school, a job, a primary or secondary education, medical care, housing, a political office, a financial investment, a military promotion, the development of one's natural talents and abilities, or whatever. The particular goal or set of goals differ from one opportunity to another, but every opportunity is a relationship of a specific agent or class of agents to a specific goal or set of goals.

The third covet element is the relationship that connects the agent of an opportunity to the goal of the opportunity. Since an opportunity is a species of liberty or freedom and freedoms involve the notion of the absence of obstacles, 95 the concept of opportunity involves the notion of the absence of an obstacle. An opportunity is a chance of a specified agent, if he so chooses, to attain a specified goal without the hindrance of a specified obstacle or set of obstacles. The absence of these obstacles gives the agent a chance he did not previously possess to obtain the specified goal. The particular obstacles or set of obstacles an opportunity removes may be insurmountable (i.e., an obstacle which, unless removed, permanently precludes an agent from attaining his goal), such as race, color, ancestry, or place of birth; surmountable (i.e., a status or condition a person may himself change or overcome), such as religious belief, wealth, social class, marital status, minimum age, high school diploma, or residency; or a combination of
The concept of opportunity can be particularized into specific conceptions of opportunity by specifying the agents, goals, and obstacles. One conception of opportunity differs from another. Some conceptions may be more just or unjust or acceptable or unacceptable than another; but on every conception, an opportunity, qua opportunity, is the same as every other. An illustration of a conception of opportunity is the conception expressed in a legislative act that provides statutory opportunities for persons in this country by making it unlawful for labor organizations to limit the employment of persons by discriminating against them on the basis of race, color, religion, ancestry, marital status, or physical or mental handicap. The act specifies the three essential terms of the opportunity: the specified class of agents (persons in this country); the specified goal (employment); and the specified obstacle (discrimination by labor organizations on the basis of race, color, religion, and so on). Legislatures do not always specify as
explicitly as the present act does the precise terms of the opportunities they intend to prescribe; and obfuscations result from expressing opportunities without specifying the constituent terms.\textsuperscript{97}

The fourth element in the concept of equal opportunity is a derivative one, namely, equality. "Equal" has the same meaning in the phrase "equal opportunity" as it has everywhere else. Thus, equal opportunity is simply the identity that obtains between two or more persons by virtue of their all falling within a class of agents who possess a chance to attain a specified goal or goals without the hindrance of a specified obstacle or obstacles. These persons are all free from the same specified obstacles to attain a specified goal. It follows that two persons can have an equal opportunity to attain a specified goal even though each faces different obstacles of his own, provided that they are free from the same specified obstacles. If, for example, two runners with different training and talent are given a chance to win a race by being allowed to start at the same time and place and run the same distance and if the measure of opportunity is the chance to win the race without the obstacles of starting at different times and running different distances, the two runners have an equal opportunity to win the race even though they face different obstacles regarding talent and training.\textsuperscript{98}

The concept of equal opportunity is not the concept of equal chance in which a chance is understood as occurring
"when a person is in a situation where he might, or is likely to, obtain a desirable goal or possession but where whether or not he does so does not depend on his efforts."99 The concept of equal opportunity does not imply that the likelihood of two persons obtaining a specified goal must be the same regardless of their personal choices and efforts.

The concept of equal opportunity, like the concept of opportunity, can be particularized into specific conceptions by specifying the agents, goals, and obstacles.100 A conception or substantive principle of equal opportunity will not require society to equalize opportunities for every goal a person may have. Rather, it will require society to equalize obstacles to the achievement of some goals and not others. Moreover, it will not require society to equalize every obstacle to the achievement of these goals.101 An illustration of a conception of and a right to equal opportunity, as well as of the derivative nature of "equal" in "equal opportunity," is the conception expressed in the legislative act which prescribes that "'no person' seeking employment with the Public Broadcasting Service (PBS) or National Public Radio (NPR) shall be subjected to 'discrimination' on grounds of 'race, color, religion, national origin, or sex.'"102 This act specifies the three essential terms of the opportunity by which equal opportunity obtains. It states that a specified class of agents (i.e., all persons desiring employment) shall have a chance
to attain a specified goal (i.e., employment at PBS or NPR) without being hindered by a specified obstacle (i.e., discrimination on grounds of race, color, religion, national origin, or sex). All members of the class of agents are equal, therefore, with respect to the opportunity prescribed. Ambiguity and confusion result when statements of opportunity do not specify the class of agents, the goal of the opportunity, and the precise obstacle the prescribed opportunity removes.

The principle of formal equal opportunity (also known as weak equal opportunity, in contrast to strong or substantive equal opportunity, which will be discussed in the critical examination of forward-looking justifications of AA) specifies the form that is to followed in allowing access to jobs, promotions, education, and other goods. The form here is that no one should be denied access to, or be disadvantaged in the competition for, such goods for irrelevant reasons and that those selected should be selected for relevant reasons only. According to this principle, "offices should be open to talent." This ideal of equal opportunity embraces the notion of and is also known as "careers open to talents"; it is "expressed by 'open competition for scarce opportunities.' In the allocation of jobs and other positions, formal equal opportunity requires only "an impartial assessment of talents and other qualifications relevant to the positions to be filled." Formal equal opportunity thus encapsulates a principle of
"meritocratic equal opportunity." In employment and higher education, the right to equal opportunity is the right of job and school applicants that they not be disadvantaged by such characteristics as their race, sex, and social background, and that the choice of successful applicants be made solely on the basis of their talents and qualifications relevant to the positions being filled. Race, sex, ethnicity, social status, family background, and other irrelevant characteristics should not be used to determine an individual’s occupation, education, or prospects for success; to prevent individuals from achieving desirable positions; or to restrict their access to positions they have the talent and ability for. Such characteristics, one writer says, "should not be relevant to one's success or failure in the competitive struggle." They "are not qualifications required by a job" and hence are "arbitrary impediments to the flourishing of ability and effort." Thus, given the principle of formal equal opportunity and the equal opportunity right "not to be discriminated against in filling the roles and positions" in society, there is equal opportunity, for example, if B, a black, is awarded a medical license and H, an Hispanic, is not because B passed the competency examination and H did not. There is not equal opportunity, on the other hand, if B is denied a medical license and W, a white, is not because B is black.
Equal opportunity understood "as requiring 'careers open to talents'" has "a distinguished heritage." This interpretation of equal opportunity is "part and parcel of the classical liberal tradition of political thought." Moreover, the principle of formal or weak equal opportunity is asserted by opposing advocates in the AA controversy. "There has been an apparent unanimity," a commentator says, "regarding hiring by competence." This general kind of principle "has achieved wide support, both on grounds of fairness and efficiency."

A policy of AA violates the right to equal opportunity because in its use of the characteristics of race, sex, and ethnicity it imposes a morally arbitrary or irrelevant obstacle that prevents some individuals from attaining positions in employment and advanced education which their talents suit them for and their values lead them to pursue. Clearly, AA contravenes the equal opportunity requirement of an impartial and a nondiscriminatory assessment of talents and qualifications relevant to filling desirable and valuable positions in society.

The right to equal consideration is the right to be treated in the distribution of social benefits and burdens (including punishments) as the formal principle of justice requires, that is, to be treated the same as others when one is equal to the others in the morally relevant respects and to be treated differently from others in direct proportion to the differences when one is not equal to or differs
from the others in the morally relevant respects. It is the right to be treated on the basis of, for example, job-related qualifications in hiring, performance in academic grading, examination scores in the allocation of professional licenses, and guilt or innocence in the distribution of punishments. In employment, it is the right of each job applicant that the applicant selected be chosen solely on the basis of his job-related qualifications. Moreover, the right to equal consideration encapsulates in its first component the right not to be discriminated against, which entitles a person to protection against actions and policies that deny him certain kinds of treatment on morally irrelevant grounds. Hence, to say that a person has a right to equal consideration is not simply to say that he must be considered equally with all others and must not be ignored or disregarded when decisions about the distribution of social benefits and burdens are made; nor is it simply to say that equal time and effort must be spent in considering him when such decisions are made.

Although the right to equal consideration involves the equal treatment of persons, it is a serious mistake to describe this right as the right to be treated equally until morally relevant differences have been proved or unless such differences can be specified to distinguish persons treated unequally. This presumption in favor of equality disregards or depreciates the requirement that persons who are unequal in the morally relevant respects
are to be treated differently and in direct proportion to
the differences between them. There are "cases in which our
antecedent expectations about the existence of characteris-
tics agreed to be relevant creates a presumption in favor of
inequality," according to one writer, "Sometimes the "burden
of proof' is on those who advocate equality of treat-
ment."\textsuperscript{122} Not only is equal consideration compatible with
unequal treatment, therefore, but also equal consideration
actually requires the unequal or differential treatment of
persons given certain differences between persons and their
circumstances. For instance, dispensing medicine to person A
but not to person B when A is sick and B is not or giving
welfare assistance to person C but not to person D when C is
poor and in need D is not accords with the right to equal
consideration, provided that being sick is a morally rele-
vant criterion for dispensing medicine and being poor and
needy is a relevant criterion for allocating welfare assis-
tance. The equal treatment of A and B and the equal treat-
ment of C and D in these cases would not be in accord with
the right to equal consideration.

Violations of the right to equal consideration are
of two principal kinds. Sometimes violations of the right
to equal consideration, including the right not to be dis-
 criminated against, involve departures from identical
treatment of persons who are equal in the morally relevant
respects, such as denying a person a teaching job in a
public high school on the morally irrelevant ground that
he is a Roman Catholic and denying some Asians careers in mathematics and the natural sciences because Asians are overrepresented in these fields. Sometimes, however, violations of the right to equal consideration involve the identical treatment of persons who are unequal in the morally relevant respects, such as giving the same welfare assistance to persons with disparate need and levying the same tax burden on persons with widely differing incomes. Since AA programs award jobs and college and university places to the specified minorities and women and in fact deny them to individual white and Asian males on the—morally irrelevant—basis of race, sex, or ethnicity, these programs are an instance of the first kind of violations of the right to equal consideration.

The moral right to equal protection of the laws requires that the laws of the state treat all persons who are equal in the morally relevant respects the same. This right thus does not require that the state give all persons identical treatment, that is, that the state allocate the same benefits and burdens to everyone. The command that the laws "treat all (literally) equally" would "subvert the very process of legislation," one writer remarks. Others comment, "The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals." Since there often are morally relevant grounds for treating people differently in the laws, not all forms of differential
treatment of persons in the laws violate the right to equal protection. Thus, a law permitting blind persons to bring guide dogs into places where animals are forbidden, a law denying drivers' licenses to blind persons, or a law granting welfare assistance to the poor only do not violate the moral right to equal protection.

There is a provision in the U.S. Constitution calling for equal protection of the laws for persons in this country: the Fourteenth Amendment of the Constitution guarantees to each person "the equal protection of the laws." The right to equal protection appealed to in the criticism of AA, however, is distinct from the legal right to equal protection. The right to equal protection invoked in the argument against AA is a moral right, whether or not it is thought to be constitutional as well, and is therefore an extralegal standard of criticism and assessment of the laws of the state, the Constitution, and legal interpretations of equal protection. This right to equal protection is violated, even if the legal right to equal protection is not, when the laws of the state subject persons who are equal in the morally relevant respects to differential treatment, or when the laws, although not discriminatory or unjust in themselves, are administered or enforced selectively and unfairly. For example, an apparently nondiscriminatory ordinance that is used systematically to deny licenses to operate a restaurant to Chinese applicants violates the moral right to equal protection. Even if a policy of AA is
compatible with the legal right to equal protection, it is not compatible with the moral right to equal protection in reserving positions for blacks and members of the other designated groups and applying different and less rigorous standards in the assessment of the qualifications of applicants from the designated groups.

The right to procedural fairness is another of the moral rights invoked in the criticism of AA. It is the right to have procedures used in the distribution of social benefits and burdens, including punishments, that conform to standards of fairness, that is, to the rules and requirements of procedural justice. The procedures involved must be carefully insulated from and unaffected by factors that are morally irrelevant to the particular contexts in question. Thus, native characteristics like race, sex, ethnicity, and place of birth must not have an explicit (or implicit) role in the process of assessing an individual's qualifications for desirable positions in society or in the process of determining an individual's guilt or innocence and the punishment or penalty to be imposed if he is convicted of a crime. The right to procedural fairness applies not only to contexts in which there is an independent criterion for the just result but also to contexts in which there is no criterion determined by principles of substantive justice and defined separately from and prior to the selection of the procedure followed. In the second type of contexts, two or more persons have equal claims to some
indivisible good (including the avoidance of some burden); and not all these claims can be satisfied. Procedural justice, together with the right to procedural fairness, requires that in such contexts, for example, the allocation of scarce medical resources, the allocative process be impartial and give each claimant an equal chance of obtaining the contested good. "It is generally agreed," one writer says, that in such contexts "the morally preferable way of allocating that good is through a tie-breaking device, or lottery, that is fair." Having recourse to such devices or procedures, for instance, flipping a coin, in reaching decisions in the first type of contexts—in which there are substantively just grounds for deciding—such as the determination of an individual's guilt or innocence and punishment in a criminal trial, violates the right to procedural fairness.

A policy of AA violates the right to procedural fairness because its procedure in allocating positions is not carefully insulated from and unaffected by factors that are morally irrelevant to the distributive contexts in question. In giving an explicit role to race, sex, and ethnicity in the assessment of an individual's qualifications for desirable positions, the procedure in AA conflicts with the requirements of procedural justice. This procedure simply skews the process of distributing the affected goods to favor members of particular racial, sexual, and ethnic groups and to disfavor nonmembers. As a purported
compensatory policy, furthermore, AA is incompatible with the right to procedural fairness in conferring benefits on individuals without ascertaining whether they have actually suffered any injustices that would warrant compensation and in imposing the burden of compensation on other individuals without finding out whether they are personally responsible for past injustices. AA gives race, sex, and ethnicity, not demonstrated individual desert or responsibility, an explicit role in the process of distributing compensation and the burden of compensation.

The right to treatment as an individual is the right to be treated as the individual person one is, that is, on the basis of one's own qualities, abilities, character, conduct, performance, and deserts, and thus not on the basis of group averages applied to him. A person is entitled to be treated on the basis of his own actual possession of the characteristics that are morally relevant to the distribution of social benefits and burdens and the imposition of punishments and penalties. According to this right, a person should not be judged or treated, for example, on the basis of his membership in a racial or ethnic group that is statistically correlated with substandard conduct or performance or the lack of morally relevant characteristics. His treatment should not depend on statistical inferences derived from the behavior or performance of others with whom he happens to share a morally arbitrary characteristic, such as being black. Rather, a person is
entitled to be compared with others and treated on the basis of the individual characteristics which he and the others actually possess, not on the basis of average characteristics possessed by the racial or ethnic group which he and the others are members of.

It is not, strictly speaking, correct to say, however, that treating someone as a member of a group is incompatible with treating him as an individual. Rather, it is treating someone as a member of a morally irrelevant group and not as a member of the morally relevant group, the group defined by possession of the morally relevant characteristics, that is incompatible with treating him as an individual. Consider the difference between grading person X on the basis of his membership in a racial group and grading him on the basis of his membership in the group of high scorers on a written test. In both cases, one can correctly say, X is being treated as a member of a group; but only in the second case is X also being treated as an individual. The reason is that the second group, but not the first one, is the morally relevant group, since its defining characteristic, high performance on a written test, is morally relevant and is possessed by X.

Policies that violate the right to treatment as an individual typically deny some benefit to persons or impose some burden on them in virtue of their membership in a morally irrelevant group or their membership in a racial, sexual, or ethnic group that frequently lacks some morally
relevant characteristic. For instance, denying a person a teaching job because he is a member of a particular ethnic group or a member of racial group that has higher rates of absenteeism or poor performance than other groups violates the right to treatment as an individual. A policy of AA violates this right in distributing jobs and college and university places on the basis of a person's membership in a particular racial, sexual, or ethnic group rather than on the basis of his own past or present actual performance of the relevant tasks or his own possession of the relevant skills, AA straightaway denies positions to persons in virtue of their membership in a particular racial, sexual, or ethnic group. As a purported compensatory policy, furthermore, AA is incompatible with the right to treatment as an individual in distributing compensatory benefits and the burden of compensation on the basis of a person's membership in a particular racial, sexual, or ethnic group, not on the basis of his own desert or responsibility.

There is, finally, the fundamental right to respect as a person. Respect is "generally an acknowledgment of the value or importance of something (or someone) from some perspective (presupposed in the context)." It implies not "the bestowal of value on the object by the estimator" but "a response elicited by value already present in the object, a response that is called for, deserved, owed, or due, something the object commands or demands." The right to respect as a person is the right of a person to
"due consideration in thinking and acting."\textsuperscript{130} It is the right to have others adopt toward him a certain attitude—which can be analyzed as involving beliefs, evaluative judgments, policy commitments, and dispositions of behavior and feeling toward the person who is respected—and act toward him accordingly. This respect is thus more than a feeling. A mere feeling or sentiment would not count as respect without the corresponding disposition to treat the individual in appropriate ways, that is, respectfully, and the belief that the individual is worthy of such treatment. This respect is also more than merely respectful behavior, since one can show respect deceptively when one does not feel or have it.\textsuperscript{131} In accordance with the right to respect as a person, we should "not regard or treat ourselves or any other person," one writer says, "only or merely as a possible object of our desires"\textsuperscript{132}; and we should "not act in such a way as to reduce either ourselves or others to the status of mere things."\textsuperscript{133} Given this right, we must recognize that persons are such that there are fundamentally morally right and wrong ways of treating or relating to them as such or for their own sakes, and that persons are to be treated in certain ways and not others because they are persons. This kind of respect for persons is termed "recognition respect," that, the disposition to give appropriate weight in one's deliberations to the fact that someone is a person and to be willing to constrain one's behavior in ways required by that fact.\textsuperscript{134} Such respect is
at least part of what Kant means by saying that persons should be treated as ends and not as means only. It is an example, after arguing that persons are by nature ends in themselves, Kant says, "Such a being is thus an object of respect and, so far, restricts all (arbitrary) choice." Rather than consisting in esteeming someone's character or accomplishment, this respect is such that all persons are entitled to it, even wrongdoers or those whose character and conduct are not worthy of moral esteem. That is, all persons are entitled to it "independently of their being good in any area of skill or ability and their being just, moral, or virtuous." This respect is not respect based on a positive assessment of the merits of individuals. Rather, it is respect that is directed toward all persons simply because they are persons.

In virtue of possessing the right to respect as a person, people are entitled to the kinds of treatment specified in the preceding discussion of moral rights and their corresponding obligations. These are kinds of treatment that persons as such are fundamentally entitled to. The right to respect as a person, it can be argued, entitles people to other modes of treatment as well, for example, to have the material prerequisites for a minimally decent human life, such as food shelter, and not to be tortured, enslaved, exploited, or degraded.

A policy of AA displays a disrespect for white and Asian male applicants as persons and is incompatible with
the right to respect as a person by denying these applicants equal opportunity and equal consideration and positions they would otherwise have received; by disregarding their achievements; and by sacrificing them and using them merely as a means to the end of dramatically increasing the representation of blacks, women, and Hispanics in the desirable positions in society.

Hence, although there are subtle differences between the specified moral rights, including differences in focus on certain elements of shared features, these rights concur in prohibiting and providing moral protection against certain kinds of objectionable actions, practices, and policies, such as AA.

An attempt to discount these rights and to evade the objection that AA violates them appeals to the idea of the forfeiture of rights. This argument in defense of AA contends that there are ways that individuals can waive or forfeit their rights and that AA does not violate the rights to equal opportunity, equal consideration, equal protection, and so on, since white males have forfeited these moral rights. To forfeit a right is simply to lose the right, at least temporarily, by some fault, offense, or crime. According to this argument, a person who wrongfully injures or unjustly exploits another acquires an obligation to compensate his victim for the loss suffered. He incurs a liability as a consequence of his wrongdoing. By his conduct he forfeits his existing rights or his
rights become qualified or limited. The wrongdoer owes the victim whatever he has, for example, his money, that will make good or remedy the injury he caused. He forfeits a portion of his liberty, such as to spend or not to spend his money. When the community exacts a sacrifice from him to pay the injured party, therefore, he has no right that is being denied or violated. The community is simply requiring him to discharge his obligation to the wronged party. Since whites males are responsible for the past injustices warranting compensation to the designated groups, they have incurred an obligation to pay compensation to members of these groups. As a result, their rights have become qualified, limited, or weakened to the point that the obstacle to the compensatory justification of AA created by the rights to equal opportunity, equal consideration, and so on, is overcome.

This defense of AA does not successfully argue, however, that the model of compensation which includes the idea of the forfeiture of rights is applicable to the present case. This argument in favor of AA does not show that white male job and school applicants are culpable or have done anything to incur a liability to pay compensation and hence that these white males have effectively waived or forfeited their rights or that their rights have become qualified, limited, or weakened. Since the claim that all, or even most, white males, particularly the younger job and school applicants, are responsible for the injustices that
supposedly warrant compensatory preferential treatment is contradicted by the empirical evidence, a policy of AA, despite the present defense, does not evade the objection that it violates white applicants' rights in preventing them from achieving desirable positions. AA denies rights that have not been forfeited and that remain in force.

It might be objected that a policy of AA is justified at least in those cases in which the white male applicant bypassed has committed some injustice and directly owes the preferred black or female applicant compensation. The nature of the injustice may be such that interfering with the white male applicant's rights to equal opportunity and equal consideration is the appropriate form of compensation. Suppose, for instance, the injustice involved his depriving the black or female applicant of fair opportunities for employment. Such an injustice might be the basis for requiring the white male applicant to forgo, as compensation, his rights to equal opportunity and equal consideration when he and the black or female applicant are in competition for the same job. However, apart from the problem that in such cases innocent parties may be made to endure the detrimental effects of the selection of less-qualified candidates, the conclusion that preferential treatment in these cases is justified does not follow even if the culpable white males have forfeited the relevant rights. Other white male applicants for the affected positions may outrank the black and female applicants to be
given preference. Innocent white male applicants who rank above these black and female applicants in qualifications have not forfeited these rights and therefore bypassing them violates their rights to equal opportunity and equal consideration.

Furthermore, even if white males who have committed some injustice owe compensation to the victimized members of the designated groups, breaching or discounting their rights to equal opportunity, equal consideration, and so on, is not thereby justified, unless awarding compensation takes precedence over distributive justice and these rights are forfeitable. These rights may be nonforfeitable, that is, rights that a person cannot lose through his own wrong-doing, such as perhaps the right not to be tortured or the right not to be subjected to exploitation or degradation, rather than forfeitable, that is, rights that one must qualify for by meeting conditions or proper conduct. If any rights are nonforfeitable, the moral rights appealed to in the criticism of AA are the prime candidates. Would defenders of AA maintain, for example, that a white person who has committed some injustice forfeits the right to procedural fairness or the right to equal consideration in the criminal justice system and has no complaint of injustice if a black or an Hispanic who has greater guilt for a crime than this white is treated more favorably in the criminal justice system? Would they also maintain that a white person who has committed some injustice
forfeits the rights to equal opportunity and equal consider-
eration and can be justifiably denied a scarce medical
resource when he has the greatest medical need or an elec-
tive political office when he has received the most votes?
Defenders of AA generally reject the view that white males
forfeit the right to continue in the jobs they occupy and
may simply be dismissed and replaced by minority or female
applicants. Critics of AA can reasonably ask how white
males can forfeit the rights to equal opportunity and equal
consideration but not the nonfundamental supposed right to
continue in the jobs they occupy.

The defense of AA that appeals to the idea of the
forfeiture of rights falsely assumes that forfeiting a por-
tion of one's liberty, such as the liberty to spend or not
to spend one's money, or having to relinquish some of the
goods one has is essentially the same as forfeiting or hav-
ing to relinquish one's entitlement to a job or college or
university place one applies for. Things that an individual
owns, for instance, personal goods like clothing, housing,
bank account, and tools (as opposed to things he merely
possesses, such as a borrowed hammer, or occupies, such as
a rented house) he may use or dispose of as he pleases, for
example, by keeping them, selling them, giving them to his
friends, or bequeathing them to his children. Prized scarce
competitive goods like jobs and college and university
places, however, are not goods that one may dispose of,
transfer or receive in these ways. An individual's
entitlement to a job or college or university place depends on and is created by his own achievement. An individual is entitled to a position in virtue of satisfying merit criteria determined by material principles of distributive justice to be morally relevant. Someone who wrongfully harms another may decide to give some of what he has as compensation, or he may be required to repair the damage he has done; and the victim can have a legitimate claim to some of what he has. It does not follow, however, that a wrongdoer may decide or be required to give as compensation the position he is the best-qualified applicant for or that he occupies, and that the victim can have a legitimate claim to it. Not only is a job or college or university place not something that the best-qualified applicant or one who occupies owns, but the victim may not have the minimal qualifications for the position or other individuals may have better qualifications.

Defense of Moral Rights

Problems for the rights objection to AA seem to emerge, however, from the persistent tendency among thinkers to reject the notion that there are rights independent of the law or any other conventional system and from serious doubts cast on the appeal to moral rights in debates over social policies and in attempts to resolve ethical issues. Thus, in denying the existence of moral rights Jeremy Bentham writes:
Rights are . . . the fruits of the law, and of the law alone. There are no rights without the law—no rights contrary to the law—no rights anterior to the law. . . . There are no other than legal rights;—no natural rights—no rights of man, anterior or superior to those created by the laws. The assertion of such rights, absurd in logic, is pernicious in moral.

Bentham's view "makes the idea of a natural right—a right independent of the law of the land—'nonsense on stilts.'" Bentham holds that natural rights are mere fictions; they are not real. What people call natural rights, according to Bentham, are not rights at all. For him, real rights are legal rights. The appeal to rights in moral philosophy and in debates over practical issues, nineteenth-century English philosopher D. G. Ritchie maintains, is "a rhetorical device for gaining a point without the trouble of proving it" and a device "which should be discredited in all serious writing."

Echoing the skepticism of Bentham, Ritchie, and others, some contemporary philosophers maintain that rights can be reduced to duties or obligations of individuals involving others and hence that the language of rights is completely replaceable or that belief in the existence of moral rights is rationally unfounded. Thus, there is a general correlation between rights and duties such that every right implies a duty and every duty implies a right, one argument contends; therefore, "right" and "duty" are different names for the same normative relation, depending on the point from which it is viewed. Rights are redundant in the sense that in talking of rights we are talking about
no more than we were already talking about in talking of duties. Rights are just extra baggage, adding nothing to the moral enterprise. Duties, not rights, are the indispensable items because ultimately it is people’s behavior that we are concerned with and duties are more directly tied to what people are to do. Furthermore, even if it is granted that there are duties that do not entail other people's rights, some writers argue, duties are indispensable. There is a corresponding duty wherever there is a right; and there are duties and self-imposed requirements, for example, to be kind, generous, and charitable, that entail no corresponding rights.

Those who appeal to moral rights in debates over social issues have the problems, it is argued, of saying precisely not only what these rights are but also where they come from or what the source of these rights is. Rather than simply asserting the existence of the supposed rights, rights advocates should be able to explain the source of these rights; but this is something they have conspicuously failed to do. If there were valid moral rights, rights skeptics object, these rights would have to be based on or justified through a valid moral principle; but there is the insurmountable problem of finding grounding principles for moral rights. Some moral skeptics deny the existence of objectively valid moral principles. Others argue that if there are objective moral principles they cannot be known. These skeptics argue that no one
ever knows that any substantive moral claim is true or that no one is ever justified in believing any substantive moral claim.\textsuperscript{156} We cannot have moral knowledge because we cannot acquire the evidence necessary to justify any moral judgments.\textsuperscript{157} One skeptical argument concerning moral rights holds that there are competing and mutually incompatible moral principles, which either do not seem sufficiently distinct from the norms or rights they are called on to justify or seem in the end to stand in need of justification themselves.\textsuperscript{158} Consequently, moral rights are ultimately without a determinate justifying ground or decision procedure; and thus there is no way of knowing whether there are any moral rights at all, or if there are any, which ones there are. There is, then, no justification for the inclusion of moral rights in any conceptual framework for morality. If the inclusion of moral rights in such a framework is to be justified, some reason beyond the need for moral principles will be required.\textsuperscript{159} Some philosophers who are skeptical about moral rights are less concerned to deny that moral rights exist than simply to doubt the value or importance they would have if they did exist.\textsuperscript{160}

In response, rights theorists assert that there is a correlation only between some rights and duties and that since to have a duty is to be subject to a binding normative requirement there are similar difficulties for duty theorists in giving an account of the source of duties and how we come to be subject to them.\textsuperscript{161} According to rights
theorists, furthermore, rights make a unique contribution to moral discourse. Moral consequences depend on whether or not the rights in question exist. Rights are therefore not merely echoes of other concepts that are the morally significant ones. Rejecting the view that the language of rights can be replaced by another vocabulary, some writers say that they accept the moral and social purposes served by the traditional interpretations of basic human rights, such as the protection of the legitimate interests of citizens in political states and the provision of standards for the treatment of persons to which all societies are responsible.162

Notwithstanding the various skeptical objections, moral intuitions support the view that there are moral rights of the kind appealed to in the criticism of AA. In its contemporary sense, the term "moral intuitions" is used to refer to "the judgments we are inclined to make about what we ought to do in particular cases."163 An intuitionist methodology, one writer points out, "is very common in analytic ethics, where appeals are constantly made to 'what we believe' or 'what we would say' about particular cases."164 In recent years, most philosophers working on problems of practical ethics have focused on intuitions about problems and cases.165 Although "moral intuitions are not an infallible guide to moral truth," another writer says, moral intuitions—not prereflective hunches or unexamined beliefs about what is right or wrong in particular
cases—which are "strongly and widely shared" may "at least provide important evidence where the truth lies." Critics of moral skepticism have argued that the evidential basis for moral judgments includes moral intuitions and have claimed that moral intuitions should be admitted as the data for moral theorizing just as perceptual judgments are admitted as the data for scientific theorizing. Some writers say there is no other way to proceed in moral and political philosophy than to appeal to our intuitive sense of right and wrong and our considered convictions. In invoking moral rights in the assessment of AA, however, I shall not be content with the bare assertion that these rights exist or that they are intuitively evident. Rather, there are cogent reasons for recognizing moral rights, I shall maintain, and thus for preserving the idea of the reality of nonlegal rights and for recognizing the contribution of the appeal to moral rights to the resolution of ethical issues. These reasons show that we have to recognize the rights in question if certain accepted beliefs, claims, practices, activities, and kinds of discourse concerning our moral experience are to make sense, to be reasonable, to be well-grounded, or to be true.

To begin with, acceptance of the existence of moral rights can be reinforced by considering how we often look at important social issues. Thus, we can all agree, some writers assert, that the discrimination so frequently practiced in the past was seriously wrong and that its
wrongness was independent of such considerations as its lack of social utility. Most people seem to condemn such discrimination precisely because its victims were denied the opportunity for employment and higher education, for example, on grounds of race, sex, or ethnicity. Most people seem to believe that these victims had something like a right not to be excluded on such grounds. If someone denies that such rights exist, however, he cannot condemn the so-called discrimination against blacks in the past or the apparent mistreatment of members of other groups as violations of such rights. Hence, if someone believes that it is morally imperative that the law recognize and secure such rights and if, most importantly, he complains that injustice is done and persons are wronged unless governments and other institutions are limited in these ways, he is in effect presupposing independent, nonlegal rights. He cannot both assume rights independent of the law—whose violation constitutes a moral injustice—in arguments for their recognition in the law and hold that such rights are simply creations of the law. An important use of rights in moral philosophy is "to argue for changes in the social order"; but the skeptical view of Bentham and others "makes this literally meaningless—that is, nonsense—since where there is no socially acknowledged and enforced right (i.e., no legal right), there can be no right period." This skeptical denial of moral rights makes unintelligible the recognized practice of appealing to rights even when
they are not embodied in positive laws or ongoing social rules or are opposed to such laws and rules, and of viewing moral rights as providing a standard for critical evaluation, endorsement, or justified rejection of or disobedience to human laws and conventions. Since debates over contemporary social issues that involve the language of rights pertain to what our social policies should be, it is clear that the rights in question are moral rights and that existing legal rights ought to be changed or maintained accordingly.

Another reason for recognizing moral rights and for denying that rights are dispensable items in moral discourse is related to the familiar thesis expressed in the phrase "rights are trumps," that is, that "valid claims of rights take precedence over considerations about the maximizing of social utility" or that rights "carry a special weight which overrides ordinary utilitarian calculations." This reason focuses on the role or function that appeals to rights have, according to rights theorists, in constraining actions to promote the interests of other people and limiting what the community may do to individuals in the pursuit of its goals, in the name of a greater social good, or in the attempt to bring about the best results overall. "Most students of public policy prefer the idiom of utilitarian analysis," that is, "calculating the effects of a given reform proposal on the well-being of each individual," a political philosopher writes, "and
choosing the course of action which will produce the greatest balance of satisfaction over suffering, taking everything into account." However, the view that the neglect or sacrifice of some for the sake of others is acceptable and that there is nothing intrinsically wrong with sacrificing an important individual interest to a greater sum of lesser interests is not satisfactory as a basis for public policy, rights theorists adamantly insist. Moral rights constrain the community from doing everything it wants to do, from sacrificing the individual to achieve the greater good of the community, and from sacrificing important individual interests to greater sums of lesser interests. These rights protect individuals against having, in one writer's words, their "most basic concerns overridden at the behest of a utilitarian calculus of social advantage," as in the disadvantaging of blacks and other racial or ethnic minorities to satisfy the preferences of the majority. The concerns of an individual that moral rights protect involve what is personally owed to an individual as his due and for his own sake, not simply what adds to overall utility or contributes to the general welfare.

A further reason for recognizing moral rights arises from the consideration that regarding rights simply as identical with or dispensable in favor of their corresponding duties ignores or neglects the priority of rights. Rights make a categorical requirement on the activities of
others; that is, they assert what ought to be done independently of such conditions as the agents's current aims and desires. Rights, however, are not mere norms or standards of conduct, according to rights theorists; rights are rules which define the boundaries of what is owed to right-holders by those who have the corresponding or closely related duties. Rather than being reducible to or dispensable in favor of their corresponding duties or obligations, rights are prior to these duties in a certain respect: they are prior in the order of justification in the sense that duty-bearers have correlative duties because persons have certain rights, and not conversely. Rights thus form the justificatory basis of their corresponding duties. One who holds that a right is dispensable in favor of its corresponding duty "fails to notice," a rights theorist asserts, "that the right is the ground of the duty" on the part of others and hence that a right of one person is not simply a duty borne by another. "A right may imply more than one duty or various duties under varying circumstances." It is a "reason for one or more persons to bear one or more duties." Rights provide the point or rationale of certain kinds of duties, namely, according to some writers, that the justification for imposing such duties consist in protecting the interests of rightholders. Rights focus on the possessors of rights, on those whose interests they protect, rather than on duty-bearers. To omit reference to moral rights would be to "omit the
justifying basis of the duties" and to lose the point or rationale of certain kinds of duties. \(^{192}\) A moral theory that accommodates rights with their focus on the possessors of rights has a significance that is absent from a moral theory that speaks only the language of duties. \(^{193}\) Hence, "the language of rights is not redundant." \(^{194}\) Thus, it is "false," rights theorists conclude, that "all that can be said in a terminology of such rights can be and indeed is best said in the indispensable terminology of duty." \(^{195}\)

Moral rights provide not only a distinct and an independent but also a firm, definite ground for certain duties or obligations, in contrast to consequentialist or utilitarian (utilitarianism is a form of consequentialism) principles. Moral claims about what ought to be done or avoided in general or on particular occasions are compatible with and might be grounded in or justified by different principles and theories; \(^{197}\) but consequentialist and utilitarian principles provide a tenuous and an inadequate basis for the corresponding duties of moral rights. The term "consequentialism" is primarily used to refer to moral views or theories which base their evaluation of actions solely on consequences. In contemporary philosophical usage, the term is most often used to refer to the view that morally right action is action that maximizes the good (according to the satisficing version of consequentialism, "an action is right if it produces enough or sufficient in the way of good consequences"), that is, that the rightness of an
action depends on whether its consequences are as good as those of any alternative action available to the agent. A utilitarian principle holds, in addition, that happiness, pleasure, the satisfaction of desires or preferences, well-being, or some combination of these are the only features that automatically determine the goodness of consequences. On utilitarian or consequentialist principles, moral obligations, for example, the obligation not to kill retarded infants, are contingent on such considerations and conditions as persons' desires or preference or the value of the consequences of certain practices, such as persons' sentimental interests in not killing retarded infants or the consequence that killing these infants would eventually lead to the killing of normal adult human beings. Given a change in these circumstances or in persons' desires or preferences, the moral obligations would no longer exist. If, however, we would not alter our moral judgments in these circumstances as these principles require, these principles cannot account for our unaltered judgments in these circumstances, unlike moral rights, such as the rights to life and to respect as a person, and cannot adequately ground or justify such obligations as the obligation not to kill retarded infants. Moreover, even if utilitarian and consequentialist approaches give right answers to questions about the morality of certain actions and practices and lead to the same particular moral judgments in certain cases as the rights view, they do so for the
wrong reasons, for instance, that a practice of discriminating against a minority or a social arrangement in which some have extravagant wealth and others live in abject pov-
is morally wrong, not because it is fundamentally unjust but because it does not in fact maximize utility or have the best results.\textsuperscript{202}

A systematic reason for recognizing moral rights derives from the connection between rights and justice. To do an injustice to a person, to violate a duty of justice to a person, or to treat a person unjustly is to deny him his due and the treatment he is owed.\textsuperscript{203} To deny a person the treatment he is owed is to deny him the treatment he is entitled to. Doing an injustice to a person, violating a duty of justice to a person, or treating a person unjustly therefore presuppose the existence of moral rights. The incoherence of claiming both that there are duties of justice to and not merely regarding persons, who therefore can have injustices done to them, and that persons do not have moral rights undermines the skeptical approach. Hence, if persons can have injustices done to them or committed against them, they have moral rights. Accordingly, if they do not have moral rights, they cannot have injustices done to them or committed against them. If persons do not have moral rights, furthermore, they have no rights to compensation for violations of rights or injustices to persons that warrant compensation. The violation of rights, unlike other moral considerations, always at least raises the
presumption, one writer notes, that the victims, for example, of racial injustice should be compensated. Rights skeptics might object that the preceding argument begs the question by presupposing the appropriateness of rights language as a consequence or paraphrase of claims of justice or injustice. Recourse to rights is not shown to be necessary or unavoidable, these skeptics might argue; we can speak of justice or injustice without appealing to or having recourse to rights. Thus, to do or to commit injustice, we can simply say, is to violate the requirements of justice. On the common moral understanding, however, to do an injustice to someone is not simply to violate a requirement of justice. When an injustice has been done to a person, not only has something wrong been done but also a person has been wronged, that is, treated unjustly, and been denied what he entitled to or has a right to. Moreover, we can violate a requirement of justice without doing an injustice to a person, without wronging him, or without treating him unjustly. "Some matters of justice do not directly involve rights," one writer says. "I can judge that some nasty man deserves the bad luck he suffers without being committed to the view that he has a right to it." It is true that when we judge that a man deserves something, such as happiness or success or even punishment, we do not imply that he has a right to it or, given the distinction between justice and desert, that he is wronged or done an injustice if he is not given it. Thus,
although we can correctly say that refusing to punish a wrongdoer violates a requirement of justice, it is not thereby appropriate for us to say that the wrongdoer has been victimized or done an injustice in not receiving the punishment he deserves or justice requires. Doing an injustice to a person involves depriving him of some good or benefit he is entitled to or has a right to, as, for example, in depriving a person of the position for which he is best qualified or in punishing a person for a crime he did not commit. For such deprivation the proper reaction is one of indignation, not sorrow, pity, or sympathy.

If persons do not have moral rights, then, actions and practices can be morally wrong, for instance, because they lack social utility; but they cannot be morally wrong because they commit injustices against persons. Thus, the punishment of innocent persons might still be morally wrong, but it would not be unjust to them. Injustice to persons is not simply the infliction of harm, a failure to do what is morally obligatory, or a failure to do what would be good or best to do because the consequences would be best.

The connection between rights and the intrinsic worth or dignity of persons (the term "dignity" here may be taken to refer to the unique, invariable, and inalienable worth inherent in being a person), provides another systematic reason for recognizing moral rights. "One important answer to the questions of why people should be regarded as having
claims of fundamental rights at all," some rights theorists assert, is that "a society whose moral code does not include the concept of a claim of right" and "in which no such claims were ever made or ever regarded as justifiable would be" one "that was morally impoverished, and very significantly so." People in such a society may act beneficently, may not be cruel or unfeeling, and may be kinder and more sensitive than people in other societies; but such a culture would lack "the notion of persons as makers of claims upon one another, as having basic entitlements others would be obligated to respect." Having rights prevents an individual from being left in a passive position, dependent on others' good will in fulfilling obligations corresponding to rights. Rights "enable us to stand on our own two feet, 'to look others in the eye, and to feel in some fundamental way the equal of anyone.'" Thus, "'to think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others.'" Recognition of one's moral rights is essential to self-respect; self-respect requires respect for one's rights. Self-respect here, which every person is entitled to, is grounded not in the quality of one's character and conduct but in personhood and its inherent worth or dignity. Self-respect in this sense involves the perception and appreciation of oneself as a person, that is, a being with inherent worth and moral rights.
Certain attitudes or actions, such as servility, needless self-deprecation, self-degradation, and tolerating without protest or resistance the denial of one's moral rights, manifest a lack of self-respect and show that persons do not have an appropriate sense of or do not recognize their worth as persons. Hence, "to lack the concept of oneself as a rights bearer is to be bereft of a significant element of human dignity. Without such a concept," rights theorists maintain, "we could not view ourselves as beings entitled to be treated as not simply means but ends as well."

Respecting "persons as ends," viewing them "as having basic human dignity, seems to be inextricably bound up with viewing persons as possessors of rights—as beings who are owed a vital say in how they are to be treated, and," according to rights theorists, "whose interests are not to be overridden simply in order to make others better off." Consequently, opting "for a code of conduct in which rights are absent is to abandon the kind of respect for persons and human dignity at issue."

Unlike things, whether natural objects or artefacts, persons do not have value only insofar as they are objects of desire or are regarded as having value. Rather, persons have "an absolute and irreplaceable worth," that is, intrinsic worth or dignity, for their "value is not dependent on" their "usefulness or desirability." They have a fundamental value that should not be denied or overlooked and that demands respect; this respect is
grounded in features that persons share\(^{219}\) and sets limits to agents' pursuit of their goals.\(^{220}\) Persons should be treated in ways that respect their worth or dignity. They should be treated as ends, not as mere expendable commodities, instrumentally valuable objects, useful objects for others' own purposes, or means to satisfy others' desires or to serve others' interests. In virtue of the kind of beings they are—i.e., intrinsically valuable beings—persons are owed certain kinds of treatment; and there are just and unjust, not merely morally right and wrong, ways of treating them. Moral rights must be acknowledged if persons' inherent worth and self-respect and respect for them as ends are to be secured and preserved. These rights are necessary to secure and to protect "human dignity and respect at the most fundamental level."\(^{221}\)

It might be objected that the expressions "A has moral rights" and "A has intrinsic worth or dignity" are equivalent and hence that the latter simply reduplicates the former. Since the two expressions are thus equivalent in meaning, the attribution of worth or dignity adds nothing substantive to the attribution of rights. Hence, the argument for moral rights based on intrinsic worth or dignity does not satisfy the requirement of noncircularity.\(^{222}\) However, the attribution of worth or dignity in the foregoing argument for moral rights is independent of and logically prior to the attribution of moral rights. Persons have moral rights because they possess intrinsic worth or
dignity. Therefore, the attribution of intrinsic worth or dignity grounds the attribution of moral rights in a non-circular way.

As beings possessing reason, the capacity for choice, the capacity to act morally, the capacity to suffer, the capacity to experience emotions, and the capacity for affective sympathy, persons have fundamental value and intrinsic worth or dignity and are worthy of respect. Conceiving their fundamental value and intrinsic worth or dignity in this way differs from the Kantian view which bases a person's absolute, inherent, or infinite worth or dignity solely on his nature as a rational, self-directing being, that is, a being who is capable of reasoning about what to do and regulating his conduct accordingly. This view is narrow and restrictive, excluding, for example, the infantile, fetuses (at least those in the third trimester), the irreversibly senile or comatose, the mentally ill, and the severely retarded—individuals we generally want to say possess fundamental value and inherent worth or dignity and are worthy of respect, even though they do not satisfy the Kantian requirement of rational, autonomous agency. The possession of not only cognitive but also affective capacities provides the basis for asserting the fundamental value and inherent worth or dignity of human persons.

The intrinsic worth or dignity attributed to persons belongs permanently and equally to every person as such. It is not an empirical characteristic in the way the capacity
for feeling physical pain is empirically ascertainable; nor is it something that persons may occurrently exhibit, lack, or lose. Likewise, this intrinsic worth or dignity is not something that depends on the degree to which persons are useful in furthering the interests of others. Also, persons possess this dignity entirely independently of their position in any social hierarchy. Furthermore, having this dignity is not necessarily the same as having a proper sense of dignity. Failing to have an adequate appreciation of one's intrinsic worth or dignity. Moreover, this worth or dignity is not something that persons have more of than others. Although individuals vary in their earned worth (e.g., some people act in such a way that they are more deserving and more creditable than others), it might be said, all have equal unearned worth in virtue of their status as human persons. To deny that persons are equal in intrinsic worth or dignity is to open the way to treating some persons with less respect than others.

According to one view, "to say persons have intrinsic worth as such is just another way of saying they are such that there are morally right and wrong ways of treating them." The Kantian view that persons should or should not be treated in certain ways "because they have intrinsic or absolute value" and that they have this value "because they have rational wills, etc.," is a mistake. The mistake is not in thinking that "what justifies regarding persons as morally right or wrong to do things to is something
intrinsic, namely, the fact they have rational wills, etc.," but in thinking that "they must have intrinsic worth in addition." If the fact that "persons have rational wills, etc., justifies their being regarded as right or wrong to do things to," proponents of this view argue, "the attribution of intrinsic worth can be dispensed with at least in logic if not in rhetoric." What does "the real moral work," these proponents hold, is "the fact that persons have" the "characteristics they do."²²⁹

However, the attribution of intrinsic worth or dignity to human persons is an expression of the recognition that it is in virtue of possessing reason, the capacity for choice, the capacity for affective sympathy, the capacity to suffer, and so on, that they are intrinsically valuable beings and are therefore worthy of respectful treatment. Their having these characteristics is what makes them persons and thus intrinsically valuable beings.²³⁰ Given that human persons merit special moral concern and have conferred on them a morally exalted status, the reason must be the properties or characteristics they bear that qualifies them for such concern.²³¹ The fact that persons are intrinsically valuable beings is what makes them worthy of respect and explains why there are not only morally right and wrong but also just and unjust ways of treating them.

Proponents of the view criticized here concede that they face the familiar problem concerning how the fact that persons have the characteristics they do can do moral work;
but, they insist, "Kantians have that problem too since they believe that that fact confers intrinsic value." This problem involves committing "'the naturalistic fallacy'"—the view, very roughly speaking," one moral philosopher writes, "that it is a fallacy to infer values from facts." The term "naturalistic fallacy" has been used to refer to what many philosophers regard as fallacious attempts to infer normative or value judgments from purely factual statements. However, the present defense of moral rights does not hold either that facts about human nature provide a basis for a logically compelling argument about the rights we have or that the value judgment that persons have intrinsic worth or dignity is an inference from the premise that persons have certain characteristics. Rather, the value judgment that in possessing certain characteristics persons have intrinsic worth or dignity can be viewed as a postulate, that is, a theoretical assumption, that underlies and is central to democratic social theory. This postulate underlies the Kantian injunction that we must never treat human beings merely as a means but always at the same time as an end and principles of respect for persons, such as the principle that "it is impermissible not to respect every human being, oneself or any other, as a rational creature." Alternatively, we can describe this postulate as underlying the point of view, which one moral philosopher calls "the moral point of view," from which we are to proceed in formulating moral principles and
judgments—"the point of view of regarding actions as right or wrong and dispositions as good or bad because of what they do to persons as such." The postulate that persons have intrinsic worth or dignity explains and illuminates our moral experience and ultimately grounds our moral judgments prohibiting, for example, infanticide, the elimination of the retarded and the senile, slavery, racial discrimination, and the degradation and torture of other human beings, even when such practices maximize social utility or optimize the aggregate consequences for all affected by the outcomes.

We have to recognize moral rights, then, if self-respect and respect for persons and the belief that persons have intrinsic worth or dignity, the appeal to rights not embodied in or even opposed to positive laws and ongoing social rules, and the protection of individuals in society's pursuit of its goals, as well as claims that certain moral duties or obligations have an adequate justifying ground or basis, that there are moral duties to and not merely regarding persons, and that discourse both denying the existence of moral rights and affirming the possibility of injustice to persons is incoherent, are to make sense, to be reasonable, to be well-grounded, or to be true.

Some writers who assume that rights themselves are not the basic elements of morality but are derived from more fundamental moral principles say that grounding rights in or tracing them back to such foundational ideas as human
dignity and moral agency has failed to gain widespread support. The reasons may be, these writers claim, that such notions do not seem sufficiently distinct from the very norms or rights they are called on to justify or seem ultimately to be in need of a more basic sort of justification themselves.\textsuperscript{236} Other writers who view rights as nonfoundational, however, maintain that the Kantian ideas of intrinsic worth, dignity, and respect for persons seem to offer a promising foundation for moral rights.\textsuperscript{237}

Even if it is granted that there are moral rights of the kind appealed to in the debate over AA and that as understood in the present discussion these rights are not misapplied to this practical issue, it might be objected, alternative interpretations of these rights yield a divergent result when applied to the issue of AA and that accommodate AA programs are possible. From the standpoint of morality, however, as the discussion in the following chapters will show, the present interpretation of these rights has the advantages that it accords with the reasons for recognizing moral rights and accords with and illuminates intuitively correct judgments about the morality of actions, practices, and policies in a variety of contexts. Alternative interpretations that accommodate AA also accommodate other morally objectionable policies.
Further Objections to AA

Given the foregoing compensatory and noncompensatory objections to AA, critics of AA can cogently argue that this policy involves a kind of vicious regress and is therefore unacceptable as a general compensatory instrument. Thus, past injustice warrants compensation; and AA is practiced as a mode of compensating members of certain racial, sexual, and ethnic groups for past discrimination. However, nonmembers of these groups who are compelled to make redress by being prevented from achieving desirable positions in employment and advanced education are themselves victims of injustice through AA and have claims to compensation. Hence, AA has to be practiced to compensate for the injustice caused by its second application, and so on. Since the individuals who are bypassed by AA programs are victims of essentially the same distributive injustice and violation of rights as the victims of the previous discrimination that gave rise to the demand for compensation in the first place, there is no clear reason for denying that compensation is owed to this class of individuals.\(^{238}\) Therefore, these individuals can properly demand compensation.\(^{239}\) Hence, in generating a nonterminating or unending process of compensation and injustice a policy of AA produces new injustices and creates new victims and new rights to compensation. As a compensatory instrument, then, AA fails to advance matters since in attempting to solve the initial problem, namely, to compensate victims of past injustice, it reintroduces the
same problem in the proposed solution. The initial problem will continue to recur and will remain unsolved. AA therefore stands in stark contrast to morally acceptable programs of compensation, which confer benefits on individuals who have actually suffered injustice without creating new victims of injustice that warrants compensation to them.

The attempt to evade the preceding objection to AA by claiming privilege for the first step in the alleged regress, such as by arguing that AA does not commit injustices against the white males who are bypassed since they share the guilt for the past injustices that warrant compensation, fails. The criticism of the compensatory argument for AA in the present and preceding chapters disallows such claims of privilege for the initial application of AA. Defenders of AA cannot successfully reply, then, that since the initial application of AA does not activate the compensatory mechanism by creating new victims and new rights to compensation, the alleged regress never develops.

An important method of rational moral argument involves the exposure of logical inadequacies, that is, contradictions and inconsistencies, in a moral position. An objection to AA employing this method relies on the insight that the preferential use of the categories of race, sex, and ethnicity in hiring and admissions has moral implications for social policy in the distribution of benefits, as well as the imposition of burdens, in other contexts. This objection contends that AA is shown to be morally
unacceptable when its underlying principle, namely, that preference on the basis of race, sex, and ethnicity may be used as a means of compensating individuals for past injustices committed against them, is applied to contexts beyond hiring and admissions. One way of testing the moral permissibility of a policy or practice and morally evaluating it is to determine whether universalizing or extending the principle underlying the policy or practice to relevantly similar contexts has morally unacceptable implications. If there are no morally differences between the AA and the extended cases, the cases would stand or fall together. The role of reasons in moral discourse imposes a constraint of consistency. Consistency requires that if there are exactly the same reasons in support of one course of action or policy as there are in support of another, those policies or courses of action will be equally right or wrong; they will be equally well supported or undercut by reasons. Hence, if it is morally permissible (or morally required) to take account of such factors as the race, sex, or ethnicity of applicants and to depart from criteria of distributive justice in hiring and admissions to compensate for the effects of past injustice, it is also morally permissible in relevantly similar contexts (whether or not AA defenders advocate such action) to take account of such factors, to depart from criteria of justice, and to apply lower or less stringent standards to members of certain groups in seeking to compensate for past injustice. However, universalizing or
extending the principle implicit in the compensatory justification of AA to such contexts, the present objection contends, has unnoticed consequences that, AA defenders seemingly would acknowledge, are morally unacceptable. Since these consequences are morally unacceptable and therefore the preferential policies in the extended contexts are morally impermissible, AA defenders have to acknowledge that a policy of preferential treatment in hiring and admissions is morally impermissible as well, even if they have not urged or advocated the adoption of the preferential policies in the extended contexts.

If AA defenders reject the consequent moral rightness or permissibility of the preferential policies in relevantly similar contexts while accepting the AA principle, they are entangled in inconsistency. Either they have to abandon the principle implicit in the compensatory justification of preferential treatment in hiring and admissions, or they have to deny that the preferential policies in the extended contexts are morally impermissible and thus have to accept the implications of universalizing this principle. The reasoning in this objection has the following valid form: if something is the case, then something else will be the case; that something else is not the case; therefore, the first-mentioned something is not the case. Universalizing the AA principle or extending it to relevantly similar contexts is thus a reductio of AA as a policy of compensation.
There are many possible social policies that are morally similar to compensatory preference in hiring, promotions, and admissions in applying lower or less rigorous standards to members of the designated groups. Consider, for example, policies that would afford preferential treatment to blacks or members of the other designated groups in academic grading, graduation requirements, job performance evaluation, professional licensure examinations, political elections, the allocation of scarce medical resources, income, housing, awards and prizes for intellectual and physical achievement, taxation, and the criminal justice system. Thus, under such policies, the distribution of academic grades and honors would be skewed to favor black students; and lower graduation requirements would be established for black students. Black students would receive the same grades as or even higher grades (e.g., A grades for C work) than white students who have superior work. If black students should not have to meet the same standards as white and Asian students in college and university admissions, critics of AA might reasonably ask why black students should have to meet the same standards as these nonblack students in grading or the awarding of honors or degrees. Different standards would also be applied to blacks and whites in the evaluation of employees' work and performance. For instance, black employees would receive higher performance ratings or evaluations than white employees for equal or even inferior performance. Further, the passing scores for blacks in
examinations for licenses to practice law or medicine, for example, would be lower than the passing scores for whites; and when quotas are set limiting the number of professional licenses awarded, some whites with higher passing scores would even be denied licenses. Lower eligibility requirements would be set for blacks in voting (e.g., blacks would be permitted to vote at age eighteen, but whites would not be permitted to vote until age nineteen or twenty), even voter registration would be permitted for blacks but not for whites, blacks would be given weighted votes, certain elective political offices would be awarded to blacks who did not receive the most votes, and so on. In health care, blacks would benefit at the expense of medically needier whites in the allocation of scarce resources, such as organ transplants, kidney dialysis machines, and blood transfusions. Also, blacks would receive higher pay than whites for doing the same or lower-level jobs. Blacks seeking to buy a house or to rent an apartment would be favored over whites. Blacks would receive awards for intellectual achievement, such as in science and mathematics, over others who have done superior work. Athletic competitions involving sports in which blacks have traditionally been underrepresented would be skewed to make it easier for blacks to prevail.

In addition, blacks would receive preferential treatment in contexts involving the distribution of burdens, non-punitive and punitive. Thus, blacks would be taxed less than
whites who have the same or substantially lower incomes. Even middle- and upper-class blacks would have smaller tax burdens than whites who have lower incomes. Further, white employees, but not black employees, would be penalized or even dismissed for a certain level of performance or type of misconduct even though the black employees' performance is equally or more unsatisfactory and their misconduct is equally or more serious. Consider, for example, an insurance company that fires white, but not black, employees who commit expense account fraud, and an oil company that dismisses white, but not black, employees who steal company property and falsify expense reports. Also, blacks would even receive preferential treatment in the criminal justice system, that is, in arrest, indictment, trial, conviction, sentencing, probation, and parole procedures. Thus, blacks convicted of crimes would receive lighter sentences than whites convicted of the same or less serious crimes; and crimes committed by whites against blacks would be punished more severely than the same crimes committed by blacks against whites. The compensatory argument for AA would justify, for example, punishing two black perpetrators of a bank robbery (they plan the bank robbery and execute the plan) less severely than two whites who are inciters (one gives encouragement to the perpetrators and the other supplies the weapons), a white who is an abettor (he is the getaway driver), or a white who is a protector (he provides refuge for the perpetrators), and perhaps even less
severely than a white neighbor of the protector who learns of all that has taken place and disapproves but does nothing (he is guilty of the misdemeanor called misprision of felony) or another white neighbor of the protector who learns of all that has taken place but is bribed into silence (he is guilty of the misdemeanor called compounding a felony)." 242 If, on the view of advocates of AA, no principles of justice or individual moral rights prohibit conferring such benefits as quality jobs and college and university places preferentially on the members of a certain race to achieve the goal of compensation, is it not likewise true, critics of AA might reasonably ask, that no principles of justice, such as that the quantum of punishment should be proportionate to the gravity of the offense, or moral rights prohibit such favored treatment in the criminal justice system to achieve the same goal?

These preferential policies, it might be claimed, remedy past discrimination against blacks and such effects of this discrimination as blacks' lower academic performance, lower graduation rates, lower job performance, gross underrepresentation in the professions and other desirable positions, lower socioeconomic status and overrepresentation in low-paying and undesirable jobs, lower political participation and underrepresentation in elective political offices, "relatively poorer health" and the failure "to have adequate access to health care," 243 unequal access to decent housing, and disproportionally high crime rates and gross
overrepresentation in the prison population.

Although the present debate over AA concerns the preferential use of the categories of race, sex, and ethnicity in hiring and admissions, controversy could have similarly arisen over the preferential use of these categories in contexts other than hiring and admissions. The reasons adduced in favor of preferential treatment in hiring and admissions support equally well or provide equal justification for the preferential policies in the extended contexts. Given the premises of the compensatory argument for AA, the preferential policies in the extended contexts can also be defended as ways of compensating members of the designated groups for past injustice and its effects. Thus, if racism and discrimination and their lingering effects have been as pervasive as AA proponents claim, it might be argued, reallocating jobs and college and university places will not be sufficient. There are social conditions in the extended contexts that need to be ameliorated and that are a legacy of the same racial, sexual, and ethnic prejudice and discrimination which have produced the gross underrepresentation of blacks and the other designated groups in employment and advanced education. Like AA, furthermore, the preferential policies in the extended contexts would advantage blacks and members of the other groups and disadvantage white males. In fact, these policies would directly benefit many more members of the designated groups than AA does, including lower-class minorities who have not been able to acquire and to develop
marketable skills for desirable jobs and educational skills for places in colleges and universities. These policies would also directly affect many more white males than AA does; and some of these policies would not even involve, as AA does, denying white males goods they would have obtained were it not for preferential treatment for members of the designated groups. On the contrary, some of these policies would simply withhold from white males goods, including the avoidance of nonpunitive and punitive burdens, that are given to members of the specified groups. Moreover, the white males who would be harmed and disadvantaged by these preferential policies have no legitimate complaint of injustice to them, it might be argued along the lines of the compensatory argument for AA, since these white males have contributed to or share the guilt or responsibility for past injustices and the disadvantages and deprivations they would suffer through these policies are simply their share of the burden of compensation.

Given that the AA and extended cases are relevantly similar and that the preferential policies in the extended contexts have morally unacceptable features and are therefore morally impermissible, an inescapable conclusion is that a policy of preferential treatment in hiring and admissions is also morally impermissible. Preferential treatment in the extended contexts and preferential treatment in hiring and admissions are morally impermissible on essentially the same noncompensatory grounds, namely, for violating
principles of justice and nondiscrimination and basic individual moral rights. Just as white and Asian males would be victims of discrimination and injustice in the preferential policies in the extended contexts, so they are victims of discrimination and injustice in programs of preferential treatment in hiring and admissions. The specified minorities and women are not the only possible victims of discrimination and injustice, and employment and admission to educational institutions are not the only contexts in which discrimination and injustice can take place. Hence, if the present debate involved one or more preferential policies in the extended contexts instead of preferential treatment in hiring and admissions, the moral argument against preference here would be essentially unchanged.

Principles of justice, distributive and retributive, and nondiscrimination and the fundamental individual moral rights invoked in the criticism of AA also govern the distribution of social benefits and burdens, including punishments, in the extended contexts. There are just and also unjust ways, not merely socially productive and socially unproductive ways, of distributing social benefits, as well as burdens, in contexts other than employment and higher education. In some, but not all, of the extended contexts criteria of nonmoral merit, such as achievement, performance, and competency, are the morally relevant and just criteria of distribution. Specifying the relevant criteria in the extended contexts, material principles of justice
require, for example, that academic grades, honors, and
degrees be allocated on the basis of academic performance;
that professional licenses be allocated on the basis of
knowledge and competence, as demonstrated in, for instance,
written examinations; and that verdicts in the criminal jus-
tice system be rendered according to innocence or guilt.

Distributing social benefits and burdens in the
extended contexts, as well as in hiring and admissions, on
the basis of such factors as race, loyalty to or solidarity
with one's own religious or ethnic group, personal inclina-
tions, celebrity status, parent's occupation, place of
birth, family or political connections, and random selection
(when individuals are not equal in the morally relevant
respects) is discriminatory and unjust. Principles of jus-
tice and nondiscrimination and the rights to equal opportu-
nity, equal consideration, and so on, are violated when, for
example, blacks are permitted to vote at age eighteen but
whites are not permitted to vote until age nineteen or
twenty; white, but not black, employees are penalized for a
certain level of performance or type of misconduct; blacks
receive higher pay than whites for doing the same or lower-
level jobs; and athletic competitions in sports in which
blacks have traditionally been underrepresented are skewed
to make it easier for blacks to prevail, such as by deduct-
ing strokes from blacks' scores in golf. These principles
and rights are also violated by policies that, for example,
assign grades according to some random process; assign
grades and award honors or degrees to blacks, children of very rich parents, and athletes at lower standards of academic performance than are required of others; and allocate scarce medical resources to blacks and relatives or friends of wealthy and politically influential persons ahead of others with greater medical need or treat such people less harshly than others in the criminal justice system, such as by imposing less or no punishment at all on them for the same or even more serious crimes and offenses.

Seeming to acknowledge that preferential policies in the extended contexts would be morally objectionable, proponents of the compensatory argument for AA do not demand, urge, or recommend the adoption of such policies as part of a general effort to remedy as far as possible past discrimination and its pervasive effects. To avoid being trapped in inconsistency, however, their rejection of these policies as modes of compensating members of the designated groups rationally and morally commits them to the rejection of preferential treatment in hiring and admissions. If these defenders of AA deny that AA and the extended cases are relevantly similar and hence that the moral impermissibility of AA can be correctly inferred from the moral impermissibility the preferential policies in the extended cases, they face the problem of specifying the alleged differences between the AA and extended cases and showing that these differences are indeed morally relevant. Thus, if they acknowledge that the use of the categories of race, sex, and ethnicity to
favor members of the designated groups in academic grading, awarding degrees professional licenses, evaluating employees' performance and conduct, allocating elective political offices, determining guilt or innocence and punishment, and so on, would be discriminatory and unjust and therefore morally impermissible, they have to explain why AA is not likewise morally impermissible. If, on the other hand, these defenders of AA deny that any of the compensatory preferential policies in the extended cases would be discriminatory or unjust, are they claiming that no compensatory preferential policy would be? If they are not making that extreme claim, what compensatory preferential policies, critics of AA might reasonably inquire, are they prepared to concede would violate moral principles and would be discriminatory or unjust and therefore morally impermissible?

The present objection to AA, it must be noted, does not contend simply that this policy is morally impermissible because it conflicts with our moral intuitions. If this objection made that claim, defenders of AA could simply reply that it begs the question at issue. The present objection avoids this charge, however, in contending instead that a policy of AA is morally wrong or impermissible since the principle implicit in the backward-looking justification of AA, when applied to relevantly similar contexts, has morally unacceptable implications. That is, the implications of this principle conflict with intuitive judgments about particular cases and contradict the implications of moral principles.
The compensatory argument for AA disregards or neglects crucial questions about the means used to achieve the end or goal of AA and even about the end or goal itself. The word "end" normally indicates "something to be brought about, something which we aim at in our actions." In this sense, "end" is contrasted with "means," that is, "an agency, instrument, or method used to attain an end." This argument for AA does not establish, contrary to the foregoing criticisms, either that AA is a morally permissible means or that it is morally preferable to alternative methods of achieving its declared end or goal.

Two questions about the means used to achieve a particular end or goal that must be asked are the following: an empirical question, which concerns the effectiveness of the means in bringing about the end; and a moral question, which concerns the permissibility of the means. AA may indeed be an effective method, as advocates of AA insist, of dramatically and expeditiously increasing the numbers of blacks and Hispanics on college campuses and in various job categories. The pertinent question here, however, is not whether AA is an effective, or even the quickest and most effective, method of bringing about some end desired by AA advocates and officials but whether AA is an effective means of compensating victims of past injustice. In fact, AA is an ineffective, ill-suited mechanism for adequately compensating individuals for past injustices committed against them. It is not structured or designed to compensate
individuals for the specific injuries they have personally suffered.

To say that an end or goal, such as remedying the social injustice of racism, is valued or desired or to agree that some action should be taken to achieve that end is not thereby to maintain that the use of any means whatever to achieve that end is morally permissible or that a certain policy, such as forced busing, must be implemented. Means cannot be assessed as morally right or permissible or morally wrong or impermissible simply by reference to their intended consequences or their effectiveness in bringing about desired ends. There are moral constraints on social policies, including AA, and on the ways in which we pursue our ends; and among these constraints are considerations of justice and rights. Social policies may be morally impermissible because they violate principles of justice or moral rights. Hence, there are morally unacceptable or impermissible ways or means of achieving worthy aims and legitimate or valuable goals, such as an increase in medical knowledge, the compensation of victims of racism and sexism, and the reduction of crime. Proponents and critics of AA presumably would not contemplate or regard as morally acceptable, for example, the suspension of the right to due process as a means of reducing crime. Thus, simply asserting that AA seeks to rectify or to compensate for past injustice would not be sufficient to justify this policy, even if the preferentially treated individuals were themselves victims of
past discrimination or injustice. If the intended consequences or results or effectiveness in achieving desired goals were the only basis for morally evaluating actions, practices, and policies, any atrocity in the service of sufficiently broad or important interests could be justified, for example, unlimited and unrestrained testing and experimentation on human beings, torturing or enslaving people, and starving hundreds of thousands of children to death and causing the deaths of hundreds of thousands more from easily preventable or treatable diseases (as in Iraq, where people suffered deprivation, misery, and death through years of sanctions and bombardment). The general goal of a policy alone justifies the policy only if there are no moral constraints on the means to achieve ends or goals, this goal is morally acceptable, and this policy achieves it.

The relevant question here about AA, then, is whether it is a morally acceptable or permissible means of achieving the declared goal of compensating individuals who belong to the designated groups for past injustice. The unequivocal conclusion of the foregoing discussion is not that compensation for past racism and discrimination should be eliminated but that AA is a morally unacceptable policy. It is at variance with the requirements of compensatory justice (in assuming, for instance, that any minority or female recipient of preference has a compensatory right to a desirable position) and is incompatible with other principles of justice and fundamental individual moral rights in seeking
to compensate for the denial of equality of opportunity to some persons by denying equality of opportunity to others. Those who reject this conclusion but who acknowledge that there are moral constraints on the means used to achieve ends and that not every method of compensation is morally permissible encounter the problems of showing that AA falls within the bounds of morally permissible means and of explaining why other policies that would benefit blacks and others in employment in the name of compensation, such as dismissing white males from jobs and replacing them with members of designated groups to increase the representation of these groups in quality jobs more quickly, do not. After all, workers are routinely dismissed from jobs simply to maximize profits or to increase efficiency. Many of the white males who would be harmed by the suggested mode of compensation, such as older white males entrenched in high-status and high-paying positions, it might be argued, have greater responsibility for past injustices than the white males penalized by AA. Advocates of AA may be reluctant to accept the implication that the suggested mode of compensation is morally permissible, but they have to show that they can consistently reject this implication. Defenders of AA who acknowledge that there are possible modes of compensation in employment or advanced education that are morally impermissible because they would treat white males unjustly have the problem of justifying the claim that AA is not morally impermissible on the same
grounds.

Beyond the foregoing empirical and moral questions about AA as a compensatory policy, and important considera­tion in the moral assessment of a practice or policy con­cerns how the practice or policy compares with feasible alternatives. A policy might be morally unjustified because there are feasible or practicable alternative means of achieving the declared goal that would produce less harm and less injustice. The compensatory argument for AA does not critically examine feasible alternatives to AA and show that AA is morally preferable to these alternative modes of com­pensation. Preferential treatment in hiring and admissions on the basis of race, sex, and ethnicity is not the only alternative to eliminating compensation for past injus­tice; and feasible alternatives to AA would be far more effective in achieving the professed goal of AA and would not seek to remedy past injustices by producing new ones. These alternatives include legal mechanisms to provide redress (such as the award of a job unjustly denied or financial compensation to victims of discrimination), reme­dial education, open admission to community colleges, job training, income redistribution, subsidized housing, and special medical care. These programs would be sensitive to individual desert; they would not directly benefit those who are undeserving of compensation and would not penalize those who do not deserve to have penalties inflicted on them. Instead of conferring benefits on individuals who are mere
proxies for real victims, these programs would be intended and structured to compensate victims of injustice, irrespective of race, sex, or ethnicity, for the specific injuries they have suffered. Eligibility for these programs would be based on unjust injury actually and personally suffered and would have to be demonstrated, not merely assumed or asserted. Further, these programs would fit the remedy, as far as possible, to the injury suffered. They would have the additional merit of spreading the burden of compensation fairly on the general taxpayer. The costs of these programs would be paid for by the society as a whole through tax revenues and thus would not, as in AA, be assigned entirely to a relatively small subclass of the members of society. Moreover, these alternatives to AA would be compatible with principles of distributive justice and fundamental individual moral rights.

According to one reply, however, AA is necessary to remedy past injustice against the designated groups, particularly blacks because of their unique suffering among these discriminated-against groups, and to eliminate the underrepresentation of these groups that derives from past discrimination. Furthermore, the institution of the alternative compensatory programs would require the creation of a vast and expensive bureaucracy, whereas the implementation of a policy of AA is neither costly nor difficult.

First of all, many of the kinds of alternative programs suggested are to a significant extent already in
place, providing assistance, for example, to the victimized, poor, elderly, handicapped, and uneducated or ill-educated. Consequently, there would not be a need to create a vast, expensive bureaucracy to institute these programs. The significant moral advantages of these alternatives to AA outweigh the difficulties and the increased expenditure of funds that may be involved in expanding, modifying, or instituting these programs. Furthermore, since a policy of AA disregards the requirements of compensatory justice, it clearly is not necessary to compensate individuals who have suffered injustice. An important distinction here is the distinction between being necessary for compensation that accords with the requirements of compensatory justice and being necessary for the achievement of some goal deemed desirable by advocates of AA. A policy of AA may indeed be necessary for the rapid elimination of such supposed effects of past discrimination as the underrepresentation of the designated minorities in desirable and valuable positions; but it is not thereby necessary for conferring benefits on victims of past injustice in accordance with the requirements of compensatory justice. Moreover, programs of preferential treatment were not necessary to compensate members of other previously discriminated-against and victimized groups and to enable them to overcome the effects of past injustice. Many victims of racial and ethnic discrimination in America, such as the Chinese, Japanese, Jews, Irish, Italians, and Germans, eventually prospered in this country
despite the absence of government help. Indeed, Asians, particularly the Chinese and Japanese, and Jews managed to achieve high socioeconomic status, high levels of education, and high representation in desirable and valuable positions not only without the benefit decades ago of legal protection against discrimination and the many social programs available to blacks and Hispanic groups in recent decades but also without any programs of compensation at all. Notably also, blacks have managed to achieve significant overrepresentation among athletes in the high-status and high-paying sports of basketball, football, and baseball without programs of preferential treatment.

Acknowledging that "other minorities in the United States—European immigrants, for example—who have been victimized by discrimination moved up in American society without the assistance of AA measures," AA defenders who insist that AA is a necessary remedy claim that "the situations of yesterday's European white immigrants and blacks are not analogous." They say that "ethnic prejudice was not as virulent or pervasive as racism" and that "overt racism contributed to the occupational ascent of newly arrived whites." These defenders of AA cite such statements by some sociologists as that Jewish, Irish, Italian, and German immigrants benefited from racism, for example, through the usurpation of decent jobs from Northern blacks. To begin with, however, this reply does not answer the point about blacks' overwhelming success in certain fields.
without the assistance of AA measures; nor does it address the earlier point about the success of Asians, particularly the Chinese and Japanese, despite having suffered deprivation and mistreatment in the United States comparable to that suffered by blacks. Consider, for example, that at the beginning of the twentieth century Japanese immigrants in this country were agricultural field hands and domestic servants to an even greater extent than their black contemporaries; yet "the Japanese rose from such occupations within the lifetime of the first generation, and the second generation began at higher levels, in wholly different sectors of the economy, largely as a result of education."

Also, the wholesale internment of Japanese Americans during the Second World War was, in the words of one commentator, "far worse than anything done to blacks then or since." Japanese Americans "were rounded up and sent to concentration camps. Here they were kept behind barbed wire and guarded by soldiers. The property they left behind was either stolen or sold at a sharp loss." At the time of the evacuation, "the Federal Reserve Bank estimated Japanese property losses at $400 million—a figure that, today, would be many billions."

Nevertheless, twenty-five years after the war and without AA measures or programs of compensation, Japanese Americans "had incomes 32 percent above the national average."

Furthermore, such responses in favor of AA tend to disregard or to minimize the desperate poverty and the deprivation and mistreatment white immigrant groups had to
endure in this country, and to discount or to deprecate the achievement of these groups. Consider the Irish, for example, according to some historians' accounts. With the only alternative a slow, agonizing death at home as a result of the Great Famine, hundreds of thousands of Irish came to America in the nineteenth century and had to endure horrifying conditions on the immigrant ships (called "coffin ships"), such as overcrowding, filth, lack of fresh air, contaminated water, disease, starvation, exploitation, and extortion.\textsuperscript{257} The vast majority of Irish immigrants were clustered together in poverty and squalor in the ghettos of cities of the East—New York, Philadelphia, and Boston—with thousands living below ground level in cellars often flooded by rainwater and sewage. Significant numbers of these immigrants failed to survive.\textsuperscript{258} The Irish in America suffered taunts, humiliation, prejudice, virulent anti-Catholicism, mob violence, industrial exploitation, and discrimination.\textsuperscript{259} In the nineteenth century in some states of the North, employers would specify that they were willing to hire blacks but not Irishmen.\textsuperscript{260} Irish immigrants seeking work endured signs in major cities saying "No Irish Need Apply."\textsuperscript{261} Concerning the Irish, one writer recommended, "the best remedy for whatever is amiss in America would be if every Irishman should kill a Negro and be hanged for it."\textsuperscript{262} Further, millions of Eastern and Central European immigrants faced opposition "far greater," one writer reports, "than that faced by nonwhite immigrants today."
Being white in America, "by itself, offered no insurance against racist exclusion." Indeed, the language used "to warn against white immigrants sounds like a racist description of American blacks"; thus, "the immigrants were described as 'hirsute, low-browed, big-faced persons of obviously low mentality . . . clearly they belong in skins, in wattled huts at the close of the great Ice Age.'" Moreover, any claim or suggestion that the ascent of Jewish, Irish, Italian, German, and other white immigrant groups in American society is primarily or largely attributable to racism and the usurpation of decent jobs from Northern blacks is historically incorrect. Indeed, since the black population in the North was not large and the black sector was only a comparatively small part of the Northern economy, most members of these white immigrant groups need not have and could not have depended on such usurpation to move up in American society.

Even if it is granted that the situations of yesterday's European white immigrants and blacks in the past were not analogous, it neither follows nor is reasonable to conclude that AA measures are necessary now as a remedy for past injustice, even injustice against blacks. The blacks who are eligible for AA have not been enslaved and have not suffered the grave injustices that blacks in the past suffered; nor have these present-day blacks suffered the desperate poverty and the deprivation, hostility, and mistreatment that the Chinese, Japanese, and white immigrant groups
in the past had to endure and to struggle to overcome. The relevant groups for comparison in considering whether AA programs are necessary to remedy past injustices are these present-day blacks, not the blacks in the past who were enslaved or who suffered other grave injustices, and these Asian and white groups in the past.

Concerning the success of Asians in this country, "some people have argued," one commentator notes, "that Asian immigrants have the advantage of starting out fresh when they get to America, whereas blacks must constantly drag the baggage of slavery and oppression behind them." Some defenders of AA claim that, unlike native blacks, "Asian immigrants have been drawn disproportionately from occupational elites," that is, "skilled, educated persons" with "economic and social-class advantages," for example, "scientists, engineers, doctors, and academics." However, such claims "do not apply the descendants of Asians who came to this country a century ago practically in bondage and who, in many cases, were treated as badly as blacks." The empirical evidence shows, for instance, that the Chinese and Japanese rose economically in this country before a significant proportion of them had even completed high school. Recall that Japanese immigrants rose from the occupations of agricultural field hand and domestic servant, two occupations in which at the beginning of the twentieth century they were represented to an even greater extent than their black contemporaries. Further, the
children of Japanese immigrants had even high educational achievements even though their parents (who spoke broken English) were farmers, educated persons or intellectuals or persons with economic and social-class advantages. Asian Americans from low-income families, including recent arrivals, not only have managed to attain economic and occupational success but also have even outperformed blacks, Mexican Americans, and American Indians from high-income families on cognitive achievement tests. Hence, the claim or suggestion that Asians' achievement and success in this country are ascribable to the immigration of skilled, educated, professional, and economically and socially advantaged persons is contradicted by the empirical evidence and also demeans the notable achievement of Asians in America.

The crucial moral question about the end or goal of an action or policy is, Is the end or goal morally acceptable? Ends, not only means, can conflict with moral principles, such as principles of justice, and be morally unacceptable. To compensate victims of injustice is a morally acceptable goal; but in disregarding the requirements of compensatory justice AA seems to betray that this goal is only its declared or apparent goal, not its real goal, or the goal that in fact seeks to achieve. Despite the rhetoric of AA advocates about compensation for past injustice, the real goal of AA seems to be to give the specified minority groups proportional representation and women dramatically increased representation in the colleges, universities, professions,
and labor force as a whole. Not only is this goal not the same as that of compensating individual victims of discrimination and injustice, but also the single-minded and uncompromising pursuit of this goal, as in AA, conflicts with the goals, in actions and policies, of conforming to principles of justice, compensatory and distributive, and respecting fundamental individual moral rights.
Notes


6. This information comes from an Associated Press report that appeared in newspapers nationally on 14 December 2000.


9. These data are found in a recent study by Linda Wightman cited in Thernstrom and Thernstrom, "Racial Preferences," 48.


12. Ibid.


15. Wolff, Political Philosophy, 207.

16. Ibid.

17. Almond, Exploring Ethics, 176.


25. Buchanan, "Justice, Distributive."


30. Miller, "Desert and Merit."


32. Ibid.

33. Ibid.

34. Sher, Desert, 121.


42. James W. Nickel, "Should Reparations Be to Individuals or to Groups?" in Affirmative Action Debate, ed. Cahn, 28.

43. Wolff, Political Philosophy, 207.

44. Nickel, "Discrimination."


46. Wasserman, "Discrimination."


50. Wasserman, "Discrimination."

51. Graft, "Speciesism."


53. Nickel, "Discrimination."


57. Nickel, "Discrimination"; and Wasserman, "Discrimination."


59. Ibid.

60. L. W. Sumner, "Rights," in Ethical Theory, ed. Lafollette, 297.
61. Martin, "Rights."


63. Shaw, Contemporary Ethics, 184; and Martin, "Rights."

64. Martin, "Rights."

65. Ibid.

66. Rowan, Conflicts of Rights, ix.


68. Shaw, Contemporary Ethics, 184-85.

69. Almond, Exploring Ethics, 63.


72. Rowan, Conflicts of Rights, ix.

73. Shaw, Contemporary Ethics, 184.

74. Held, "Feminism and Political Theory," 160; and Beauchamp, Philosophical Ethics, 189.


76. Beauchamp, Philosophical Ethics, 189-90.


79. Rowan, Conflicts of Rights, ix.

80. Ibid., x.

81. Ibid.


84. Sumner, "Rights," 289.


89. Ibid., 159.


92. Ibid.


97. Ibid., 161.

98. Ibid., 162-63.


103. Ibid.

104. Ibid., 164.
115. Ibid., 8.
118. O'Neill, "When Opportunities Are Equal," 179.

127. Graft, "Speciesism."


130. Ibid.

131. Hill, "Respect for Persons."


133. Ibid., 197.

134. Hill, "Respect for Persons."


137. Darwall, Philosophical Ethics, 226.


139. Hill, "Respect for Persons."


144. Feinberg, Social Philosophy, 96.


147. Wolff, Political Philosophy, 128.


154. Martin, "Rights."

155. Rowan, Conflicts of Rights, 202-203.


158. Martin, "Rights."


161. Frazier, "Duty."

162. Beauchamp and Childress, Principles of Biomedical Ethics, 4th ed., 77; and Charles R. Beitz, "International

163. David McNaughton, "Intuitionism," in Ethical Theory, ed. LaFollette, 270.

164. Sumner, "Rights," 301.


168. Kymlicka, Contemporary Political Philosophy, 6.


171. Lyons, ed., Rights, 3-4; and Beauchamp, Philosophical Ethics, 188.


173. Regan, Animal Rights, 269.

174. Gewirth, "Rights."

175. Wolff, Nozick, 24; and Shaw, Contemporary Ethics, 189.

176. Rowan, Conflicts of Rights, 4-5.


178. Norman, Moral Philosophers, 188.

179. Ibid., 186; Archard, "Political and Social Philosophy," 264; and Sumner, "Rights," 288-89.


181. Ibid.

182. Ibid.; and Norman, Moral Philosophers, 194.

183. Bowie and Simon, Political Order, 78.


194. Ibid.


196. Ibid.


199. McNaughton, "Intuitionism," 268.


201. Ibid.


203. Frazier, "Duty."

205. Lyons, ed., Rights, 8.

206. Sher, "Merit and Desert."


209. Ibid., 72.


211. Bowie and Simon, Political Order, 4th ed, 73.


214. Ibid., 22.


219. Darwall, Philosophical Ethics, 227.

220. Norman, Moral Philosophers, 89.

221. Bowie and Simon, Political Order, 78.


223. Darwall, Philosophical Ethics, 163-65; and Dillon, ed., Self-Respect, 25.


227. Ibid.


229. Frankena, "Respect for Persons," 159-60.

230. Darwall, Philosophical Ethics, 227.

231. Murphy and Coleman, Philosophy of Law, 75.


233. Regan, Animal Rights, 247. See also Warburton, Philosophy, 58.

234. Hill, "Respect for Persons."


236. Martin, "Rights."

237. See also Norman, Moral Philosophers. 187.


241. Sparkes, Talking Philosophy, 157, 221; and Conway and Munson, Elements of Reasoning, 61.

242. See Feinberg, Doing and Deserving, 245, for the use of this example in a different context.


244. Norman, Moral Philosophers, 87.


248. Ibid.

249. See Ezorsky, Racism and Justice, 57-63.


252. Ezorsky, Racism and Justice, 57.


255. Sowell, Race and Culture, 83.


258. Grenham, History of Ireland, 61.

259. See Grenham, History of Ireland, 61; and Miller and Wagner, Out of Ireland, 52-53; and D'Souza, End of Racism, 137.


261. D'Souza, End of Racism, 137; and Miller and Wagner, Out of Ireland, 54.


263. D'Souza, End of Racism, 137.


265. Taylor, Good Intentions, 113.

266. Ezorsky, Racism and Justice, 59.
267. Ibid.


Chapter 4
Unjust-Benefit Compensatory Argument for AA

Recognizing the inadequacy of the previous compensatory argument for AA but sharing the conviction that AA is a morally justified mode of compensating blacks, as well as women and Hispanics, for past injustice, some defenders of AA propose a major variation from the simple model of compensation. According to them, every minority-group member and women has suffered from the effects of past discrimination, even if they have not been discriminated against, for example, in employment or the admission to educational institutions. Further, let us not insist, these defenders of AA assert, that contemporary white males are guilty of perpetrating and are responsible for injustices. Some white males are and some are not; and "public administrators cannot be expected to sort out the guilty from the nonguilty."¹ However, contemporary white males nevertheless have a liability which justifies the imposition of the burden of compensation on them,² and the problem of injustice to white males through AA programs does not then arise. That is, the present generation of white males, including job and school applicants, are the beneficiaries of past discriminatory practices and past injustices even if they were not directly involved in such practices, have not themselves acted unjustly, are not the causes of past discrimination and injustices, did not contribute to these injustices, and are
not responsible for them.  

"White males unjustly enriched themselves for centuries in America at the expense of African Americans, women, and other aggrieved minorities"; and "young white males today are the spiritual heirs of those that perpetrated injustice." While the current generation of whites may not be at fault," a proponent of AA writes, the "unfair advantage" of "white Americans" over "black Americans" is "still theirs." As a result of past racist exclusion, young whites have "a decided advantage over young blacks because they have generally received better educational and entrepreneurial opportunities." The "advantages of being white in contemporary American society, while perhaps not unjustly obtained (in the sense of wronging blacks), were unfairly acquired." Every white male has benefited at least indirectly from the effects of past discrimination and has benefited from a culture in which men are treated more favorably than women. Such universal benefit, proponents of the present argument maintain, implies universal liability, that is, the obligation to make compensation.

According to the present argument for AA, this policy is a morally justified means of remedying the effects of past injustice by favoring those who have been harmed at the expense of those who have benefited from unjust social practices. The white males directly affected by AA are not being denied benefits they deserve but are merely being asked to give back unearned benefits that arose from these social
practices and that are "the ill-procured product of slavery and discrimination," the product of "'unjust enrichment," and "the result of racist advantages." "Redistributing opportunities" in AA "would clearly curtail benefits" that white males "have come to expect." Compensation at the expense of innocent parties may generally be wrong; but, defenders of AA hold, it is not wrong when an innocent person has unwittingly profited from the wrongdoing of others. Having benefited from society's racism and sexism, white male job and school applicants are not in a position to claim that they are themselves victims of injustice when the community imposes the burden of compensating members of the designated groups on them. Given this divergence from the simple model of compensation, therefore, a policy of AA cannot be dismissed as morally unjustified merely because it places the burden of compensation on individuals who have not perpetrated and are not responsible for past injustices.

In the attempt to disarm the objections to AA relating to who is owed and who owes compensation, the first task of the present argument for AA is to show how past discrimination has affected the recipients of preferential treatment and thus to provide a clear basis for benefiting these individuals in the name of compensatory justice. Perhaps they have not been discriminated against in employment and have not been excluded from good jobs or restricted to menial and low-paying jobs, nor perhaps have they been excluded from
places in higher education. According to this argument, however, even if present members of the designated groups are not victims of specific acts of discrimination or exclusion, they suffer the lingering effects of generations of discrimination and injustice. "The effect on the individual that is the specific object of a racist exclusion is not the only effect of that act," proponents of AA assert, "and may not be the effect that is most injurious or long term. For an invidious act affects not only y, but also y's family and friends." Thus, discrimination in employment and the systematic and unjust exclusion of blacks and other minority-group members from quality jobs have often resulted in poverty issuing in and reinforced by such other privations as malnourishment, substandard housing, poor health care, inadequate education, lack of intellectual stimulation, and the lack of motivation to seek educational and employment opportunities. Poverty, apart from the physical suffering it brings, some writers say, produces low self-esteem and diminished expectations. Disadvantages resulting from these privations, proponents of AA insist, have been transmitted from one generation to another. Indeed, blacks' current disadvantages are, in part at least, it is claimed, a legacy of the slave trade. Blacks "have suffered the consequences—rooted in slavery and enduring in its racist aftermath—of systematic, intergenerational injustice," a defender of AA writes. "Among the poor, imprisoned, those subjected to inadequate education, unsafe housing, and poor
health care, African Americans are consistently and dispropor­tionately represented."22 Hence, past injustice has espe­cially disadvantaged the present generation of blacks and negatively affected their present competitive position.23 Because of the gap in education and abilities caused by gener­ations of racism, "white Americans have an unfair advan­tage over black Americans in the competition for education and jobs."24 Blacks lack the skills to perform as well as whites and to compete effectively for desirable positions.25 Further, "it must be assumed," an advocate Of AA writes, that "all members" of the disadvantaged groups "have experi­enced so much suffering that all are due some sort of com­pensation." In fact, "only the most resourceful black or woman is able to avoid (or overcome) the crippling effects of prejudice and discrimination."26

Proponents of the present defense of AA underscore that the effects of discrimination are not necessarily lim­ited to individuals directly victimized by it. The social, economic, cultural, and motivational effects of discrimina­tion are passed on to children by their parents and thus perpetuate themselves through generations. Since the "effects of discrimination can be cumulative," the "off­sring of victims of discrimination can be severely handi­capped." The "self-concept, lifestyle and careers of parents have a tremendous impact upon their children." Such factors "greatly influence the home environment" and "play a signif­icant role in shaping a child's interests and motivation."
Also, "the financial, intellectual and social resources accumulated by parents play a larger role in determining the opportunities their children get."\(^{27}\) An advocate of AA writes:

Just consider the difference between the opportunities available to the offspring of middle-class suburbanites and those available to the children of unemployed slum-dwellers. These differences range from diet (deficiencies can retard both mental and physical growth), to housing, to medical care, to social and cultural enrichment.\(^{28}\)

Although the cumulative effects of discrimination are not "any less real for women than they are for blacks," a defender of AA says, these effects "have had a more devastating impact upon the latter than the former," who have "for the most part only experienced" the "motivational" cumulative effects of discrimination and not, as blacks have experienced, "both the motivational and the educational/economic/social cumulative effects of discrimination."\(^{29}\)

"The consequences of past and residual bias are undeniable,"\(^{30}\) one advocate of AA insists. "From the post-Reconstruction period to the present," another supporter of AA says, "racist practices have continued to transmit and reinforce the consequences of slavery. Today blacks still predominate in those occupations that in a slave society would be reserved for slaves."\(^{31}\) Further, given that blacks have the same basic goals, aspirations, hopes, and willingness to work assiduously to realize opportunities as whites, "it is a reasonable assumption,"\(^{32}\) a proponent of the present defense of AA maintains, that blacks' lack of skills to
perform as well as whites and to compete effectively for desirable positions, their gross underrepresentation in the desirable positions in society in the absence of AA programs, and the fact that blacks come from disadvantaged backgrounds and have parents who typically have less money and less education than white parents are "due to injustice." Disparities between blacks and whites in cognitive skills, test scores, academic achievement, and educational attainment, as well as in family structure, health, and crime, are reasonably held to be the effects of past discrimination. Owing to past discrimination and before the entrenchment of AA programs, proponents of the present compensatory argument for AA seek to remind critics, "practically no Native Americans, and a mere handful of blacks, Hispanics and females" occupied "influential, high-status positions in business, government, and so forth." These minority groups and "nondependent females" received "a meager slice of the American pie" and were "several times likelier than their counterparts to be trapped in poverty." Again, "Blacks and Chicanos generally" had "lower life-prospects than white males," in "the sense that, as a group, their life-time earnings" were "lower," their "educational and social opportunities" were "inferior," and their "access to healthcare" was "restricted." Again, "it can safely be assumed" that the "relatively lower socioeconomic status of blacks" even today, such as the median net worth of black families that is less than one-tenth that of white
families, "can be related to the effects of past discrimination."  

Given, then, that the harms which result from discrimination are frequently passed from generation to generation, an individual who has never been directly victimized by discrimination may indirectly suffer its debilitating effects. Since there is a duty to make reparations when wrongful injury has been done, rectification for the effects of past discrimination must be allowed, proponents of the present defense of AA argue, not only for those who are the immediate victims of discrimination but also for those who are indirectly victimized by it.  

"All members of the male (caucasian) majority must have benefited to some extent," a proponent of AA insists, "by the discrimination that has kept others out of the mainstream of American life."  

"All white males have benefited to some degree from discrimination against women and minorities," another AA proponent claims. White males have profited from discrimination practiced in the past and continue to profit from the effects of discrimination suffered by blacks, women, and Hispanics. The benefits to whites from racism, for instance, are undeniable. Some whites have benefited directly from past discrimination or "past racist exclusions," such as by gaining jobs in hiring or promotion that in a just society would have gone to blacks.  

White workers have also benefited from racial discrimination in training and desirable job assignment and from housing
discrimination in areas where jobs are available. Further, AA proponents claim, whites have benefited from discrimination in primary and secondary education (and from having attended predominantly white schools) and in admission to institutions of higher education. Even European immigrant groups in the past received state support in acquiring property, education, and jobs that blacks that blacks were denied, it is also claimed; employment, educational, and investment opportunities that blacks were excluded from were made available to European immigrants. In addition to those whites who are "the direct beneficiaries of past racist exclusions," AA proponents say, other whites are "the indirect beneficiaries of past racist acts." These whites "have benefited indirectly," a proponent of AA writes, "by receiving advantages that have accrued to them as a result of acts of discrimination which have benefited their parents or grandparents." The benefits from discrimination are therefore not necessarily limited to individuals who directly benefit from it. Indeed, just as the children of victims of discrimination can be severely handicapped, so can the children of beneficiaries of discrimination be highly advantaged. For the same reasons that the debilitating effects of discrimination can be passed on to future generations, proponents of AA argue, undeserved benefits resulting from discrimination can be passed on as well. Hence, the benefits that are derived from discrimination, not only the effects of discrimination, can be cumulative.
That the beneficiaries of past discrimination, who are the individuals that AA programs purportedly aim at, are not necessarily its perpetrators is most perspicuous when the benefits from discrimination are passed on to children and grandchildren. This point is true, however, defenders of AA observe, of most initial acts of discrimination as well. Thus, the individuals who set restrictive admissions policies are not the students who directly benefit from such policies; and the individuals who benefit from the exclusion of others in the hiring and promotion processes are not those who do the hiring and promoting.\footnote{50}

The strategy of the present compensatory defense of AA is to argue that since white males have benefited from past discrimination imposed by the community, even if they are not its perpetrators, and hence are not wholly innocent parties, white male applicants can be properly assessed the costs of the community's programs of preferential treatment.\footnote{51} Possession of benefits derived from past injustice constitutes an unjust enrichment, and the possessor is under an obligation to restore the benefits to their rightful recipients. Unjust benefit or enrichment undermines a person's claim to innocence, proponents of the present defense of AA maintain, and makes him liable to pay compensation.\footnote{52} Hence, unjust benefits may be taken from a beneficiary without injustice. Given white males' diminished innocence owing to the fact that they are "recipients of an 'unjust enrichment,'"\footnote{53} then, "it is only fitting," these proponents of AA
argue, that white males today "should cede some of their undeserved social and economic advantages."\textsuperscript{54}

To support the particular judgment that AA is morally justified, proponents of the present argument for AA give the simple, concrete example of a stolen bicycle or other item of property that must be returned.\textsuperscript{55} Thus, X's parent steals a bicycle from Y's parent, both of whom subsequently die; and X inherits the bicycle from his parent, the thief. Although X is innocent of the theft and the knowledge of it, he is in possession of stolen goods rightfully belonging to Y, who would have inherited the bicycle had it not been stolen. The bicycle should be returned to Y, even if A is not the cause of Y's being deprived.\textsuperscript{56} Since "it is not unreasonable that sons sometimes be deprived of certain benefits that derive from injustice done by their ancestors" and "a son who has inherited stolen property . . . has no right to the goods and may reasonably be expected to give them up," it "seems entirely appropriate that they be transferred to the daughter or son of the thief's deceased victim."\textsuperscript{57} Analogously, "present-day whites owe reparations to contemporary blacks," according to the present argument for AA, "not because they are themselves guilty of causing the disadvantages of blacks, but because they are in possession of advantages that fell to them as a result of the gross injustices of their ancestors." Indeed, "special advantages continue to fall even to innocent whites because of the ongoing prejudice of their white neighbors."\textsuperscript{58} AA is
in accord with compensatory justice, then, in requiring white male applicants to relinquish desirable positions in favor of black, other minority, and female applicants.

The present compensatory defense of AA involves a shift from the principle that an agent who wrongfully causes injury or harm owes compensation to the principle that a person who benefits from an agent's wrongdoing is liable for or owes compensation. This shift is a sharp divergence from the simple model of compensation; and, according to some writers, it is far from clear that there is any consensus at the level of intuition supporting the unjust-benefit principle. In fact, several writers have endorsed the principle but suggested that it should apply only to those who have benefited from injustice intentionally or voluntarily. However, most of the writers who endorse the unjust-benefit principle of compensation are not concerned with guilt and innocence and with the requirement that those who are to blame for an injustice be made to pay compensation. Rather, these writers are interested in restoring the competitive balance that would have existed had the injustice in question not taken place. They believe that the natural way of accomplishing this goal is to ask those who have gained from injustice to give up what they have gained. These writers agree that although the principle that we should never compensate one innocent person at the expense of another is initially plausible, closer study suggests an exception to it. As advocates claim, even though innocent
or unrelated third parties have played no role in causing certain injustices, they can sometimes benefit from them. Hence, having unwittingly benefited from acts of injustice may indeed create a liability to compensate for them, at least to the extent of relinquishing the undeserved or unjust benefits. 63

The problem for the present defense of AA is whether it can advance beyond reliance on simple, concrete examples or simple principles that generally command assent and have direct intuitive appeal and can show that through deployment of the unjust-benefit principle the compensatory defense of AA becomes more applicable to the programs in need of justification. This variation from the simple model of compensation, however, as I shall argue, also does not apply to the programs it is supposed to justify. It fails to refute or to undermine the objections that AA does not satisfy the requirements of compensatory justice; consequently, it does not successfully assimilate AA to existing compensatory practices that reflect widely accepted principles of justice. AA does not satisfy the conditions for the moral justification of this policy that AA advocates themselves set forth, namely, that "the person who will benefit" from the policy "must have been handicapped" by discrimination and "the person who will be victimized" by the policy "must have benefited from previous acts of discrimination." 64 Notwithstanding the present variation from the simple model of compensation, furthermore, AA remains vulnerable, I shall
argue, to the noncompensatory objections relating to the principles of nondiscrimination and distributive justice, fundamental individual moral rights, the social policy implications of making use of the categories of race and gender and ethnicity, and the means-end distinction.

To begin with, there are serious problems with the claims by proponents of the present argument for AA that the consequences of slavery and past and residual bias are evident and undeniable and that past discrimination has caused, or is the only reasonable explanation of, the statistical disparities between blacks and whites in income, wealth, and occupational success and the disparities between these groups in cognitive skills, test scores, academic achievement, and educational attainment. Thus, the claims that the economic and occupational consequences of slavery are evident today and that blacks still predominate in those occupations that in a slave society are reserved for slaves are undermined by research data (see chapter 2) concerning racial and ethnic group similarities and differences, such as data relating to the contemporary socioeconomic position of Hispanic groups compared with that of blacks and data indicating the heavy representation of Asian and white immigrant groups in slavish occupations, that is, in menial, low-paying, harsh, and dangerous jobs, for example, draining infested swamps, building railroads, and tending combustible boilers. Further, while acknowledging that Asians have had far greater success in this country than the designated
minority groups, AA defenders seem to be at a loss to explain the success of Asians in a society in which they have been the victims of pervasive and intense prejudice and severe mistreatment. One defender of AA simply remarks that "Asian Americans have somehow broken into professional fields—medicine, engineering, science." Moreover, if it is reasonable to assume that blacks have the same basic goals, aspirations, dreams, hopes, and willingness to work assiduously to realize opportunities as whites, is it not also reasonable to assume that non-Jewish whites have the same basic goals, aspirations, and so on, as Jews and Asians? If AA advocates answer yes, critics of AA can ask them to explain the differences between non-Jewish whites and Jews and between non-Jewish whites and Asians in income and representation in high-level positions and to explain why Jews learn more in school than non-Jewish whites and why most Asian Americans learn more than European (white) Americans. Would AA advocates say that it is a reasonable assumption that these group differences are due to injustice?

In the 1960s, several social scientists remark, racial egalitarians routinely blamed cognitive inequalities, such as the black-white test score gap, on (past discrimination and) the combined effects of black poverty, racial segregation, and inadequately funded predominantly black schools. Beyond the problem of substantiating the claim that these conditions have themselves been caused by discrimination,
however, the empirical evidence shows, according to researchers, that such traditional explanations of the racial gap in cognitive skills and test scores as poverty and disadvantage (and differences in families' economic and educational resources) and school segregation (and resource differences between predominantly black and predominantly white schools) "do not work very well." The evidence indicates that blacks' lower test scores and school grades are not attributable to fact that "they come from families with less money or less schooling than the average white" or that "black parents typically have less education and less money than white parents." When researchers match black and white parents in years of education, occupation, income, and family structure, black children still do not perform as well as white children on standardized tests.

"Racial disparities in parental wealth have almost no effect on children's test scores" once researchers "control income, schooling, and the mother's test scores." Such cognitive disparities as the test score gap shrink only a little when black and white families have the same amount of schooling, same income, and same wealth. The evidence shows that income inequality between blacks and whites "appears to play some role in the test score gap, but it is quite small." For instance, black children from low-income families do not perform as well on the SAT as white and Asian children from the same economic background. Also, "children from affluent black families have much lower test scores than their
white counterparts." Indeed, these black children score lower than white and Asian children from low-income families on such tests as the SAT. Data correlating test scores with the level of parental education show similar results. For example, blacks whose parents have only a high school diploma score much lower on the SAT than whites and Asians whose parents have the same level of education. Blacks from college-educated families score lower than their white and Asian counterparts. In fact, blacks whose parents have graduate degrees score lower than whites and Asians whose parents have only a high school diploma. The "real problem" is "not class," a researcher observes, "but 'racial differences in academic achievement.'"

Further, "despite glaring economic inequalities between a few rich suburbs and nearby central cities," the evidence of research indicates, "the average black child and the average white child now live in school districts that spend almost exactly the same amount per pupil." Even in the 1960s black and white schools differed little in educational resources. Moreover, large racial differences in cognitive skills and test scores persist in desegregated, racially mixed schools. The black-white test score gap shrinks only slightly when black and white children attend the same schools. According to a recent study, a school's racial mix does not positively affect blacks' reading scores or consistently influence their math scores.
Who Is Owed Compensation?

The present compensatory defense of AA does not successfully rebut the objection that AA programs do not actually compensate victims of past discrimination. The blacks and members of the other designated groups who stand to benefit directly from AA in employment and higher education have not themselves been harmed by past discrimination. On the present defense of AA, this policy seeks to compensate members of the designated groups for the disadvantaging effects of past discrimination they have suffered. AA, however, does not confer compensatory benefits on those who have suffered disadvantages that are the inevitable or unavoidable result of injustice. The individuals whom AA directly benefits are not solely or primarily those who (perhaps with the exception of certain blue-collar workers) come from disadvantaged backgrounds; who have suffered such debilitating effects of past injustice as poverty, malnourishment, inadequate housing, poor medical care, and inadequate public education; or who as a result of such privations have been unable to acquire the skills and qualifications to compete effectively for desirable positions. Those who have suffered such disadvantages, unlike the recipients of preferential treatment, tend to lack the education and training required by AA programs. 85

Distinguishing between qualified and unqualified or less-qualified members of the designated groups and taking no account of socioeconomic status or economic deprivation...
in conferring compensatory benefits, AA mainly affords advantages to individuals who are better off.\textsuperscript{86} The recipients of preference, including even new immigrants who have not shared America's history of injustices,\textsuperscript{87} "typically have been hardly handicapped at all,"\textsuperscript{88} a commentator says, and have not been prevented from acquiring the qualifications to be deemed capable of succeeding in desirable positions, such as places in graduate programs in science and mathematics and law and medical school. No causal connection is shown between their lower qualifications and past discrimination. Minority recipients of preference in AA tend to come from backgrounds that, some commentators observe, cannot be plausibly considered disadvantaged.\textsuperscript{89} The individuals recruited in AA programs are "middle-class minority students," a university professor having firsthand knowledge of the operation of these programs remarks. "Almost all of the minority students in our program have appeared to be of middle-class background," and "it is pointless to pretend that they are disadvantaged."\textsuperscript{90} "Middle-class minority-group members who have had a relatively easy time of it," another professor says, "benefit more" from AA programs "than others in the same group who have been severely oppressed in the past."\textsuperscript{91} Some proponents of AA concede that "many if not most of the blacks who benefit from preferential treatment have middle-class origins" and that AA programs "benefit mainly middle-class blacks and women."\textsuperscript{92} In fact, many of the minority and female recipients of preferential treatment
come from upper-class and "highly advantaged" backgrounds, one commentator writes, and are the "sons and daughters of well-educated, affluent lawyers, doctors and industrialists." Some minority recipients of preference come from families not only with very high incomes but also with both parents who are professionals. In addition, many of those who directly benefit from AA have received years of good undergraduate and postgraduate education. Indeed, the beneficiaries of preferential hiring in higher education are either Ph.D.'s or Ph.D. candidates, many from the nation's most prestigious graduate institutions.

Similarly, set-aside programs directly benefit minorities and women who are hardly disadvantaged. These programs reward already successful minority and female contractors. Even wealthy and well-connected minorities and women profit "from sheltered competition for public contracts." Minority businessmen who participate in set-aside programs have an average net worth far higher than the average net worth of not only the groups they belong to but also Americans in general.

Census data indicate that most members of disadvantaged minority groups are not poor. Thus, "most blacks are not in the underclass," an advocate of AA acknowledges. In the mid-1990s, "only about one-third of blacks were poor; the rest were middle-class or better off." Given that at least in highly competitive processes (such as admission to professional school) class, income, and
other advantages will affect the development of the relevant qualifications, some commentators emphasize, blacks as well as members of the other specified minority groups who achieve the highest qualifications are likely to be those have not come from backgrounds disadvantaged by discrimination. It is reasonable to expect the nonpoor and advantaged members of the specified minority groups not only to be overrepresented, relative to the poor of their groups, among college and university applicants and applicants for higher-level jobs but also to be disproportionally represented among the most qualified minority students and therefore to profit disproportionally from programs of preferential treatment applied according to race and ethnicity. Although AA modifies admissions and job standards for blacks and other minorities in comparison with whites, it preserves the merit ideal in rank ordering minority applicants and choosing those with the best qualifications within their own group. Once women are added to the pool of groups designated to receive preference, the number of advantaged individuals eligible for favored treatment "is expanded enormously." Since "to be preferentially admitted to law school or medical school, a black or woman must usually have attended a good college, and earned good grades," an advocate of AA concedes, "those from the middle and upper classes" have "a decided advantage over those from the lower socioeconomic classes." In AA programs, "the truly advantaged" blacks, in one commentator's phrase,
are able to insulate themselves from competition with
whites, while competing only against lower-class group mem-
ers.109 A black columnist writes, "My children compete
with the children of Anacostia, Watts, Hough, Cabrini Green
and Overtown. This is a competition that they are likely to
win."110

In response to the present objection to AA, defenders
of AA contend that all blacks have at some point been nega-
tively affected by racism and have a right to compensa-
tion.111 A black advocate of AA wrote about thirty years
ago:

"Enslavement followed by legalized discrimination marks all
blacks," proponents of AA claim, "and none are required to
prove their individual injuries."113 Even if some blacks
have overcome past injuries, a defender of AA disputes the
claim that "just because a person has overcome his injury,
he no longer has a right to compensation."114 Focusing on
present rather than past harm, other defenders of AA argue
that there are no black individuals who do not suffer pres-
ent disadvantages and the continuing effects of racism and
discrimination. It is unimaginable, these defenders of AA
insist, that any black person in contemporary American
society has managed to escape the negative effects of
racism. Even those blacks who appear to have done so are
victims, though perhaps to a lesser degree.¹¹⁵ "It is false," a proponent of AA writes, "that blacks born into better-off families have not been injured by discrimination."¹¹⁶ Black parents were victims of invidious discrimination in business, the professions, housing, and education. As a result, "black professionals and entrepreneurs could do far less for their children than their white counterparts." Moreover, "the sons and daughters of black lawyers, doctors, and business persons have themselves suffered the experience of living in a segregated, pervasively racist society."¹¹⁷

Some defenders of AA accuse those who believe that there are blacks unaffected by racism and discrimination of confusing the notion of being unharmed with the notion of being harmed to a lesser degree. Because of discrimination, "even today's 'best-prepared'" blacks "suffer some degree of inequality of opportunity"¹¹⁸ or denial of equality of opportunity. Critics' attempts to demonstrate that not all blacks suffer the effects of racism invariably refer to examples of blacks who are merely suffering less than other blacks; but it does not follow that these blacks are not suffering at all. While blacks undeniably suffer various degrees of harm, AA defenders claim, it is false to conclude that some blacks suffer no harm.¹¹⁹ The objection that AA cannot be justified by appeal to compensatory justice because it is "not usually the case" that the recipients of preferential treatment have been "wrongly injured" is "based on a false inference," namely, that since "the
black middle-class beneficiaries of preferential treatment are probably less injured than blacks in the lower and under classes . . . the former are only slightly injured or not injured at all." Hence, "even if one assumes that the economically better-off blacks are less deserving of compensation, it hardly follows," an advocate of AA argues, "that they do not deserve any compensation."'121 'Because I have lost only one leg,'" another AA advocate argues, "'I may be less deserving of compensation than another who has lost two legs, but it does not follow that I deserve no compensation.'"122

First of all, however, sophisticated critics of AA do not make the disputed claim that persons who have overcome past injuries no longer have a right to compensation. Rather, these critics of AA hold that the empirical evidence does not support or even contradicts the claim that minority recipients of preferential treatment were injured by racism and discrimination in the past and have overcome their injuries. The assumption that any black or other minority-group member who does not suffer the present dis-advantaging effects or racism and discrimination must have been injured in the past and must have overcome his injuries is not justified. Furthermore, contrary to the accusations of defenders of AA, these critics of AA do not confuse the notion of being unharmed with that of being harmed to a lesser degree, do not attempt to demonstrate that not all blacks suffer the effects of racism and discrimination by
pointing to examples of blacks who are merely suffering less than other blacks, and do not make the false or incorrect inference that since blacks undeniably suffer various degrees of harm from past discrimination some blacks suffer no such harm. AA proponents merely assert that all blacks, and perhaps all women and blacks as well, suffer the continuing effects of past discrimination; but such a claim, some commentators say, is "virtually impossible to demonstrate" or is "not easily (or at all)" open to empirical investigation and examination. Indeed, the empirical evidence contradicts this claim as well as the claim that the typical black recipients of preferential treatment have been harmed and disadvantaged by past discrimination. Thus, there are blacks who have the qualifications to obtain quality jobs or places in higher education without regard to race. Also, many blacks today, among whom are typical recipients of preference in AA programs, have parents who are well off and not merely better off than other blacks; it is not true that these parents could do far less for their children than their white counterparts for their children. Rather than having suffered the experience of living in a pervasively racist society, these present-day blacks come from middle- and upper-class families and are advantaged socially, economically, and educationally (i.e., they have attended "fine schools") not merely in comparison with the black underclass but compared with a large proportion of the general population, including "the vast majority of whites."
These blacks are not akin to victims who have lost one leg rather than two. Moreover, even nonadvantaged blacks who receive preference for lower-level or blue-collar jobs requiring only some set of fixed or minimal qualifications, such as jobs on an assembly line or in a police or fire department, come from socioeconomic and educational backgrounds that are no worse than those of many of their white and Asian competitors. Defenders of AA cannot reasonably claim that although discrimination has not prevented blacks and members of the other specified minority groups from acquiring at least minimal qualifications for higher-level positions, it has prevented members of these minority groups from being able to compete effectively for lower-level positions.

Concerning even poor and underclass blacks and members of the other specified minority groups, defenders of AA cannot simply assume that these minorities have been indirectly victimized by past discrimination and suffer its debilitating effects. It need not be true that these minorities are disadvantaged because of past discrimination, since present disadvantages "may result from many other causes distinguishable from past discrimination." That is, "low income, class background, inadequate housing, a broken home, or cultural or linguistic differences may be only tangentially related, if they are related at all," as one commentator writes, "to previous acts of discrimination." Critics of AA can reasonably ask what AA proponents ascribe the plight
of poor, disadvantaged white and Asian males to. Are AA advocates saying that although poor blacks and members of the other designated minority groups must be assumed to be victims of past discrimination, these white and Asian males and their parents simply lack motivation, ambition, or ability?

In response to the foregoing criticisms, one proponent of the present defense of AA declares that "it is absurd to suppose that the young blacks and women now of age to apply for jobs have not been wronged." Another defender of AA insists that "we know that all blacks, lower class, middle class, and upper class, have been wronged by racial injustice." However, such replies betray an inattention to or a lack of awareness of an important question about the nature of compensation, namely, whether we compensate a person simply for being wronged, that is, for having his rights violated or being done an injustice, or for being harmed. A person is harmed, according to a natural proposal, when he is made less well off than he would have been if not for some action, or, on an alternative description, when he has his interests (i.e., "distinguishable components of a person's good or well-being") set back or damaged in the sense of being prevented from effectively pursuing his chosen ends, fulfilling his actual or potential desires, or securing his good. Harms include being physically hurt or being caused to experience pain, damage to health, imprisonment or confinement, exclusion or discrimination,
and the loss or destruction of property. A person can be wronged without being harmed, for instance, when an enemy spreads vicious lies about his behavior but no one believes the charges, no damage is done to his livelihood, he suffers no anxiety about his future, and so on. If the focus is on wrongs, as opposed to harms, it is more likely, as some commentators remark, that all blacks and women have been wronged at some time, even if only slighted or insulted through the use of epithets or the expression of racist or sexist attitudes. "But," as one writer on compensation notes, "only wrongful harms require compensation." These harms are not minimal and do not cause mere slight sadness or sorrow, inconvenience, or offense. Having suffered wrongful harms is the ground that proponents of the present defense of AA themselves establish for compensation. Thus, blacks "deserve compensation for the wrongful harms of discrimination." a defender of AA declares.

Hence, the person who is wronged by an enemy's spreading vicious but transparent lies about his behavior has a claim for apology but not for compensation. Apology rather than compensation, as writers on compensation maintain, is the appropriate response to insult. To be compensable, wrongs must result in clear, measurable harms to the victims.

Some defenders of AA contend that even those blacks and members of the other designated groups who have not experienced direct harm from discrimination or who, like
middle- and upper-class group members, have not been indi-
rectly debilitated by such effects of discrimination as
poverty, inadequate diet, and inadequate housing have nev-
ertheless suffered psychological harm. There are disadvan-
tages other than poverty, such as being black and having
decreased self-esteem, some AA defenders claim, that even
middle- and upper-class blacks have suffered. 143 In addi-
tion to materially damaging the life prospects of many
blacks, "discrimination attacks the 'self-confidence and
self-respect' of blacks." 144 Discrimination is not only
"insulting to blacks because of its underlying premise that
some racial groups are less worthy than others" but also
"harmful to blacks because it often reduces self-esteem and
produces a sense of inferiority." 145 That the social and
cultural environment in contemporary American society has
been hostile and unfriendly to blacks is undeniable, AA
proponents insist; and there has existed a realistic and
pervasive threat of direct harm to blacks. 146 A consequence
is that blacks have suffered psychologically, 147 since for
any individual black the direct harm done to other blacks,
because they are black, "is a warning that (he) too may
experience the same treatment." 148 "Those blacks who
'escape discrimination,'" a proponent of AA asserts, "who
are 'spared' discrimination, nevertheless 'feel threatened
and insulted' at the discrimination against other
blacks" 149 and are therefore harmed indirectly, though not
vicariously. They are harmed because they are subject to
the pervasive, indiscriminate mistreatment of group members. Each of them is susceptible to the same type of direct harm even though at the time he or she may not experience some particular harm.\textsuperscript{150} It is the fear or realization even of middle- and upper-class blacks, like a hypothetical Jewish multimillionaire in Berlin during the Nazi reign who has somehow escaped persecution,\textsuperscript{151} that "one is under sentence" and "could be next" and that "one's life and prospects may suddenly change for the worse in a way that one cannot control" which has "everything to do" with "the undermining of self-confidence and self-respect."\textsuperscript{152}

According to proponents of AA, the racist and sexist social and cultural environment in this society has generated a lack of self-respect and self-confidence in minorities and women. In particular, the effects of racism have harmed the self-confidence of blacks, since racism has resulted in diminished opportunities for blacks, which in turn have resulted in blacks having less self-esteem and self-respect than their white counterparts.\textsuperscript{153} Employing the notion of self-respect in their critiques of the oppression of white women, racial minorities, and others, some political theorists agree that damage is done to the self-respect, that is, the sense of one's worth,\textsuperscript{154} of members of groups "that are marginalized, stigmatized, or exploited by the dominant culture."\textsuperscript{155} When social relationships and social institutions are "unjust, discriminatory, or oppressive, self-respect can be diminished,
distorted, or destroyed."\textsuperscript{156} Oppressed people may internalize the disparaging images and views of them produced by the dominant culture and therefore "come to see themselves as inferior or as undeserving of equal treatment."\textsuperscript{157} Thus, "even those who were not themselves downgraded for being black or female," a proponent of AA writes, "have suffered the consequences of the downgrading of other blacks and women: lack of self-confidence, and lack of self-respect." She continues:

For where a community accepts that a person's being black, or being a woman, are right and proper grounds for denying that person full membership in the community, it can hardly be supposed that any but the most extraordinarily independent of them have had to work harder—if only against self-doubt—than all but the most deprived white males, in the competition for a place among the best qualified.\textsuperscript{158}

Hence, such negative effects of racism and sexism as fear, lack of self-confidence, and lack of self-respect have disinclined members of the specified groups to pursue employment and educational opportunities or have inhibited their ability to compete for desirable positions equally and effectively with nonmembers not so affected.\textsuperscript{159}

In America's "racist and sexist past," proponents of the present justification of AA claim, "prejudicial attitudes damaged self-esteem, undermined motivations, limited realistic options, and made even 'officially open' opportunities seem undesirable. Racism and sexism were (and are) insults," these advocates of AA insist, "not merely tangible injuries."\textsuperscript{160} "Racism and sexism" are "such total
phenomena," an advocate of AA said in the 1970s, that "it never occurs to most women and blacks even to attempt" to go to professional school; they do not even develop "the necessary 'motivational attitude'"\textsuperscript{161} to acquire the qualifications for admission to professional school. Women characteristically lack the motivation, supporters of AA claimed more than two decades ago, to seek admission to university programs and entry into professions traditionally dominated by men.\textsuperscript{162} Many women have adopted the pervasive assumption that women should not or cannot do the jobs that men do and that certain sorts of activities are not appropriate for women.\textsuperscript{163}

In objecting that the typical recipients of preferential treatment have no valid claims for compensation, critics of AA evidently make the unjustified assumption that middle- and upper-class blacks and women are "unscathed by racist and sexist attitudes,"\textsuperscript{164} a defender of AA declares, and base their objection on an underestimation of racial and sexual discrimination and prejudice.\textsuperscript{165} Racist and sexist attitudes "do not support only discrimination," such as by making the fact of being black or female a negative factor in hiring and admissions decisions. Rather, these attitudes "support an elaborate system of expectations and stereotyping which subtly but definitely reduces the chances of women and blacks to acquire qualifications for desirable positions."\textsuperscript{166} Racism and sexism are species of prejudice, which "typically involves a negative attitude towards a group
based on a belief that members of the group are undeserving of equal treatment because they are somehow inferior or morally deficient. Prejudice often relies on stereotypes—i.e., "simplified and negatively slanted conceptions of the typical characteristics and activities of members of the group"—such as that blacks are not academically talented or that they have an inability to perform well in high-level positions. Some scholars and AA advocates claim that slavery caused many blacks to internalize racist stereotypes and that segregation imposed a sense of inferiority that many blacks have internalized.

Regarding the claim that discrimination attacks the self-confidence and self-respect of blacks, however, critics of AA can point out that attack can toughen or strengthen as well as weaken. We must be careful about implying, some commentators caution, that discrimination psychologically disables all blacks and even all women and Hispanics. Some blacks and members of the other discriminated-against groups may be motivated to overachievement rather than underachievement. "At the turn of the century," one commentator writes, "some blacks even viewed Jim Crow as a challenge to work hard and surpass whites." Also, some blacks and members of the other discriminated-against groups may grow up in an especially supportive environment and receive encouragement to pursue careers and to achieve success.

Proponents of the present attempted justification of AA simply assume that because a particular individual
receiving preference in AA is a black, a woman, or an Hispanic he or she has been harmed at least psychologically in having the experience of living in a racist and sexist social and cultural environment in this society. The underlying assumption, however, that this society or community is pervasively racist and sexist and accepts that a person's being black, female, or Hispanic provides right and proper grounds for denying that person goods and opportunities and full membership in the community is contradicted by the empirical evidence. Thus, in the mid-1960s, it may be recalled, the United States began an extensive assault on discrimination against the specified minorities and women; and widespread policies and programs affording preferential treatment to these groups that were instituted over thirty years ago have continued. More than a decade ago, even some AA advocates conceded that discrimination against the specified minorities and women was illegal and hence that those inclined to discriminate against these groups were "more likely to be wary of indulging their prejudices." 174

Furthermore, middle- and upper-class minority and female recipients of preference have apparently not suffered the sorts of motivational and psychological harm that AA proponents describe, although the black recipients may have experienced racial slights. 175 Thus, these members of the designated groups, particularly those who are serious or viable candidates for and receive high-level positions,
not only are not the group members who have been excluded from opportunities to develop and to profit from qualifications but also are not those who have had their chances to acquire qualifications for desirable positions reduced or who, living in a racist and sexist society, have suffered the loss of self-confidence, self-respect, and motivation or have been compelled to work harder than white males and to struggle against self-doubt in the competition for a place among the best-qualified candidates. Rather than having had to overcome the disabling psychological effects of racism and sexism and discrimination against and the downgrading of other group members, middle- and upper-class minority and female recipients of preference have had the opportunities and the self-confidence, self-respect, and ambition to pursue and to attain high qualifications and advanced degrees. Indeed, these members of the designated groups include, an AA advocate admits, minorities and women who are the children of affluent professionals and who have had had "the very best in private schooling" and women who are the products of "feminist upbringing and encouragement."176 Recall that the recipients of preference in hiring in higher education will be either Ph.D.'s or Ph.D. candidates, many from the nation's most prestigious graduate institutions; they are advantaged compared not only with other group members but also with a large proportion of the general population.177 Regarding the recipients of preferential treatment who hold Ph.D.'s or other advanced
degrees, one commentator writes, "Certainly no motivational
deficiencies are present in general among members of that
class; if anything, motives had to be stronger than average
to achieve membership." 178

Even blacks and other minority-group members who are
not advantaged, who have only a primary or secondary educa-
tion, and who work in low-status and low-paying jobs, as
well as women in nonworking roles or traditionally female-
dominated jobs, cannot simply be assumed to have suffered
the loss or undermining of self-confidence, self-respect,
motivation, and ambition through racism and sexism in this
society and an elaborate system of expectations and stereo-
typing supported by racist and sexist attitudes. There are
white males also who are not advantaged, who have only a
primary or secondary education, who work in low-status and
low-paying jobs, and who have not developed the necessary
motivational attitude to acquire the qualifications for and
to seek places in graduate or professional school and other
high-status positions.

Allowing appeal to claims of psychological harm to
individuals from social expectations and stereotyping,
socially shaped preferences and attitudes, social and moti-
vational pressures, patterns of customary or traditional
roles, and so on, in determining who is owed compensation
encounters serious problems. For instance, there are the
problems of establishing that particular individuals have
suffered motivational deprivation amounting to harm (e.g.,
social pressures "affect different individuals in different ways and in several different ways can fail to amount to harm"\textsuperscript{179} and showing that negative attitudes, expectations, and stereotyping are institutionalized, that is, that they actually influence officials' decisions in social institutions. Furthermore, even if the complex psychological premises in arguments for compensation that appeal to claims of motivational harm are correct, we cannot allow such arguments, some writers on compensation insist, and still keep a reasonable limit on who is owed compensation.\textsuperscript{180} For example, since Italians have been stereotyped as barbers, opera singers, and mobsters rather than as professors, it might be argued, "this stereotyping amounts to social brainwashing"\textsuperscript{181} or motivational deprivation and Italians should receive professorial positions as compensation.\textsuperscript{182} Many white males should receive compensation as well, it might also be argued, because, for instance, they "succumb to social pressures by working all their lives at jobs they hate in order to appear successful."\textsuperscript{183} A further difficulty is to overcome the objection that putative harms that are indirect, psychological, and tenuously related to clear and direct harms are not properly compensable at all.\textsuperscript{184}

Several replies are made to criticisms of the way that AA programs distribute compensatory benefits within the designated groups. One reply is that it is simply wrongheaded to criticize social institutions for selecting minority and female applicants who are advantaged and who have the best
chance of succeeding in the affected positions on the
grounds that these institutions are vonferring benefits on
the wrong members of the designated groups. What else could
these institutions hope or be reasonably expected to do to
achieve the goal of AA? However, if the stated goal of AA
is to compensate victims of past discrimination, it is
hardly wrongheaded to criticize this policy for directly
benefiting individuals who have not personally suffered
disadvantages caused by past discrimination. Another reply
is that these criticisms of AA are correct "only in so far"
as they call attention to "the obvious fact that not all
individual blacks or women equally benefit when individual
X or Y is given preferential treatment in hiring or promo-
tion." However, "it is morally irresponsible to argue that
we should not attempt to compensate for any injuries to the
victims of injustice unless we can compensate for all inju-
ries."\(^{185}\) Contrary to this reply, the relevant criticisms
of AA contend not that we should not attempt to compensate
for any injuries or harms to victims of past injustice
unless we can compensate for all injuries but that only
victims should receive compensatory benefits and that AA
programs do not confer these benefits on group members who
have been discriminated against or who have suffered the
disadvantaging effects of past discrimination.

Abandoning the insistence that all members of the
designated groups have been harmed by past discrimination,
one reply maintains that "we can compensate members of some
groups by giving a benefit to any member of the group—even a member who has not been unjustly injured." A "sufficient condition" for such compensation is that "the group be what might be called a 'community of concern.'" which exists when "every member of the group (or at least most members) would prefer, other things being equal, that certain benefits go to any other member of the group rather than to an outsider." Thus, "we can compensate the unjustly disadvantaged members of the community by giving a benefit to another member of the community—even if that member has not been treated unjustly." The claim is that "since each disadvantaged member wants . . . the nondisadvantaged member to prosper, benefiting the latter, such as by giving him preference in hiring or admissions, "also benefits the former in that it fulfills one of his or her desires."^186

"Present blacks and women have been unjustly disadvantaged," this reply claims; "and they identify sufficiently strongly with other blacks and women to meet the conditions for this sort of group compensation."^187

In the first place, however, it would surely seem, as one commentator remarks, that those individuals disadvantaged socially, economically, educationally, and motivationally by past discrimination would prefer policies that direct such important benefits as quality jobs and university places toward them rather than toward other members of the groups that they identify with. ^188 Whatever satisfaction or pride unemployed black slumdwellers or underclass
blacks may take in in the visible income and status of well-off blacks must be insignificant compared with what they would feel or enjoy were they to reach the same level themselves. Furthermore, in directly benefiting individuals who have not been unjustly injured or disadvantaged, programs of preferential treatment do not compensate group members who have actually suffered injustice. One commentator writes:

Would any of us seriously maintain that members of the "perpetual underclass" . . . are compensated for past injustice by policies of preferential treatment that do not affect their life chances directly, but that affect, instead, the life chances of other persons who are members of the same group? Benefiting an unjustly disadvantaged group member merely by fulfilling his desire that a nondisadvantaged group member prosper, such as by receiving preference in AA, does not compensate the unjustly disadvantaged group member by rectifying the past injustice he suffered. It does not satisfy the requirements of compensatory justice governing the kind and amount of compensation victims are owed and entitled to.

Although by itself a policy of preferential treatment in hiring and admissions may not be very compensatory, some writers suggest, AA can perhaps be justified as one policy in a package which seeks to compensate for past injustice. Thus, one advocate of AA asserts that "AA employment programs should not perform the function" of or "substitute for other compensatory programs to blacks, such as
cash payments to the elderly" and "compensatory programs in primary and secondary schools." However, the emphasis of vigorous proponents of compensation for the designated groups is on AA; little consideration is given to other, possible compensatory programs. Further, since AA is only very weakly compensatory in its effect, some writers say, given that it tends to confer benefits on individuals who have not personally suffered the disadvantaging effects of past discrimination and to ignore those who have, the contribution of a policy of preferential treatment in hiring and admissions to any mixed program of adequate compensation would be negligible. Hence, the omission of AA from an effective mixed program of compensation would hardly diminish that program's overall effects.

The present compensatory argument for AA also does not undermine or disarm the objections that AA ignores or disregards the compensatory claims of victimized nonmembers of the designated groups and implies falsely that all members of these groups are more deserving of compensation than any nonmembers or that a nonmember who has been seriously disadvantaged by social injustice has less of a claim to compensation than a black, a woman, or an Hispanic who has been only minimally harmed by discrimination. There are, for example, grandchildren of Jews who were rejected by professional schools because of a thinly disguised quota system limiting the number of Jewish admittees, descendants of Chinese and Japanese who suffered all sorts of...
humiliating mistreatment, and Chinese and Japanese who received disadvantages passed on from their parents and grandparents. The "prevalence" of "racial" or "religious stereotypes," one writer commented about three decades ago, has prevented many members of such nonblack groups as the Chinese, Japanese, and Jews from "realizing their full potential." There are, he added, "ethnics—Irish, Italian, and Polish—who have suffered past public discrimination," the "effects of which cannot be said to have totally vanished." Although, for instance, "many Irish have achieved middle-class status," others "in their ethnic ghettos are less fortunate."

A defender of AA responds that there is "no merit in this objection," which implies, he thinks, that "since the society obviously cannot meet all these claims for compensation, it has no good reason to meet black claims for compensation." Discrimination against blacks in America has "historically been far more severe than discrimination against other racial and ethnic groups"; and although "various European ethnic groups were certainly discriminated against, they also profited from the severer discrimination against blacks." Therefore, "if society can only meet some claims for compensation, it should meet the most pressing claims"; and "blacks appear to have the most pressing claims." Contrary to this reply, however, the relevant objection to AA does not imply that society has no good reason to meet valid black, or nonblack, claims for
compensation. Furthermore, this reply does not explain why women and Hispanics are included in programs of preferential treatment but Asians (particularly the Chinese and Japanese), whose historical mistreatment in this country is a close second to that of blacks and whose historical claims for compensation are more pressing and more compelling than those of the nonblack groups afforded preference, are excluded from compensation. Moreover, even if it is accepted that discrimination against blacks has historically been the severest, it is not therefore true that all present-day blacks have more pressing claims for compensation than victimized members of other groups and that no members of these groups have been more severely disadvantaged by social injustice and have more pressing compensatory claims than some present-day blacks.

**What Compensation Is Owed?**

Even if it is granted that every black, as well as every woman and Hispanic, has been harmed by discrimination, at least indirectly or psychologically, and deserves compensation, the present argument for AA still does not adequately defend this policy in the name of compensation. In particular, AA remains vulnerable to the objection that it not only does not apportion benefit to degree of harm or injury suffered but also actually inverts the ratio of harm to present benefit and thus reverses the required proportionality in the distribution of compensation, selecting
for preference those individuals who have been harmed least, not most severely, by past discrimination and who least deserve compensation relative to other group members. AA benefits most those minority-group members and women who are least disadvantaged (socially, economically, educationally, and motivationally), who have experienced at most only some sort of psychological harm, and who are owed the least and benefits least those group members who are most disadvantaged and who are owed the most. Those blacks and other minority-group members who suffer most from disadvantages caused by past discrimination tend to be those who are poorest, who lack adequate education and training, and who experience the negative psychological effects of discrimination most acutely. Even if the least disadvantaged minority-group members are owed something, "their claims would seem to have lower priority," critics say, "than the needs of the most disadvantaged."198 Middle- and upper-class minorities and women who have been harmed only psychologically by discrimination should not be compensated ahead of or in place of those who have been harmed directly or who suffer the severely disadvantaging effects of past discrimination. Similarly, wealthy Jews in Nazi Germany—e.g., a Jewish multimillionaire in Berlin—who somehow escaped persecution or who were not direct victims but who suffered psychological harm should not have received compensation ahead of or in place of direct victims, such as inmates of the concentration camps.
AA defenders' replies that "as long as preferential treatment compensates those who deserve compensation, the fact that it does not compensate those who most deserve compensation is hardly an argument against it," and that "the fact that preferential treatment does not reach Blacks who have been most harmed by racism is no criticism for helping those less harmed" miss the point of the preceding objection. Compensatory justice requires that victims of the most egregious and severest harms be compensated first and most, not last (or not at all) and least.

According to another reply to the preceding objection to AA, perhaps it is precisely those minorities and women "who have worked hard and struggled through the educational system and professional school who have suffered the most wrong from discrimination." These individuals "have been exposed to subtle discrimination in university and graduate school, whereas others have not." A variant of this reply maintains that before AA racial discrimination penalized or disadvantaged blacks in direct proportion to their qualifications and levels of education. Those with higher qualifications and levels of education "were typically subjected to greater prejudice and higher rates of exclusion from opportunities to develop and profit from those qualifications." Therefore, "while it may appear" that blacks with higher qualifications and higher levels of education and achievement "have been harmed least by racial discrimination, the fact is that many such individuals may
in fact have been harmed most, relative to what they could have achieved if racial discrimination had not impeded their efforts." Affirmative action attempts to target those whose potential has been depressed as a result of racial discrimination," including perhaps "many blacks among the most well off," and "provide them with opportunities they would have otherwise." However, even if middle- and upper-class black recipients of preferential treatment have been harmed in some way, defenders of AA do not attempt to substantiate, and the empirical evidence does not support, claims that these blacks have been excluded from opportunities to develop and to profit from qualifications, have been impeded in their efforts at achievement by discrimination, or have had their potential lowered as a result of discrimination. Furthermore, those minorities who have suffered the severely disadvantaging effects of past discrimination and who have not even had genuine opportunities to develop their potential and to become viable candidates for quality, higher-level jobs or places in graduate or professional school have been more severely harmed and more seriously victimized than the middle- and upper-class minorities who have been able not only to gain admission to college but also to go on to graduate or professional school. Some advocates of AA agree that "among Blacks most harmed by racism" would be "individuals with maximum potential who were prevented by racist exclusions from developing their potential into even
minimal qualifications. Hence, if AA is the community's method of compensating blacks and members of the other designated groups for past discrimination and its effects, such as reduced job and educational skills, many group members who have been harmed by discrimination will not even be eligible for compensation or will be able to obtain only lower-level positions as compensation, since they will not have the substantial qualifications required for higher-level positions. The individuals who have been most severely harmed by the effects of past discrimination are precisely those who are now least likely to have even minimal qualifications for such positions. Consequently, in adopting AA as the method of compensating the specified minorities and women, the community will be systematically unable to provide appropriate compensation to those who have the strongest claims to it and who therefore should be compensated first and most.

On the assumption that middle- and upper-class blacks, women, and Hispanics have experienced some sort of psychological harm and are owed compensation, AA is objectionable for violating the requirement of compensatory justice that compensation match benefit to harm or loss. Individuals who have been harmed only psychologically do not deserve the same compensation as those who have suffered the severely disadvantaging effects of past discrimination or who were discriminated against in employment or advanced
education (or who were inmates of concentration camps); and these individuals should not be benefited as if they had been victimized in these ways. They have been only minimally harmed by discrimination and thus have relatively weak compensatory claims. As a result, they are owed little compensation, in contrast to what AA provides. Minority-group members and women who, for example, did not apply for desirable positions because of the belief that their applications would not be considered fairly are not owed compensation in the form of the preferential award of a quality job or place in college or professional school, even if a principle of compensation in kind that requires or permits preference in hiring and admissions is accepted. However, these minority-group members and women can apply for positions they did not apply for earlier.

One argument for AA contends that the preferential treatment of current members of the designated groups who have not themselves been discriminatorily denied employment or higher education may be justified as compensation for the other sorts of deprivations these individuals are apt to have suffered as a result of past acts of discrimination in these areas, such as privations in diet, housing, and public education. This reply appeals to the principle generally acknowledged by both common sense and law that a person who has been deprived of a certain amount of one sort of good may sometimes be reasonably compensated by an equivalent amount of a good of another sort. It
is this principle, surely, that, according to writers on compensation, underlies the practice of awarding sums of money to compensate for pain incurred in accidents, damaged reputations, and so on. 210 There are cases, such as those involving the loss of a limb, in which it is impossible to restore to health or to bring him to the condition he would have been in had the injury not occurred; but an attempt is made "to give him enough money to make his life functional and as happy as it can reasonably be." 211 This reply, however, does not show that the principle appealed to would apply with justification in the AA case. Indeed, insofar as the point is simply to compensate individuals for the various sorts of privations they have suffered, there is no special reason to employ AA, some writers correctly insist, rather than some other seemingly preferable mechanism of compensation. It seems, for instance, that it would be most appropriate to compensate for past privations simply by making available to the victims equivalent amounts of the very same sorts of goods they have been deprived of. 212 Even if it were granted that these victims should be given an equivalent amount of goods of another sort, using other mechanisms of compensation, such as simple cash payments, would allow far greater precision in the adjustment of compensation to privation than AA ever could. 213 Further, as indicated earlier (p. ) and as other writers on compensatory preference agree, there is a difficulty in the idea that jobs or places in law or medical school, for example,
are compensations equivalent to the goods which severely disadvantaged individuals have been deprived of.

**Who Owes Compensation?**

Encompassed by the argumentative strategy that since white males are beneficiaries of past injustice they are therefore liable for compensation is the familiar argument from slavery. According to this argument, while it may be acknowledged that "both the perpetrators and the primary victims of slavery are gone" and that "no blacks today were alive during slavery," blacks are "fully entitled to inherit the stolen wealth that their forefathers produced." The argument says:

If I am kidnapped and forced to work for subsistence and my meager earnings are then confiscated, I am not only owed compensation for the confiscation of those earnings; far more important, I am also owed compensation for what I would have produced had I not been kidnapped. And if I am not around to claim my compensation, my descendants, to whom I would have bequeathed it, can claim it as their right. This is the case in relation to the slaves and their descendants.

The slaves had an indisputable right to the products of their labor, and they presumably conferred their rights of ownership to the products of their labor on their descendants. The slaveholders stole these products and bequeathed them to their descendants. The families of slaveholders have "inherited wealth which was accumulated by iniquitous practices" and "are still being enriched by inheritance laws." Hence, since the descendants of slaveholders are in possession of wealth to which the descendants of slaves
have rights, the descendants of slaveholders must return this wealth to the descendants of slaves while conceding that they were not rightfully in possession of it.\(^{219}\)

If the preceding argument is maintaining that blacks who were slaves had a right to a just wage (and not a right to what they produced, since we would not say that a person hired to make a cabinet, for example, has a right to the cabinet), that these blacks would have bequeathed their profits to their descendants, and that by making them slaves slaveholders stole what amounted to these earnings, critics of AA can agree.\(^{220}\) However, the strongest claim that this argument will then support is that the descendants of slaveholders owe these earnings (and compensation for what the slaves' earnings would have been had they not been enslaved) to the descendants of slaves\(^{221}\); but the direct descendants of slaveholders are "few and comparatively hard to trace."\(^{222}\) Although this argument can perhaps explain why the descendants of slaveholders owe compensation to the descendants of slaves, it does not explain why whites who are not descendants of slaveholders have this obligation. Many whites are the descendants of immigrants who came to this country after the end of slavery. This argument is "in the right direction," an advocate of AA says; but it "fails to show," he acknowledges, "how whites who are not the descendants of slave masters owe a debt of justice to black Americans."\(^{223}\) Further, since the line of reparations extends from slaves to their
descendants, this argument excludes from reparations the large number of blacks who are not descendants of slaves, thus excluding a large segment of the black community. An argument must be presented, a supporter of AA writes, "that shows how all whites, even recent immigrants, benefited from slavery and how all blacks felt its damaging effects." Some proponents of the slavery argument insist that it does not claim that "the descendants of slaves must seek reparation from those among the white population who happen to be descendants of slave owners." Rather, the argument claims that slavery produced "not merely specific hoards" of wealth, for example, "gold, silver, or diamonds, which could be passed on in a very concrete way from father to son," but "wealth which has been passed down mainly to descendants of the white community to the exclusion of the descendants of slaves." Thus, "it is the white community as a whole that prevents the descendants of slaves from exercising their rights of ownership, and the white community as a whole that must bear the cost of reparation." The preceding statement contains "two distinguishable arguments." In the first argument, "the assertion is that each white person, individually, owes reparation to the black community because membership in the white community serves to identify an individual as a recipient of benefits to which the black community has a rightful claim." In the second argument, "the conclusion is that the white
community as a whole, considered as a corporation or company, owes reparation to the black community." Some proponents of AA stress that "the unjust appropriation of wealth from Blacks did not end with the abolishment of slavery." Whites, including immigrants, benefited from segregation and other racially exclusionary practices. "Racism became a formidable weapon used by the White working class," such as through closed shops in labor unions, "in order to eliminate competition from Black workers." As a result, "the status of Blacks after the abolishment of slavery was (with the exception of the radical reconstruction era) simply a continuation of conditions that had prevailed during slavery." Hence, "it is not merely the progeny of slave holders that owe restitution." Rather, "the opportunities denied Blacks have been distributed throughout the White community at large, and it is that community as a whole that owes the Black community restitution." 

In the first place, however, the expanded argument from slavery faces the problems of explaining how just wages owed to descendants of slaves could have produced a hoard of wealth for the entire white community—i.e., outside and in the South—and of defending the claims that such wealth has accrued and has been passed down to descendants of the white community and that each white person is a recipient of these benefits. Even the claim that slavery produced a hoard of wealth for the white community in the South before the Civil War is not, according to historians,
supported by the evidence. Thus, although individual planters and slave owners reaped profits from slavery, these profits "never returned to the community in the form of internal improvements or banks or factories." These profits were not invested in the development of the economically backward plantation society. Instead, the planters plowed back their profits into more land and additional slaves. Further, since the alleged benefits from slavery could not have accrued or have not been shown to have accrued, it is not shown that the white community, even in the South, owes reparation to the black community as a whole. Even if these benefits were shown to have accrued, there would still be the question why, critics point out, the black community as a whole has a rightful claim to these benefits and deserves reparation. Moreover, the expanded slavery argument considers the white community as a whole as a corporate entity; but white society is a motley or an amorphous collection, not an organization, unlike the community as a whole. Even if the white community were considered as a corporate entity, it would not follow that each white individually owes the black community reparation, since, as earlier noted, liability does not generally distribute from a corporate entity or an organized group to each of its members. In addition, proponents of AA do not show that all, or even most, whites during and after slavery were recipients or possessors of benefits to which the black community has a rightful claim;
nor can this conclusion be correctly inferred from claims that there were whites who did benefit from the unjust appropriation of wealth in slavery, segregation, and other racist practices.

A misconception about American slavery is that as an institution it involved white slave owners and black slaves,\textsuperscript{233} that in fact American slavery was a system exclusively maintained by whites to exploit blacks.\textsuperscript{234} The historical evidence reveals that not all blacks were slaves, that not all whites owned and profited from having slaves, and that not all slave owners and those who profited from having slaves were white. Thus, from the beginning there were a substantial number of free blacks in America. In 1860, for instance, there were nearly half a million free blacks, 50 percent of whom lived in the South.\textsuperscript{235} Further, most whites in the United States did not own slaves. In 1850, the number of white slaveholding families was 10 percent.\textsuperscript{236} Even in the South on the eve of the Civil War, three-quarters of white families owned no slaves at all.\textsuperscript{237} An eminent historian from Columbia University and several colleagues write, "The cotton nabobs, whose vast plantations and splendid mansions have featured so magnificently in postwar romances, never amounted to more than 1 percent of the white population." The "small planters, who had from 1 to 20 slaves, and who lived at best in crude simplicity, made up 23 percent. Yeoman farmers, with no slaves at all, composed the remaining 76 percent."\textsuperscript{238} Numerically at
least, the typical white Southerners were small farmers who were not slaveholders. In the United States, moreover, slaveholding was not confined to whites. Thus, several thousands of free blacks owned black slaves. During the first half of the nineteenth century, some blacks owned Southern slave plantations alongside their white counterparts; some owned slaves jointly with whites; and others rented slaves from their white neighbors. Also, American Indian tribes, such as the Choctaws, Cherokees, Creeks, and Seminoles, owned black slaves.

In the nineteenth century in America, although black slaves lived miserably, other people, including many whites, endured hardship, deprivation, inhumanity, and disrespect. Indeed, a systematic and pervasive form of injustice like slavery, a commentator writes, may have contributed to a social climate in which other forms of injustice, some of which victimized whites, flourished, such as the economic exploitation of whites in the pre-Civil War South. Thus, concerning material living and working conditions, the historical evidence shows that although "the slave's diet of pork, corn-meal, molasses, and greens was coarse and monotonous, and the slave's quarters were unhygienic by modern standards, . . . the poor white farmers lived no better." Also, "slaves worked no longer than," and in some areas not as long as, "many northern agricultural and industrial laborers." The "emerging consensus" of scholarship on American slavery is that "slaves were, in
material terms of diet, health, and shelter, slightly better off than northern industrial workers, and far better off than workers in much of Europe. Moreover, because slaves were expensive, slaveholders often hired immigrants, especially Irishmen, to perform menial jobs too dangerous for high-priced slaves, such as draining infested swamps, cutting trees, building railroads, tending combustible boilers, and working on riverboats. A Northern traveler was reportedly told by an Alabama riverboat owner, "The niggers are worth too much to be risked here; if the Paddies are knocked overboard or their backs break, nobody loses anything." When builders of canals wanted a labor force and asked plantation owners to rent their slaves, the planters replied, "No way, these slaves are worth money. Get Irishmen instead. If they die, there's no monetary loss."

The immigrant ancestors of many present-day whites, furthermore, suffered desperate poverty and severe hardship and deprivation in their countries of origin in addition to having had to endure such conditions in this country, along with discrimination and injustice that in some cases benefited blacks—in the nineteenth century in some Northern states, for instance, it may be recalled, the Irish were denied jobs that were made available to blacks. Comparing the circumstances of Indians and blacks in America to those of the Irish in Europe, a French writer traveling in the United States in the 1830s commented:
I have seen the Indian in his forests and the Negro in his chains, and thought, as I contemplated their pitiable condition, that I saw the very extreme of human wretchedness, but I did not then know the condition of unfortunate Ireland.

The former slave turned abolitionist Frederick Douglas, while visiting Ireland in the 1840s, agreed; he was "so appalled that he was almost 'ashamed to lift my voice against American slavery.'"  

Even if it is granted that white males unjustly enriched themselves for centuries in America at the expense of blacks and the other designated aggrieved groups and that there are contemporary white males who have reaped profits from past injustice, AA is objectionable from the standpoint of compensatory justice. It arbitrarily and unjustly compels individuals, including some from disadvantaged backgrounds, to bear the burden of compensation; according to the empirical evidence, they have not benefited in any demonstrable sense from past discrimination and injustice. Indeed, some of these individuals may themselves be victims rather than innocent beneficiaries of injustice. Some of them, perhaps many, are the children or grandchildren of individuals who were disadvantaged by AA programs that benefited minorities and women during the last thirty five or more years. The white male job and school applicants who are compelled to pay compensation by being prevented from achieving desirable positions are not, as some advocates of AA claim, simply being denied benefits they "have come to expect" or the ability "to benefit as
much from past injustices as they had hoped or expected." On the other hand, middle- and upper-class blacks, women, and Hispanics who have benefited from past discrimination or who have benefited far more than many white males are not required to pay compensation at all. Indeed, some, perhaps many, of the current minority and female recipients of preferential treatment are the children or grandchildren of individuals who benefited from discrimination in their favor in AA programs during the previous three decades.

AA imposes the burden of compensation without attempting to ascertain whether any of the individuals singled out to bear this burden have actually benefited from past injustice and therefore have a liability for compensation. It does not systematically attempt to distinguish between those who have benefited from past injustice and those who have not. AA merely assumes that because a particular individual is a white male he has received unearned benefits and undeserved social and economic advantages that derive from unjust social practices. While AA counts even middle- and upper-class minorities and women as unjustly disadvantaged, it counts poor, lower-class white males as unjustly advantaged and permits displacing them in favor of minorities and women from well-to-do families. Concerning this feature of AA, even one proponent of this policy writes, "It is morally improper to insist that the son of a wealthy black family be given preferential treatment over
the daughter [or son?] of a poor white family."²⁵⁵ Also, some proponents of AA acknowledge that there are problems in identifying or marking out those whites who have passively benefited from racist practices. Although some whites have gained or benefited from such practices, these advocates of AA concede, other whites have not; and disentangling the two groups is a practical impossibility. The whites who have passively benefited from racist practices cannot be marked off from those who have not, these advocates of AA agree.²⁵⁶

As one critic of AA notes, white male applicants are not average in wealth, prior benefits, and so on; most of them have little or no economic resources at the time of application for their first position in graduate school or the job market. Most white male applicants do not come from advantaged backgrounds. Many of them are only second- or third-generation Americans whose parents had a difficult road themselves.²⁵⁷ Also, most white male applicants have not attended academically selective and socially exclusive private schools. Indeed, some of them have attended poor schools, such as impoverished parochial schools in low-income neighborhoods. Most white male applicants have difficulty in seeing how, up to the time of their application, they have benefited from past discrimination.²⁵⁸ It seems more likely that whites who have inherited wealth or who are already well-off and have comfortable jobs are the ones who have benefited; but predominantly younger, nonaffluent
white males who are attempting to start their careers or even to find a first job are the ones who bear the brunt of AA programs.\textsuperscript{259} As one critic of AA writes, "it is not the offspring of the privileged who are likely to pay the price. It is not a Rockefeller or a Kennedy who will be dropped to make room for quotas; it is a DeFunis or a Bakke."\textsuperscript{260}

Many proponents of AA assert fairly casually in the literature on AA, a commentator notes, that all white males have benefited from racial, sexual, and ethnic discrimination.\textsuperscript{261} This proposition "seems, perhaps, too obviously true to need arguing"\textsuperscript{262}; but it is not obviously true and requires defense. The question here is whether all white males have received net benefits from past discrimination, that is, whether they are better off than they would have been had this discrimination never taken place\textsuperscript{263} and whether they have received opportunities and other goods in virtue of the discriminatory denial of these opportunities and goods to blacks and the other designated groups. From the claim that some white males have undoubtedly benefited from past discrimination in this sense, perhaps because their parents or grandparents acquired great wealth as a result of discrimination, it cannot be correctly inferred that all or even most contemporary white males are net gainers from either racial or sexual discrimination.

Some white males have benefited directly from discrimination, such as by obtaining jobs that should have
gone to blacks or members of the other designated groups; but other white males have not—e.g., they would have obtained their jobs or other positions even in the absence of discrimination. Furthermore, the empirical evidence contradicts the claim that all white males have benefited at least indirectly from past discrimination by receiving advantages that have accrued to them as a result of discrimination which benefited their parents or grandparents. "Those who have benefited from discrimination," an advocate of AA says, "tend to be better off educationally, socially, and economically than those victimized by it." \(^{264}\) Many urban and rural white males, however, come not from advantaged but from poor or lower-class backgrounds and hence clearly are not better off in these respects than the recipients of preferential treatment. Rather, middle- and upper-class minorities and women have "a decided advantage"\(^{265}\) over these white males. Thus, data from the years 1984-92 reported by the Census Bureau show that slightly more than 10 percent of white families had no assets or a negative net worth and slightly more than 25 percent owned a few thousand dollars in assets, an amount about as low as the median net worth of black and Hispanic families.\(^{266}\) The parents, as well as the grandparents, of many poor urban and rural white males endured desperate poverty and severe deprivation, had little formal education, and worked all their lives in menial or low-paying jobs. Indeed, when they were children, many of these parents had to leave
elementary school to go to work to help their poverty-stricken families. These parents were disadvantaged in self-concept, lifestyle, and careers and did not accumulate financial, intellectual, and social resources; and they have passed their disadvantages to their children just as deprived blacks have. Perhaps children of beneficiaries of discrimination can be highly advantaged, as AA advocates claim; but lower-class whites whose parents and grandparents were poor neither are children of beneficiaries of discrimination nor are they highly advantaged. Further, not all whites who do not come from disadvantaged or lower-class backgrounds need have received social and economic advantages as a result of previous discrimination. Whatever resources some or many of these whites have may derive from their own or their parents' efforts and abilities.

Because so many blacks still feel the economic effects of past discrimination, some proponents of AA insist, all whites have benefited economically from that discrimination. However, even if it were granted that many blacks still feel such effects and hence that one sector of the population has suffered economic loss, it would hardly follow that all members of the other sectors have gained, as empirical evidence regarding urban and rural poor and lower-class whites confirms. Consider, for example, racial discrimination in employment. Since the black sector is a relatively small part of the economy and the white sector is large enough to be virtually self-sufficient, critics can argue, employment
discrimination need not result in higher wages for white workers competing for certain jobs, given that there will likely remain an adequate supply of competent workers for these jobs.\textsuperscript{268} Even if it is granted that employment discrimination and segregation, by limiting the flow of labor to good jobs, did result in higher wages for certain jobs than might otherwise have obtained, the same line of reasoning leads to the conclusion that the crowding of blacks into menial jobs likely depressed wages for unskilled labor below what they might have been in the absence of discrimination and segregation. Both blacks and whites who competed for these jobs suffered economic losses.\textsuperscript{269} Citing the conclusion of some economists, one writer says, "There is evidence to suggest that a fair number of whites not only have failed to benefit, but have also suffered from the effects of racism." The "willingness of blacks in the 1960s to accept inferior wages and working conditions, for example, effectively decreased the conditions for all workers and took jobs from some whites."\textsuperscript{270} Although they claim that some white workers "have gained from racism," some AA advocates admit that "some white workers have lost."\textsuperscript{271} Hence, some whites, it can be argued, are worse off materially and economically than they would have been had discrimination not taken place. These whites are net losers, not net gainers, from racial discrimination.\textsuperscript{272}

According to some defenders of AA, all white males have benefited at least psychologically in having a more
secure sense of self-respect and self-confidence deriving from or having a foundation in racist and sexist discrimination which denied self-respect and self-confidence to blacks and women. Even those white males who have not actually been "direct beneficiaries of policies which excluded or down-graded blacks and women—perhaps in school admissions, perhaps in access to financial aid, perhaps elsewhere"—have had, "at any rate, the advantages in the competition which comes of confidence in one's full membership (in the community), and of one's rights being recognized as a matter of course." Since jobs vary greatly in prestige, as some writers note, holding an undesirable job confers low status that can erode or undermine the jobholder's self-esteem. Therefore, because of systematic racial and sexual discrimination and the restriction of blacks and women to positions of low prestige, every white male has gained "a certain amount of free esteem by comparison." It is not clear, however, some commentator's note, that one person's loss of esteem must always be another's gain and hence that every white male has gained an extra measure of esteem. Notwithstanding some person's loss of esteem, other persons may have, lack, gain, or lose esteem. In any case, over the more than three decades of AA, white male job and school applicants have not had confidence in their full membership in the community and have not had their rights recognized as a matter of course; but minority and female applicants have had the confidence that they do not have to compete equally
with white males for the affected positions and that they will be selected over better-qualified white (and Asian) males. Apart from any negative psychological effects of AA on white males, critics of AA can reasonably claim, poor and lower-class whites lack confidence in their full membership in the community vis-a-vis individuals of high socioeconomic status, whether white or black, given that poverty breeds low self-esteem and diminished expectations and that holding an undesirable job confers low status that can erode or undermine the jobholder's self-esteem. Further, the typical minority and female recipients of preferential treatment for desirable and valuable positions have not been denied self-respect and self-confidence; nor have they been restricted to undesirable, low-prestige positions. Moreover, being confident in one's full membership in the community and having one's right recognized as a matter of course do not create a liability for compensation. Such a liability may be created when, for instance, a person obtains some good or opportunity, such as a quality job, through discrimination and is thus made better off than he would have been had discrimination not taken place. Confidence in one's full membership in the community and having one's rights recognized routinely, however, are not undeserved benefits that a person may incur an obligation to compensate for or may have a burden of compensation imposed on him for having.

At least one benefit that has accrued to all white males as a result of racial and sexual discrimination, some
defenders of AA insist, is reduced competition. "All members of the male (Caucasian) majority" have "benefited from the way in which the cumulative effects of discrimination has limited the pool of qualified applicants." In other words, "as the cumulative effects of discrimination have built up over the years, both the motivation and qualifications of its victims have been reduced"; and "thus all members of the white male majority have had a better shot at the positions for which they have applied." First of all, however, underlying the claim that all white males have benefited from reduced competition is the unjustified empirical assumption that the relatively small number of well-qualified black, as well as Hispanic, applicants can be ascribed to past discrimination and its lingering effects. Further, given the relatively small black population in the country, many whites have applied for positions in places where there are no or few blacks and black competitors and these numbers would not have been greater in the absence of previous discrimination. Moreover, even if reduced competition is one benefit that has accrued to white males as a result of racial and sexual discrimination, this benefit is not confined to white males. Thus, among the advantages that middle- and upper-class blacks, women, and Hispanics have that derive from the debilitating effects of past discrimination on lower-class members of their groups, it might be argued, is the advantage of a limited pool of qualified minority and female applicants and a better chance at the
positions for which they have applied. Indeed, well-off and other minority and female applicants have benefited, it might be further argued, from the way in which the effects of social injustice, such as having had to endure a harsh, impoverished childhood, have limited the pool of qualified white male applicants. In any case, merely having a better mathematical chance of gaining a position because of reduced competition is not a benefit, AA critics can argue, for which the beneficiary incurs obligation of compensation. He incurs such an obligation only if he gains some substantial good, such as a desirable position, that he would not have had were it not for discrimination. Since many, or even most, white males would have obtained positions without discrimination and reduced competition, there is no undeserved or unjust benefit for which they have a duty of rectification or compensation. Proponents of AA themselves hold that "we are concerned with actual harms and benefits," and that, for example, "if someone would have flunked out of medical school anyway, then in respect of becoming a doctor, he or she would have failed to achieve this goal even without discrimination."

Even if it is granted that every, or practically every, white male has benefited to some degree from past discrimination, AA is morally objectionable for violating the requirement that the burden of compensation be proportionate to the degree of unjust benefit received and for imposing this burden arbitrarily. Those who have benefited
more from past injustice should bear a larger share of the burden of compensation. Hence, those who have benefited most from past injustice should pay more compensation than those who have benefited least. AA still is vulnerable, however, to the objection that it reverses the required proportionality in the distribution of the burden of compensation. Even if all white males have benefited from past discrimination they have not benefited equally and therefore are not equally liable for compensation. AA, however, inverts the ratio of unjust benefit to present burden, imposing the entire or heaviest burden of compensation on a relatively small number of individuals who have benefited least or only minimally from past discrimination, while the overwhelming majority, among whom are those who have benefited most, have no costs imposed on them at all. Those who are not asked to pay compensation include older white males who are entrenched in lucrative and prestigious positions, who have already established themselves in their careers, and who may have benefited greatly from previous discrimination.

One response to the preceding criticism says that it agrees that the burden of compensation should be equitably shared and that in academia, for example, "it is in place to expect the occupants of comfortable professional chairs to contribute in some way, to make some form of return to the young white male who bears the cost." In areas beyond academia, individuals who are not bypassed by AA "but who have benefited from injustice to blacks, however innocently,
who are fortunate enough to have relatively secure positions, should in such special circumstances help their young would-be colleagues and co-workers." However, the burden of compensation is not being shared in such unspecified ways in current AA programs. In any case, the suggested ways of sharing the burden of compensation are unjust, since they do not apportion the present burden to unjust benefit. White males who have benefited least or only minimally from past discrimination will still bear grossly disproportionate shares of the burden of compensation.

Another reply denies that only some bear the burden of compensation and insists that "preferential hiring is intended to function hand in hand with other programs designed to alleviate financial disadvantage and sharply upgrade educational opportunity." Those white males who already have jobs and those who get jobs will contribute through taxation to helping blacks overcome the disadvantaging effects of past discrimination. This reply is unsatisfactory as well. Although they have benefited least or have at most benefited only minimally from past discrimination, white males who lose jobs, college or university places, and even careers alone pay this high price and bear this particular burden. They will pay in taxation what everyone else pays in addition to paying the price of being prevented from achieving desirable positions and perhaps chosen careers. Others, among whom are individuals who may
have benefited greatly from past discrimination, pay a price that is comparatively trivial.\textsuperscript{284}

A further reply acknowledges that the shares of the burden of compensation are disproportionate but insists that some of this disproportion can be remedied by providing alternative opportunities for those disadvantaged by AA,\textsuperscript{285} such as through job-retraining and job-retooling programs.\textsuperscript{286} This proposal, however, does not really lighten the burden that is borne by the white males bypassed by AA, which is being prevented from achieving the desirable and valuable positions they have spent considerable time, effort, and resources aiming at. What bypassed white males get on this proposal is the opportunity to respend their time, effort, and resources for jobs and careers they have not really wanted. In fact, given the pervasiveness of AA programs, these white males can even be denied positions after they have gone through retraining and retooling programs.

Given the premises of the unjust-benefit argument for AA, there are several implications relating to the distribution of the burden of compensation that AA defenders may be reluctant to accept. Thus, in maintaining that AA is morally justified because all members of the designated groups are victims of past discrimination and all white males are passive beneficiaries of this discrimination, this argument implies that many more white males may be denied positions on grounds of compensatory justice than merely, as in
current AA programs, a percentage sufficient to give the specified minority groups proportional representation and women dramatically increased representation in the desirable positions in society. Furthermore, since middle- and upper-class blacks, women, and Hispanics have benefited more from the effects of past discrimination on lower-class, disadvantaged group members than many white males have, it might be argued, AA programs should abandon the merit ideal within the favored groups and give preference to disadvantaged over advantaged group members, and to disadvantaged nonmembers of the designated groups who suffer the effects of social injustice, including white males, over advantaged blacks, women, and Hispanics.

On the assumption that every white male has passively benefited from past discrimination, AA is objectionable on additional compensatory grounds. In particular, proponents of the present compensatory argument for AA hold, incorrectly, that merely receiving some benefit produced by injustice is sufficient to make one personally liable to compensate the victim of injustice and justifies being compelled to pay compensation, and hence that no white male applicant can justifiably complain of being treated unjustly by AA programs. According to this view, for example, if a surgeon transplants a heart into Harry from Dick's corpse without permission from Dick's family and Harry recovers, Harry "must make suitable reparation to Dick's family, conceding that he is not in rightful possession of Dick's
heart. 287 Contrary to this view, however, beneficiaries of injustice, including white male applicants, can be treated unjustly or unjustly penalized by compensatory policies in being compelled to pay compensation. There are moral constraints on what, if anything, may be demanded from these individuals and on the ways in which they may be penalized in the name of compensation. As some commentators remark, the present view of AA proponents lacks intuitive plausibility and the example these proponents of AA use to support it lacks force. 288 The implausibility of this view is perspicuous when the undeserved or unjust benefit has become intermingled with other things and cannot simply be transferred back to its original possessor. Consider the example of a person X who has his driveway repaved (or his roof remodelled or renovated) mistakenly by a contractor. Person Y, the neighbor of X, has paid the contractor in advance and leaves a set of directions in his mailbox indicating which driveway to repave. An enemy of Y takes the directions from the mailbox and replaces them with others describing X's driveway to the contractor, who resurfaces X's driveway when X is away. Y has suffered a wrong or injustice and is owed compensation, but the identity of the wrongdoer is unknown. The surface of X's repaved driveway cannot simply be stripped off or taken away (nor can the transplanted heart simply be removed) without changing the previous condition of X's driveway (or that of the heart patient). Merely receiving the undeserved benefit, however, does not make X
personally liable or place him under an obligation to com-

pensate Y and hence does not justify exacting some sort of com-

pensation from X, such as paying the cost of the contractor,
since X then suffers serious loss and is treated unjustly.

He is made worse off than he would have been had the injus-
tice to Y not taken place since he is required to relinquish
resources to obtain things he valued more highly than a
repaved driveway. Similarly, the recipient of the trans-
planted heart suffers a serious, unjust loss by having to
pay in addition to the cost of the heart transplantation, on
the present view, compensation to Dick's family, and thus by
being made worse off than he would have been had he received
a heart through the normal process.

On the other hand, the claim that someone who has
unintentionally benefited from another's wrongdoing may be
obligated to pay compensation, at least to the degree of
relinquishing undeserved or unjust benefits which have not
become intermixed with other things, is intuitively plau-
sible. A beneficiary of injustice may be obligated to relin-
quish not all the benefits and advantages he enjoys but only
those that clearly and specifically derive from unjust
actions or social practices. To some AA advocates, even
"requiring young white males to pay women and minorities all
the unfair advantages they enjoyed" would be "unfair." Analogously, an unwitting recipient of stolen land who has
invested money and effort in making the land a prosperous
farm is not obligated to return the land (which he cannot
physically separate from the improvements he has made) in its present state to the victim of the theft or his descendants. since "to ask this would be to ask him to return much more than he initially received." Although the "young white" does "not owe" the "young black with whom he is competing" the "equivalent of all the advantages he now has over his black counterpart, for these are in part due to his own efforts," he "can and it seems should give up the competitive edge which he has unfairly though innocently received over his black competitor." However, the white male applicant's academic skills and achievement, educational attainment, and superior competence for the affected positions, unlike unearned benefits or undeserved social and economic advantages that are simply inherited, are goods that he has worked diligently to attain, that derive in large part at least from his own efforts and abilities or that he may have attained even without unjust advantages (as some lower-class white males have), and that cannot simply be dismissed or depreciated as accomplishments made possible (unlike that of making the stolen land a prosperous farm) by the receipt of unearned benefits or undeserved social and economic advantages. Instead of requiring the white male applicant to cede as compensation some of the social and economic advantages he has merely inherited and not acquired or amassed through his own efforts, such as some of his parents' wealth—i.e., bank accounts, land, investments, and so on—AA requires him to give up much more than
he initially received, namely, not only his so-called competitive edge but also the desirable position and even career he has aimed his skills at achieving. This form of compensation is akin to requiring the recipient of stolen land to relinquish his whole profit rather than merely part of the proceeds of his use of the land, and to requiring the recipient of a stolen bicycle who has successfully dedicated himself to becoming a bicycling champion to relinquish his title and awards as compensation.

Even if it is granted that all white males have benefited to some degree from discrimination against minorities and women, the question is whether they have benefited to the degree that warrants depriving them of desirable positions and even careers. What an unwitting beneficiary of injustice may be required to give up as compensation is determined and limited by what he has gained. Hence, to avoid treating a recipient of an undeserved benefit unjustly, "the most he should have to surrender," one writer on compensation says, is "what he has gained or its equivalent." Therefore, AA defenders have to establish that what each bypassed white male has gained is equal in value to a desirable position or career. If these white males have gained less, denying them desirable positions or careers will be demanding too much and will be at variance with compensatory justice. Concerning bypassed applicants, one critic of AA writes, "Certainly, they did not benefit to a degree that warrants that they pay by forfeiting these jobs
to arbitrary proxies for real past victims."295 In requiring these white males to relinquish desirable positions and even chosen careers, then, AA treats them unjustly.

In responding to the objection that AA treats white males unjustly in the distribution of the burden of compensation by maintaining that all white males have benefited to some degree from discrimination against the specified minorities and women, AA defenders imply incorrectly that any white male applicant can be justly prevented from achieving a desirable position or chosen career even if he has not benefited to the degree or extent of gaining a position he would not have had in the absence of discrimination. On the mistaken view of proponents of the unjust-benefit argument for AA, for instance, a white male applicant who has received bonus points in a discriminatory hiring or admissions practice for racial group membership or has had fewer minority competitors for a position for which he applied because of discrimination may later be denied a position even if he did not actually gain a position as a result of the bonus or reduced competition or would have obtained a position anyway.

Although the simple, concrete examples in the present argument for AA, such as those involving the inheritance of a stolen bicycle and stolen land, have intuitive appeal, they do not support the particular judgment that AA is morally justified, since the crucial elements in the examples cited and the AA case are not analogous.296 Consider the
stolen bicycle example. Four specific individuals and individuals' claim and rights to a specific piece of property are involved. X inherits a bicycle stolen by his parent from Y's parent, who would have bequeathed the item of property to Y had it not been stolen. Here is a clear case of ownership of an item of property and unjust enrichment at another's expense. X is unjustly enriched by a single specifiable act which takes something from its original owner and bestows it on him. In addition, the recipient of the stolen property has made no effort (unlike in the modified example of stolen land) which could give him entitlement to it. In the AA case, however, the single item involved is a job or place in college or graduate or professional school; and the affected position is not an item of property owned by the preferred minority or female applicant or his or her ancestors which should have been bequeathed to the preferred applicant but which was unjustly taken and inherited by the white male applicant bypassed. Lastly, it is not true that the white male applicant has made no effort which could give him entitlement to the affected position.

Even if rights and entitlements to property can be historically transmitted and inherited, that is, that a person's entitlements at a given time can be derived from the prior entitlements of others, and hence that the children of a person discriminated against can be entitled to some of their parent's advantages, a black applicant whose father was discriminatorily denied a job or other position does not
thereby have an entitlement to that position or a similar one. Even if a person can transfer his entitlement to property, such as a bicycle, land or sum of money, to his children, he cannot similarly transfer his entitlement to such competitively distributed goods as jobs, college or university places, and law or medical degrees. Entitlements in the second kind of cases are created entirely by a person's own actions and contributions, not simply inherited. Thus, as one critic of AA writes, "a man's family . . . may suffer additional damages if he is denied a job, and members for whom such additional damages can be shown are also owed compensation," but "not in the form of additional jobs." 297

In inflicting serious losses on particular individuals because they are white males and therefore assumed to be beneficiaries of past injustice and not wholly innocent parties, AA is again shown to be a policy of racial indebtedness and racial retribution redolent of morally abhorrent practices in primitive societies. AA is again shown to be judgmentally unjust, furthermore, in endorsing the false or unwarranted derogatory judgments that the particular white males who suffer losses are beneficiaries of past injustice, that their achievements are therefore tainted, and that they deserve to have these losses inflicted on them.

It might be objected that AA does not impose unjust losses on white male applicants at least in those cases in which the white males who are bypassed have benefited directly from past discrimination by receiving a job or
place in higher education. However, the positions these white males are forced to relinquish now are not the positions unjustly received but are goods that these white males are entitled to and deserve on grounds of distributive justice. Preventing these white males from achieving desirable positions when it makes them worse off than they would have been had the previous acts of discrimination not taken place does impose unjust losses on them. Moreover, even if it is granted that these white males may be denied positions as compensation now, unless the minority or female applicants given preference are better qualified than the other white male applicants who did not gain positions through previous acts of discrimination the second group of white males are treated unjustly.

Further Objections

In response to the noncompensatory objections that AA programs discriminate against and treat white males unjustly, proponents of the present argument for AA seek to remind critics of AA that these programs are "instituted on behalf of certain persons . . . because they have been victims of past injustices, not on the basis of their membership in certain racial or ethnic groups." These persons are "of interest to the designers of affirmative action programmes" and are "the subject of preferential treatment only because they bear the legacy of past discrimination, not because they are members of a certain race."298 These
defenders of AA claim that "a means of identifying victimized persons is needed. Race is a factor in this context, for it was largely because of their race that they were discriminated against." It is important "not to confuse the means of identification of a victimized group with the basis upon which they were preferentially treated." In AA programs, however, race is in fact a means of identifying recipients of preferential treatment, not victimized individuals. These programs dispense compensatory benefits in the form of desirable positions to individuals on the basis of group membership, not proven victimization; and simply from the fact that it was largely because of their race that some individuals were discriminated against it cannot be correctly concluded that other individuals belonging to the same group also were discriminated against. In preferentially awarding quality jobs and college and university places to particular individuals because they belong to the designated racial, sexual, and ethnic groups, AA programs discriminatorily and unjustly deny desirable positions to particular individuals who do not belong to the groups designated to receive preference.

Several strategies of defending AA against the noncompensatory objections to it deny that AA violates the rights of white males and treats them unjustly. Claiming that the problem of violating white males' rights simply does not arise, one defense of AA discounts these rights or attempts to weaken them or to dilute their strength by insisting that
all white males have benefited from discrimination against the specified minorities and women. Since all white male job and school applicants thus are beneficiaries of past injustice, they have a liability for compensation which justifies the government and other social institutions in breaching their rights. These rights are absent or qualified; and therefore, according to this defense of AA, compelling white male job and school applicants to bear the burden of compensation for past discrimination and its present effects by taking away undeserved and unjust advantages from them, as AA does, is not denying or violating their rights. However, since the empirical evidence does not support and even contradicts the claim that all, or most, white males, particularly the younger job and school applicants, have benefited from past discrimination and injustice, the white males bypassed by AA do not satisfy the stated conditions for incurring a liability for compensation and for incurring a personal obligation to relinquish their rights to equal opportunity, equal consideration, and so on. Consequently, it is not true that white males are in no position to assert these rights in protesting the use of preferential treatment to compensate for past injustice. These rights are not absent or qualified; therefore, AA violates them and treats white male applicants unjustly. Moreover, AA programs purportedly take away or "curtail" white males' undeserved or unjustly acquired benefits and thus merely frustrate or block "their traditional expectations"; but these
programs deny individual white males goods they deserve and are entitled to.

Another strategy is to argue that there is no competing right of white males since no one can claim a right to any particular job or other position. Since "no one has a prima facie right to one or another position," the white male applicant bypassed by AA "has no right to the particular job for which he is in competition with blacks and women." AA proposes to "compensate the injured with goods no one has yet established a right to." A policy of AA, therefore, "imposes no unfair losses on anyone." However, this reply depends on acceptance of the view that the only right in question is the right to a job or other position; but this alleged right is not the competing moral consideration which the relevant objection to AA invokes. This objection does not contend that the affected positions belong to the bypassed white male applicants or that these or any applicants have rights to these positions antecedent to their application for them and the fair comparative evaluation of their qualifications. On the contrary, what belongs to these white males and what they are being unjustly denied are the rights to equal opportunity and equal consideration and hence the rights to be evaluated on their merits and not to be discriminated against. Furthermore, this reply in favor of AA undermines the compensatory defense of AA by implying that the supposed mistreatment of blacks and members of the other designated groups in employment and
admission to educational institutions in the past was not unjust because it violated no distributive rights and does not now warrant compensation in the form of the preferential award of desirable positions. Past treatment of blacks and members of the other designated groups did not deny them jobs or other positions they had a right to.

Even if it is conceded that "although a white male applicant may not have established a right to this or that job, he has a right to fair competition for it," some defenders of AA argue, AA does not violate that right and does not treat white males unjustly, since "preferential treatment need not make the competition for desirable places and positions unfair." Rather, "by compensating women and blacks for being denied equal chances to acquire qualifications" AA "may make that competition more fair." However, in straightaway awarding positions to particular individuals because they are black, female, or Hispanic and in preventing other individuals from achieving desirable positions because they are white males and therefore assumed to be beneficiaries of past injustice, AA does not make the competition for the affected positions fairer—whether or not the recipients of preference have been harmed to some degree by discrimination—but ends it entirely for the white males bypassed. AA therefore treats these white males unjustly in violating their right to genuinely fair competition.

Furthermore, the unjust-benefit argument for AA does not undermine or disarm the objection that AA is shown to be
morally unacceptable since preferential policies in relevantly similar contexts, distributive and retributive, are morally unacceptable. Given the present argument for AA, it might be claimed, not that the white males directly harmed by these policies have perpetrated or share the guilt for past injustices, but that they have benefited to some degree from discrimination against the specified minorities and women and therefore that the deprivations and disadvantages they suffer through these policies are simply their share of the burden of compensation. In response, defenders of AA might argue that a morally relevant difference between AA and these preferential policies is that white males have received undeserved and unjust advantages that have helped them in acquiring superior qualifications for the contested positions in employment and advanced education. The suggested difference between AA and the preferential policies in the extended contexts, however, is not a morally relevant difference and hence does not undermine the present objection to AA. Following the same line of reasoning in the present compensatory defense of AA, proponents of the preferential policies in the extended contexts can argue that white males have corresponding advantages in these contexts as a result of previous discrimination against the specified minorities and women. They can argue that, for example, white males are unjustly enriched in attaining higher academic grades, achieving higher scores on professional license examinations, performing better and more efficiently on
the job, having access to better medical care and avoiding the serious health problems that afflict the specified minorities, and succeeding in campaigns for elective political offices, as well as in having as a group lower crime rates and lower representation in the prison population.

Notwithstanding critics' objections, advocates of AA insist that it is the preferred method of compensating minorities and women. "What blacks and women were denied was full membership in the community," a supporter of AA writes; and "nothing can more appropriately make amends for that wrong than precisely what will make them feel they now finally have it. And that means jobs." This advocate of AA claims that "having a job and discovering you do it well, yield—perhaps better than anything else—that very self-respect which blacks and women have had to do without." AA is a form of compensation that reinstates their self-confidence and benefits them "in the manner best suited to their aspirations."

Moral reflection often does indeed make use of the idea of self-respect, such as in the judgment that an
institution which undermines the self-respect of a person or
group is morally objectionable. Also, distinguishing
between self-respect in its narrower sense ("an appropriate
recognition and response to one's status as a person with
rights and responsibilities" or "the proper appreciation
of the importance of being a person") and self-respect in
its broader sense, that is, self-esteem ("a positive self-
evaluation based upon perceived merits, such as talents and
achievements"), a number of writers agree that jobs are
an important source of self-esteem. In holding a job a
person not only earns the respect of other people but also
bolsters his own self-esteem and self-respect.

Critics of AA, however, reject the contention of the
preceding defense of AA that AA counters the psychological
effects of past discrimination on the designated minorities
and women and restores their self-respect. To begin with,
the typical recipients of preferential treatment in AA pro-
grams are not those group members who have been deprived of
or have had to do without the self-respect referred to by AA
advocates in this defense of AA. Furthermore, even for those
blacks and members of the other designated groups whose
self-respect, as well as self-esteem and self-confidence, is
in need of restoration or reinforcement, critics of AA can
reasonably doubt that the jobs granted by AA will yield that
very self-respect which, AA defenders claim, the designated
minorities have had to do without. Since AA grants the
affected jobs preferentially, it engenders the perception
that the designated minorities and women have lower competence and need special treatment to obtain quality jobs or other desirable positions. Thus, a psychological effect of AA itself is that members of the designated groups come to doubt their abilities. This self-doubt, some advocates of AA admit, even affects those group members who would have attained their achievements and gained their positions without AA but who cannot be sure that they have not directly benefited from it. Further, since the recipients of preferential treatment often are significantly less qualified than the white males who are bypassed, they may suffer psychologically from not performing well in the affected positions. Moreover, even if the jobs granted by AA may buttress the self-respect, self-esteem, and self-confidence of the minorities and women who receive them, there is little reason to believe, critics of AA argue, that preferentially granted jobs for some members of the designated groups will do anything to enhance the self-respect of the other group members whose self-respect is in need of restoration or reinforcement, especially if, as AA defenders claim, having a job and discovering that one does it well is the key to the self-respect they invoke.

The objection that "blacks (or any persons) who gain their positions through preferential treatment ought to respect themselves less," a defender of AA maintains, "assumes that these blacks do not deserve preferential treatment." Because "the overwhelming majority of blacks
have been grievously wronged by racism, they deserve to be compensated for such injury." Consequently, "black beneficiaries of employment preference" have "no good reason to feel unworthy." Although the recipients of preference may be less excellently qualified than other applicants, they should experience no diminution in self-respect," another defender of AA insists, "because when qualifications are considered along with the undeserved handicaps and advantages possessed by the applicants," they are "the most deserving." Hence, since the preferred candidates "must still overall be the most deserving," a defender of AA argues, "the present difficulty does not arise." These claims, however, do not undermine critics' objections that a policy of preferential treatment does not restore, enhance, or reinforce the self-esteem and self-confidence of those who know or suspect that they are its recipients; that this policy indeed creates the perception of lower competence of the designated minorities and women on the job and in other positions; and that AA even threatens the self-esteem and self-confidence of those who are not recipients of preference but who cannot be sure they are not. Members of the designated groups who receive preference may be aware or suspect that they are less qualified and less competent than the white male applicants who are bypassed and hence that from the standpoint of distributive justice, which governs the allocation of such social goods as jobs and college and university places, they are undeserving of the positions
they are granted in AA programs. They are thus undeserving because they do not satisfy the conditions for prevailing in the competition for the affected positions that are specified by distributively just rules and because they lack the demonstrated preeminent possession of the characteristics and skills that, according to principles of distributive justice, constitute the basis of the competition for desirable positions. Group members' awareness or suspicion of being less qualified and less competent and self-doubt about their abilities are not removed by the unjustified claim that they deserve to be compensated for some unjust injury or harm and by the unjustified decision to make certain contexts in which the allocation of goods is governed by principles of distributive justice the vehicle for providing supposed compensation. The white male applicants who would obtain the contested positions if AA were no longer implemented would not have their self-respect and self-esteem jeopardized for, in one AA defender's words, "filling jobs others deserve more." Since these white males are the best-qualified and most competent applicants for the affected positions, they are, according to principles of distributive justice, the most deserving of obtaining these positions.

Furthermore, even if AA makes the specified minorities and women feel that they have what they were denied, gives them what they want, or benefits them in the manner best suited to their aspirations, AA does not thereby
appropriately make amends for past injustice. What is appropriate compensation is determined by principles of justice, not these kinds of considerations.
Notes


2. Mosley and Capaldi, Affirmative Action, 37/.


5. This quotation is taken from an article entitled "Dismantling Affirmative Action Will Allow Unjust Preferences" by George E. Panichas, head of the philosophy department at Lafayette College. This article, which appeared in local newspapers on 4 April 1996, is based on a talk delivered at the college as part of a panel discussion on affirmative action in the spring of 1996.


7. Rowan, Conflicts of Rights, 112.


14. Ibid., 49.

15. Ibid., 26.


17. Ibid., 48.


20. Horner and Westacott, Philosophy, 173.


28. Ibid., 75.

29. Ibid.


31. Ezorsky, Racism and Justice, 74.


39. Ibid., 81.


41. Rowan, Conflicts of Rights, 113.

42. Ezorsky, Racism and Justice, 83.

43. Mosley and Capaldi, Affirmative Action, 37.

44. Katzner, "Reverse Discrimination," 81; and Rowan, Conflicts of Rights, 113.


47. Ibid., 37.


49. Ibid.

50. Ibid., 75-76.


56. Ibid.


61. Ibid.


64. Katzner, "Reverse Discrimination," 74.


69. Ibid., 42.

70. Ibid., 39; and Jencks, *Rethinking Social Policy*, 138-39.


72. Ibid., 139.


74. Ibid., 2.

75. Ibid., 9.


84. Ibid., 31.

86. Paul, "Affirmative Action."


94. See, for example, D'Souza, *End of Racism*, 239-40; and Thernstrom and Thernstrom, "Racial Preferences," 46.


97. Ibid., 170.


100. Boxill, "Preferential Treatment," 337.


103. Ibid., 92.

104. Ibid.


108. This phrase is attributed to William Julius Wilson in D'Souza, *End of Racism*, 240.


111. See Rowan, *Conflicts of Rights*, 106.


116. Ibid., 77.

117. Ibid., 78.


120. Boxill, "Affirmative Action."


123. Rowan, *Conflicts of Rights*, 104.


125. Ibid.


132. Feinberg, "Harm and Offense."


136. Fullinwider, "Reverse Discrimination and Equal Opportunity," 177; and Feinberg, "Harm and Offense."

137. Goldman, Reverse Discrimination, 80-81.

138. Ibid., 81.


141. Ibid., 187, n. 15.


145. Nickel, "Discrimination."

146. Rowan, Conflicts of Rights, 105.
147. Ibid.


150. McGary, "Groups, Moral Status of."


152. Ibid., 259-60.

153. Rowan, Conflicts of Rights, 106, 121.


159. Rowan, Conflicts of Rights, 106, 121.


167. Nickel, "Discrimination."

168. Ibid.


171. This claim is attributed to Alvin Poussaint in D'Souza, *End of Racism*, 170.


175. This comment is attributed to Shelby Steele in Paul, "Affirmative Action."


179. Ibid., 78.

180. Ibid., 81.

181. Ibid.

182. Ibid.

183. Ibid., 78.

184. Ibid., 78-82.


187. Ibid., 197.


190. Ibid., 120.


195. Ibid., 146-47.


201. Bayles, review of Justice and Reverse Discrimination, 457.


203. Ibid., 37.

204. Ibid., 30-31.

205. Ibid., 31.

206. Ibid., 37.

207. Sher, "Preferential Hiring," 47.

208. Sher, "Reverse Discrimination," 47.

209. Ibid.

210. Ibid.


213. Ibid., 73.


221. Gross, Discrimination in Reverse, 47.

222. Ibid., 45.


227. Ibid., 113.

228. Mosley and Capaldi, Affirmative Action, 36. See also Orlando Patterson, Slavery and Social Death (Cambridge, Mass.: Harvard University Press, 1982), 260, 296.


231. Hofstadter et al., United States, 300.

232. Gross, Discrimination in Reverse, 47.


234. Ibid., 79.


236. D'Souza, End of Racism, 75.

237. Parish, Slavery, 27.

238. Hofstadter et al., United States, 295-96.


244. Hofstadter et al., *United States*, 296-98.


258. Ibid.

259. Ibid.


262. Ibid.

263. Ibid.


266. Roberts, Portrait of America, 169-70.


270. Rowan, Conflicts of Rights, 113, citing the conclusion of some economists.

271. Ezorsky, Racism and Justice, 84.


274. Ibid., 61.


279. Ibid.

280. Ibid.


282. Ibid.

283. Ibid.


289. For the driveway example, see Fullinwider, Reverse Discrimination, 38-40.


292. Ibid., 218.


294. Ibid.


296. Gross, Discrimination in Reverse, 45, 137-38.


299. Ibid., 384.

300. Fullinwider, Reverse Discrimination, 37.


302. Rowan, Conflicts of Rights, 112.


305. Boxill, "Preferential Hiring," 266.

306. Ibid.

308. Ibid.
312. Ibid.
313. Hill, "Self-Respect."
314. Ibid.
316. Hill, "Self-Respect."
318. Arneson, "Work, Philosophy of."
325. Ibid.
Chapter 5

The Argument from Counterfactual Meritocracy

Another modification of the compensatory defense of AA maintains that a revised version of the unjust-benefit model of compensation provides "the moral basis" for AA. The key to an adequate justification of AA and the bypassing of white male job and school applicants, the present defense argues, is "to see that practice, not as the redressing of past privations," such as poverty and malnourishment, or as compensation for all the adverse effects of past discrimination, "but rather as a way of neutralizing the present competitive disadvantages caused by those past privations and thus as a way of restoring equal access to those goods which society distributes competitively." The objective of this strategy of justification is "to redeploy the merit argument" that is "so beloved by the critics"—i.e., individuals deserve to be treated on their own merits into "a support for affirmative action." Sometimes an applicant is best qualified for a position because another has been prevented by past discrimination from fully developing the relevant skills. Had there been no injustice, the second applicant would have been better qualified. In such cases, selection officials should exclude from consideration the deficiencies that are probably the result of discrimination and should give the less-qualified applicant enough preference to return him to the competitive position he would have had in
the absence of discrimination.⁵

According to this approach to the justification of AA, which may be termed the "argument from counterfactual meritocracy"⁶ or "counterfactual justice,"⁷ many minority and female candidates may not be the most qualified candidates who are being considered for certain positions; but they "would have been"⁸ or "might well have been"⁹ the most qualified had they not been disadvantaged by discrimination and prejudice, such as through the denial of equal educational opportunities. "In a perfectly just world, a world in which blacks and women had fair opportunities to develop their abilities and pursue their interests," a proponent of this argument writes, "many of the minimally qualified blacks and women would be equally or more competent than their white male competitors."¹⁰ Since the actual minorities and women in the applicant pool have done so well under existing conditions, proponents of this argument hold, it is reasonable to think that these minorities and women would have done even better if the effects of past discrimination are discounted.¹¹ Preferential treatment can thus be thought of "as aiming at picking out candidates who would be deserving of the positions on grounds of competence, were it not for the present effects of past injustice."¹² Hence, since compensatory justice requires that unjustly injured persons "be brought up to "the level of wealth and welfare that they would now have if they had not been disadvantaged,"¹³ the disputed positions ought to go, not to the actually most
qualified applicants who are white males, but to the counterfactually most qualified minority and female applicants, that is, those who would have been most qualified for the affected positions in the absence of past discrimination. Therefore, AA is morally justified as a way of restoring to unjustly disadvantaged blacks, along with disadvantaged members of other minority groups and women, the desirable and valuable positions they "would have secured in the absence of injury," that is, quality and high-level jobs and college, university, and professional school places.

"To be justified," a policy of preferential treatment, according to one variant of the present argument for AA, "must favor only candidates whose qualifications are such that when their selection or appointment is combined with a suitably designed educational enhancement program," these candidates "will normally turn out within a reasonably short time to be as qualified or even more qualified than their peers." This variant claims that "such candidates have the potential to be as qualified or more qualified than their peers, but that potential has not yet been actualized because of past discrimination and prejudice." Preferential treatment combined with "its suitably designed educational enhancement program purports to actualize just that potential." Therefore, preferential treatment "is a policy that is directed at only those women and minority candidates who are highly qualified, yet because of past discrimination and prejudice, are less qualified than they would otherwise be."
Preferential treatment "seeks to provide such candidates with a benefit that will nullify the effects of the past discrimination and prejudice by enabling them to become as qualified or more qualified than their peers."\(^{15}\)

It is the whole complex of privations caused by past discrimination, including inadequate public education and the lack of adequate guidance and intellectual stimulation for the young, the present argument for AA maintains, that undermines the ability of many members of the designated minority groups to compete by depriving them of the skills and capacities that determine success in the competition for desirable positions. Thus, since "black people in the United States have been, and are, systematically discriminated against" and such discrimination has led to poverty and related ills affecting them, an advocate of AA writes, "it is reasonable to believe" that this mistreatment "does make a difference in," that is, reduces, "their ability to compete for such goods as law school admission."\(^{16}\) "If unjust racial discrimination had never happened," another proponent of AA writes, "the conditions and prospects for blacks would be very different from what they are." For example, "many more blacks, probably including the beneficiaries of preferential treatment, would be better qualified"; and "certainly many would be chosen for the jobs and places which preferential treatment secures."\(^{17}\) Also, "it is unquestionable" that years of years of sexism have hindered women "in efforts to acquire good qualifications."\(^{18}\) Female candidates are
"typically disadvantaged in obtaining those qualifications that are supposed to act as the hallmark of ability." 19

Since preferential treatment in hiring, promotions, and admissions is compensation not "for all the adverse effects of past discrimination" but "for a single effect alone," namely, "the lost ability to compete" for desirable positions "on equal terms," the present defense of AA argues, "we can indeed see a deep connection between loss and remedy." 20 "Whenever someone has been irrevocably deprived of a certain good and there are several alternative ways of providing him with an equivalent amount of another good," the present defense maintains, "it will ceteris paribus be preferable to choose" the alternative that "comes closest to actually replacing the lost good." Since "the lost good is just the ability to compete on equal terms for first-level goods like desirable jobs," the "most appropriate (and so preferable) way of substituting" for the lost good is "just to remove the necessity of competing on equal terms for these goods" 21—precisely what AA does. 22

When AA is viewed as compensation for reductions in competitive ability, furthermore, proponents of the argument from counterfactual meritocracy or counterfactual justice contend, the objections that AA does not distribute the burden of compensation fairly and that it bypasses white male applicants who have not benefited enough from past discrimination to warrant the losses they suffer can be met. 23 Thus, since it is not the bypassed white male applicants' previous
gains but their potential gains that are important, critics of AA can no longer maintain that the bypassed white male applicants have not benefited enough from past discrimination to justify the losses imposed by AA. These white males, not others, stand to gain positions they would not have had if their minority and female competitors' abilities had not been diminished by the effects of past discrimination. Because these white males stand to gain the most from the lowering of their minority and female rivals' abilities, it is hardly unreasonable, proponents of this argument say, that these white males should lose the most as a result of a policy that compensates for that lowering. Hence, it does not seem unjust or unfair that white males who are the best-qualified candidates should bear the burden of compensation by being prevented from obtaining the contested positions.

The present compensatory defense of AA also had a response to the objection that AA unjustly overrides the claim of white male candidates based on qualifications and competence since distributing positions on the basis of race, sex, or ethnicity violates the principle that candidates for employment or higher education should be selected on the basis of merit and hence wrongs the most qualified candidates. The argument from counterfactual meritocracy is a version of the approach which argues that even if we accept the principle that positions ought to go to the most qualified, preferential treatment for the specified
minorities and women "is compatible with such a principle, properly understood, and may even be required by it." The principle "requires that we look not only at actual qualifications but as well at the fairness of the conditions under which they were acquired." Appealing only to considerations of individual justice, the argument from counterfactual meritocracy assumes that qualifications and competence should be the basis for decisions about who is hired or appointed, promoted, or admitted. Instead of disputing the principle that positions normally ought to go to the most qualified, this defense of AA claims that this policy seeks to substitute the counterfactually most qualified for the actually most qualified in applying this principle.

In underscoring that members of the specified minority groups are unable to compete equally with others as a result of the continuing effects of past discrimination, proponents of the argument from counterfactual meritocracy exploit the familiar analogy of a race in which one of the runners is chained to a heavy weight. A person who receives preferential treatment is like a runner in a race who for a time is forced to compete at a disadvantage with other runners, for example, by having a weight tied to his leg, but who later is allowed to transfer the weight to the runners in the race who had previously benefited from the unfair competitive advantage so that the outcome of the race will now be fair. Surely, if you handicap a runner at the outset by burdening him with heavy weights and stop the race
in the middle, you cannot make the race fair by removing the weights and letting the race resume, since the previously chained runner is already far behind. He will still suffer from the effects of the unfairly imposed handicap. Similarly, it would be unfair to evaluate handicapped minority and female applicants on the basis of actual qualifications, the present argument maintains, given that minority and female applicants who receive preferential treatment are less qualified than their white male competitors because of past discrimination and prejudice. Justice requires that the effects of an unfairly imposed handicap be negated and hence calls, the present argument for AA concludes, not only for transferring the handicap to the runners in the race who had previously benefited from the unfair advantage but also for preferentially awarding the affected positions in AA to the competitively disadvantaged, counterfactually meritorious minority and female applicants.

Even if it were granted that the argument for AA based on the idea of counterfactual meritocracy or counterfactual justice is theoretically adequate, this argument would not support the judgment that AA is morally justified, since it does not apply to current AA programs. These programs do not satisfy the specified counterfactual conditions and therefore do not satisfy the requirements of compensatory justice. This argument also faces practical difficulties relating to the possibility of satisfying the specified counterfactual conditions. Concerning the model of
counterfactual meritocracy and its application, moreover, there are theoretical problems, including those arising from considerations of justice.

To begin with, on the model of counterfactual meritocracy, AA will be justified only in favor of those minority-group members and women whose abilities have been reduced to the required degree; but AA does not directly benefit precisely those individuals who not only have been disadvantaged by discrimination but also would have been the best-qualified applicants for the affected positions in the absence of past injustice. Proponents of the present defense of AA make the unjustified, and even implausible, assumption that because of past discrimination and prejudice the minority and female recipients of preferential treatment, including those who are highly qualified and those having doctorates and scholarly knowledge of Latin or Greek, are less qualified than they would otherwise be and are less qualified than their white male competitors. According to the empirical evidence, past discrimination and prejudice have not denied these allegedly counterfactually meritorious applicants equal or fair opportunities to actualize the potential to be as qualified or more qualified than their white male competitors and have not caused them to suffer the privations, such as poverty, that, the present defense of AA claims, undermine the ability of group members to compete by depriving them of the skills and capacities that determine success in the competition for desirable
positions. Far from having suffered these privations, many of the recipients of preferential treatment are better off in these respects than white male candidates bypassed by AA.

"Blacks from middle-class or affluent backgrounds," one commentator writes, "will surely have escaped many, if not all, of the competitive handicaps besetting those raised under less fortunate circumstances." Some proponents of AA admit that "there are blacks and women who have not suffered disadvantages of a sort affecting their qualifications for the competitive positions they seek." Recall that the beneficiaries of preferential hiring in the academy are either Ph.D.'s or Ph.D. candidates, many from the nation's most prestigious graduate institutions, and that minorities and women preferentially admitted to law or medical school, some advocates of AA acknowledge, must usually have attended a good college and received good grades. Furthermore, to be deemed capable of succeeding in graduate programs, for example, in mathematics, physics, and chemistry, minority and female candidates will have a good academic preparation in such subjects in mathematics as functional analysis and abstract algebra; such subjects in physics as quantum mechanics and solid-state physics; and such subjects in chemistry as advanced organic and inorganic chemistry and chemical thermodynamics. Hence, it is not reasonable to think or to assume, as proponents of the counterfactual argument for AA do, that minorities and women in the
applicant pool and the recipients of preference for such positions would have done even better than they have done under existing conditions of the effects of past discrimination are discounted. Even for individuals who have encountered some obstacle in attaining qualifications for desirable positions, it cannot just be assumed that they would have done better under different circumstances, since they may have simply neutralized whatever impediment or disadvantage they faced.

Claims by proponents of the counterfactual defense of AA that were it not for past discrimination many more blacks, members of the other minority groups, and women would be better qualified than they are in the present world and that many would be chosen for the positions preferential treatment secures, even if they were true or supported by the empirical evidence, would not establish that the particular individuals who receive preference are the counterfactually most qualified applicants for the affected positions. Even some advocates of AA concede that "preferential treatment does not obviously secure its beneficiaries the jobs and positions they would have received in the absence of injury." Even if "most of the middle-class blacks and women who receive preferential treatment would probably be much better qualified than they are in the present world, for they would not have to contend with any racial or sexual discrimination and stereotyping," it does "not follow," an advocate of AA writes, "that they would be the most
qualified for the places and positions they receive because of preferential treatment.\textsuperscript{34} Denying that the problem of identifying those who would have been most qualified in the absence of past injustice is insurmountable, one defender of AA preference writes that "if one effect of discrimination is that fewer blacks can qualify without preference, then one proper form of compensation is to eliminate the effect of denial of admission on those who would otherwise have qualified." The "closest a law school," for example, "may be able to come to identifying the class of those who in the absence of discrimination probably would have qualified without preference is to choose the best prepared blacks who now apply."\textsuperscript{35} Even if it is granted, however, that more blacks would be most qualified for desirable positions, such as places in law school or medical school, had discrimination not taken place, there is "no reason to believe," as one writer says, that the blacks or other minority-group members who are best prepared and who are in a position to benefit directly from preference offer "even a remote approximation."\textsuperscript{36} to those who probably would have been most qualified in the absence of past discrimination. The most qualified members of the specified minority groups are likely to come from more advantaged rather than less advantaged backgrounds; but it is the more advantaged group members about whom it can least plausibly be claimed that they are worse off than they would have been and have had their competitive abilities
diminished by past discrimination and prejudice. Surely, the argument from counterfactual meritocracy is stronger for present members of the ghetto underclass, some writers remark. A probabilistic counterfactual claim made on behalf of these group members is more plausible than any such claim that can be made on behalf of the best-prepared blacks and other minority-group members who now apply for the affected positions.37

AA singles out for preference individuals belonging to the designated groups without attempting to ascertain whether they have been deprived of fair opportunities to develop their abilities and capacities and have been deprived of the ability to compete equally with others for desirable positions. Lacking a feasible method of identifying counterfactually meritorious minority and female candidates, AA makes no distinction between those group members whose lower qualifications can be ascribed to obstacles arising from social, economic, educational, and motivational disadvantages caused by past discrimination and those group members who are not disadvantaged, who have attended the best schools and colleges, and whose personal failings are causally responsible for their lower qualifications.38 Indeed, if the failure to achieve high enough examination scores or maximal qualifications is the result of the lingering effects of past discrimination and if lower examination scores and qualifications are evidence of these effects, as AA defenders claim, AA programs should depart
from evaluation on the basis of actual qualifications within the designated groups, it might be suggested, and choose from the bottom of the lists of minority and female applicants on the grounds that these group members are more likely to be the counterfactually most qualified candidates.

Where blacks are concerned, some commentators say, "past discrimination often did lead to poverty, malnourishment, inadequate education, and related ills"; and "such discrimination is indeed apt to have reduced the ability of many current individuals." The situation regarding women, however, these commentators observe, is different. Thus, "although women were often denied employment, such discrimination did not usually affect their husbands' ability to work." In most cases, such discrimination did not reduce the nourishment, education, or intellectual stimulation received by the victimized women's children. In addition, when such discrimination did affect the well-being of these women's children, it affected male and female children equally. As a result, "past discrimination against women did not initiate a cycle of poverty and deprivation that reduced the competitive abilities of current group members."

One reply contends, however, that "even if past discrimination against women did not lead to poverty and deprivation, it still diminished the competitive position of women in other ways." Thus, although past discrimination has not played the same causal role regarding women that it
has concerning blacks, it has nevertheless played a causal role, which, according to the present reply, has been mainly psychological. In particular, because past discrimination in employment and higher education has prevented women from entering many professions, younger women have lacked exemplars or role models of high achievement to encourage their own entry into these professions. In addition, many women have adopted the pervasive assumption that certain kinds of occupations and activities are not appropriate for them. The lack of role models and a culture which in many ways inculcates the belief that women cannot or should not do the jobs that men do in turn have made women psychologically less able to do these jobs. As a result, the present reply argues, women have been prevented from developing the skills and self-confidence that success in competition requires. Hence, women also have claims to be compensated through preferential treatment.

There are difficulties for the preceding reply beyond the problem of assessing the complex psychological premises on which this reply depends. Thus, "even if it is granted without question that cultural bias and absence of suitable role models do have some direct and pervasive effect upon women, it is not clear," some commentators say, "that this effect must take the form of a reduction of women's abilities to do the jobs men do. A more likely outcome would seem to be a reduction of women's inclinations to do these jobs." To the extent that this disinclination "may in turn
lead some women not to develop the relevant skills " these commentators concede, "the competitive position of these women will indeed be affected, albeit indirectly, by the scarcity of female role models." However, "even if role models do influence one's initial choice of career, the skills and self-confidence that determine competitive success seem to depend," as some writers note, "on other factors." As a result, "the connection between the competitive position of female job applicants and past wrongdoing may well be minimal." In any case, furthermore, the female recipients of preferential treatment for higher-level jobs and college and university places are not those who have been made psychologically less able to pursue and to perform in these positions and who have been prevented from developing the relevant skills and self-confidence required by successful competition. Indeed, "based on grades and performance on many standardized tests as well as on the job," a commentator writes, "women perform as well or better than men in academic capacities"; and women's "graduate training and scholarly credentials generally are equivalent to those of males." Some advocates of AA agree that discrimination has not primarily affected, that is, resulted in a diminution of, women's qualifications, though it has thus affected the qualifications of blacks and members of the other specified minority groups.

One response to the foregoing criticisms of the present defense of a policy of racial and sexual preferences maintains that race and sex are characteristics so strongly
correlated with unjustly reduced abilities that these correlations warrant preferential treatment along group lines. Even if there is little doubt that, as some commentators say, membership in the discriminated-against groups will often display some correlation with reduced competitive ability, it does not follow that such correlations are sufficiently strong to warrant preferential treatment merely according to group membership. Race or sex or ethnicity alone is an inadequate criterion for identifying the counterfactually most qualified candidates. When preference is afforded to members of the designated groups merely according to group membership, the individuals who receive it will generally be those group members whose competitive abilities were reduced the least or not at all. Although AA is purportedly a mode of compensation that restores the competitive position of counterfactually meritorious minority and female candidates, group members who have suffered the competitively disadvantaging effects of past discrimination are least likely to have qualifications good enough to place them at the top of the rankings of minority and female applicants and to enable them to receive preference afforded merely on the basis of group membership. AA is therefore also unable to resolve the problem of those who would have been most qualified in the absence of past discrimination but who now lack even minimal qualifications for high-level positions and thus are ineligible for preference for these positions. In addition, since AA programs
actually extend preference to individuals according to membership in the designated groups and reserve more than proportional percentages of openings or new positions for these groups to achieve the proportional representation of these groups in the desirable positions in society, many of the recipients of preferential treatment clearly are not those who would have been most qualified were it not for past discrimination.

Although the actually most qualified minority and female applicants are unlikely to have been the most qualified candidates for the disputed positions, another strategy for defending a policy of preferential treatment on the basis of counterfactual meritocracy maintains, the pool of successful candidates would contain a higher percentage of minorities and perhaps women, particularly in senior positions, than at present. Hence, according to this reply, we can regard the actually most qualified minority and female candidates as stand-ins or reasonable substitutes for the minority and female candidates who would have been most qualified under the specified counterfactual conditions, that is, under conditions of fair opportunity. However, besides relying on the unjustified empirical assumption that the pool of successful candidates for desirable positions would contain not only higher but even proportional percentages of minorities and perhaps women were it not for past discrimination, this reply ignores the point of a policy of AA. Since the point of AA according to the present argument
for this policy is to compensate minority-group members and women for being competitively disadvantaged by past discrimination and prejudice, AA is not justified in favor of mere proxies for group members whose competitive abilities have actually been diminished by past discrimination. While the claims of minority-group members and women who would have been the most qualified candidates in the absence of past injustice have weight, some writers assert, the claims of stand-ins do not.55

AA extends preference to minority and female individuals for many kinds of jobs and other positions; but, as some commentators note, not all jobs or other positions are equally suited to preference, given that the argument from counterfactual meritocracy calls for preferential treatment when the qualifications of applicants have been reduced through past injustice. Thus, an applicant's qualifications for positions that do not require refined or delicate abilities, such as various blue-collar jobs, are less likely to have been reduced by the effects of past discrimination. Although being a good plumber or carpenter, for example, requires considerable skill, this skill can be acquired by anyone within a broad range of ability. As a result, applicants for entry-level positions in such trades as plumbing and carpentry are unlikely to have been disadvantaged by the lingering effects of past discrimination and to have been deprived of the ability to compete equally for these positions.56
The present argument for AA restricts the relevant counterfactuals on grounds of race, sex, and ethnicity and AA restricts preference to members of the designated groups; but the model of counterfactual meritocracy appealed to in this argument does not support such restrictions. Thus, if preferential treatment is justified as compensation for reductions in competitive ability resulting from past injustice, this policy is also justified as compensation for competitive handicaps suffered by nonmembers as well as members of the designated groups, including whites from impoverished backgrounds. As some defenders of AA concede, racial and sexual discrimination against the specified minorities and women are not the only forms of injustice warranting compensation. Rather, it is "also an injustice," for example, that "poor children," most of whom are white, "are badly educated compared to rich children," an advocate of AA acknowledges. Hence, instead of asking who would have been the best-qualified candidates if the present generation of blacks and women had had a reasonably fair chance to develop their abilities and capacities, proponents of the counterfactual defense of AA should ask, critics can cogently object, who would have been the best-qualified candidates if all nonmembers of the designated groups had also had such an opportunity. Thus, given the model of counterfactual meritocracy, some white males may have claims to preference over not only other white males but also blacks and members of the other designated groups.
The present argument for AA also fails to successfully defend this policy against the objection that it is not a method of adequately compensating members and nonmembers of the designated groups who are genuine victims of past injustice. Individuals who are competitively disadvantaged as a result of past discrimination or injustice have suffered losses or reductions not merely in the ability to compete on equal terms but in the skills and qualifications that enable them to prevail in a fair competition for desirable positions and to succeed or to perform well in these positions. Although AA is purportedly a method of compensating for a particular effect of childhood and later deprivations, it simply discounts and hence does not rectify the lack of, or deficiencies in, the relevant skills that prevent victims of past injustice from competing equally for desirable jobs and college and university places.

Notwithstanding the argument from counterfactual meritocracy, furthermore, AA still fails to satisfy the requirements of compensatory justice governing the compensators. AA remains vulnerable to the objection that it imposes the costs of compensation arbitrarily and treats individual white males unjustly, since it bypasses them in favor of minority-group members and women who are not the counterfactually most qualified applicants for the disputed positions. AA does not displace precisely those individual white males who, the argument claims, stand to benefit from
the effects of past discrimination. Rather, it straightaway displaces and thus imposes the burden of compensation on individual white male job and school applicants without any attempt to establish that these particular white males are better qualified than the minority and female recipients of preference because of past discrimination and prejudice and that they stand to gain positions they would not have had, or probably would not have had, if the preferred minority and female applicants had not been disadvantaged by past discrimination and prejudice. Moreover, in reserving disproportionately large percentages of new jobs for members of the designated groups to yield significantly higher or proportional representation of these groups in the quality jobs in society, AA programs deny positions to individual white male males who clearly are not those who stand to benefit from the lowering of their minority and female rivals' abilities as a result of past discrimination.

A puzzling feature of the defense of AA based on an appeal to the idea of counterfactual meritocracy or counterfactual justice, some writers observe, is that it allows the present generation of white male job and school applicants to bear the entire burden of compensating the designated minorities and women. According to these writers, many white males who are entrenched in their high-level positions, for example, those of doctor, lawyer, scientist, engineer, and tenured professor, have already benefited from the effects of past discrimination, proponents of AA
would presumably agree, at least as much as the currently best-qualified white male applicants will if AA is not practiced. Proponents of the present defense of AA, however, see this point as "largely irrelevant." They appear to believe, these writers say, that minority-group members and women of the present generation ought to be assisted by depriving white male contemporaries who, these defenders of AA claim, would otherwise benefit at the expense of minorities and women. These writers reasonably ask why such symmetry in the distribution of the burden of compensation is desirable and why all compensation should be intragenerational. Intuitively, those who have already benefited from the effects of past discrimination should be required to bear as much of the burden of compensation as those those who were about to benefit before the intervention of AA. Perhaps, these writers suggest, the former beneficiaries of past discrimination should be required to bear more of the burden since they at least have had the opportunity to enjoy and to enlarge their unjustly acquired benefits.

Critics of AA can also reasonably ask why, on the present defense of AA, the distribution of the burden of compensation in AA is restricted on grounds of race, sex, and ethnicity. This defense of AA simply assumes that the individuals who are bypassed in programs of preferential treatment must always be white males. On the model of counterfactual meritocracy or counterfactual justice, however,
members of the specified minority groups and women may be bypassed in favor of unjustly disadvantaged white males.

A policy of AA, then, clearly is different from genuine attempts to put victimized individuals in their rightful places and to restore the competitive position each would have had in the absence of past injustice. In AA, unlike in such attempts, no real efforts are made to identify the specific acts affecting specific individuals that can be pointed to in support of the counterfactual claims that these individuals would have been in a more favorable or unfavorable position were it not for the effects of past injustice. The specific acts establish that injustice and not something else caused these individuals to be in their present position. Further, no facts are adduced about the histories of the particular minority and female applicants preferentially hired, promoted, or admitted and the particular white male applicants denied jobs or college or university places. Hence, the argument from counterfactual meritocracy and the previous arguments for AA are spurious attempts to engender the belief that the particular individuals who receive preference in AA deserve it and the particular individuals who lose out through AA deserve to have these losses inflicted on them. All these arguments in favor of AA, as one critic writes, "leech off a kind of argument in which personal desert plays a crucial role; yet they are offered in defense of preferences which do not discriminate on the basis of
personal desert but on the basis of color." They "try to associate color with personal desert so that racial quotas can be made to look like standard cases of compensation," but "this association won't do."65

The frequently cited analogy of the shackled runner is faulty and thus fails to strengthen the present compensatory defense of AA. To begin with, AA does not attempt to negate the unfair disadvantage or the unfairly imposed handicap, as in the race example, so that the competition will be fair but simply awards the prize to the less-qualified minority or female candidate. There are noteworthy dissimilarities between the AA case and the race example even if the remedy in the race example is to award the prize to the runner who was unfairly handicapped—e.g., by having had a weight tied to his leg or by having had to run a greater distance than his competitors—provided that he finished only a short distance behind the winner. Thus, in the race example, it is known that the runner has been handicapped in a specific way, unlike in the AA case, in which it is not even shown to be likely, probable, or reasonable to think that the minority and female individuals who receive preference have been competitively handicapped by past discrimination and prejudice. Further, the counterfactual judgment in the race example, namely, that the unfairly handicapped runner would have finished first had he not been disadvantaged, is practically certain, critics might agree; but the corresponding counterfactuals in the
AA case, in which the qualifications of the recipients of preferential treatment typically do not approximate those of the white males displaced, are anything but certain. Moreover, the alleged competition in the AA case more closely resembles a race in which the award of the prize is not related to the result of the race and the judges simply award the prize to the contestant whom they regard as most deserving. Unless the allotment of prizes bears a relation to the outcome of the race, a writer remarks, there is no point in running at all, since the prizes could be distributed before the race starts. To give the judges discretion to award prizes to the competitors whom they regard as most deserving "would lead," in the words of another writer, "to inevitable injustices." An example that is more analogous to the AA case involves a race in which a handicap is not imposed on any of the competitors in the race itself and the judges award the prize, not to the white male who wins the race, but to a certain runner, who finishes some distance behind, because he is black. The judges merely assume that the black runner would have finished first if, according to them, his competitive ability had not been diminished by such effects of past discrimination as inadequate diet and nutrition, training, coaching, facilities, equipment, and medical care.

Despite the appeal to the model of counterfactual meritocracy, the present argument for a policy of preferential treatment according to group membership does not
succeed in defending this policy against the noncompensatory objections that AA violates principles of distributive justice and fundamental individual moral rights and that AA is shown to morally unacceptable since relevantly similar policies are morally unacceptable. Thus, policies of giving individual blacks credit for academic grades and honors, levels of job performance, scores on professional licensure examinations, number of votes political elections, and levels of performance in athletic or other contests that AA proponents believe these blacks would have achieved in the absence of past discrimination are relevantly similar to AA and, on the present defense of AA would also be morally justified. For example, a black student who does C work may be awarded an A grade, a black worker who performs below white workers may be awarded a higher performance evaluation than the white workers, and a black who fails a professional licensure examination may be awarded a passing score, this argument implies, because these recipients of preferential treatment would have achieved such levels of performance had they not been disadvantaged by past discrimination and prejudice. Likewise, a black golfer who finishes several strokes behind whites in a tournament may be awarded the victory because, it might be claimed, he would have finished first had he not been denied a fair opportunity to actualize the potential to be as skilled or more skilled than the white competitors.
Problems in applying the model of counterfactual meritocracy in the defense of social policies like AA concern not simply whether the specified counterfactual conditions are satisfied but whether there is even a reasonable possibility or expectation of satisfying them. One problem, some writers say, derives from the notion of compensation, as commonly understood, according to which an individual is fully compensated for some injustice when he is as well off as he would have been had the injustice not taken place. The problem here is that had the injustices against the specified minorities and women not taken place many recipients of preferential treatment probably would not even exist, let alone be most qualified for the affected positions. We cannot use this notion of compensation to rectify injustice from past generations, these writers argue, because the actualization of the specified counterfactual conditions would entail the nonexistence of those minority and female individuals who would have to be compensated.\(^6^9\) "The point this objection makes cannot be gainsaid," an advocate of AA writes. Had "racial and sexual discrimination and stereotyping" never existed, "the middle-class blacks and women receiving preferential treatment would almost certainly never have existed" since their ancestors "would almost certainly never have met." This objection "may be irrelevant, however, since the present argument for AA asks us "to imagine," not "a world without a history of racial and sexual discrimination and stereotyping," but a world
without such discrimination and stereotyping "in the present generation." In this world, "most of the middle-class blacks and women receiving preferential treatment would certainly exist"; and the argument is that "they would be the most qualified for the places and positions they receive in the present world because of preferential treatment."\(^70\)

There are serious problems for an appeal to the model of counterfactual meritocracy, however, relating to the practical impossibility of satisfying the specified counterfactual conditions and substantiating the relevant counterfactuals even if counterfactual justice is interpreted as requiring the identification of the candidates who would have been most qualified, not in a perfectly just world, but in the absence of certain specific injustices affecting the present generation of blacks and women. Thus, "it is unclear whether the candidate who would have been most qualified can be identified," one commentator writes, "with any reasonable degree of probability."\(^71\) Even some advocates of AA concede that it is "uncertain" that "the black beneficiaries of preferential treatment would be the very ones chosen" for "the jobs and places which preferential treatment secures" if "unjust racial discrimination had never happened."\(^72\) Indeed, the detailed knowledge required to determine the individuals who would have been most qualified is, in the words of one commentator, "hopelessly beyond our grasp" and therefore "unattainable."\(^73\) The kinds of
calculations needed to determine which individuals would have been most qualified, not who might have been or could have been most qualified, are exceedingly complex. Given the imperfection of our causal knowledge, officials cannot reasonably determine the identity of the counterfactually most qualified individuals. Officials have both to accurately identify those individuals whose abilities have been reduced by past injustice and to specify the precise degree to which their abilities have been reduced.\textsuperscript{74} Even if we exclude potential applicants and restrict our attention to actual applicants, the process of identifying and selecting those individuals who are counterfactually most qualified for particular positions is unworkable. Officials would have to determine not simply whether but the degree to which the abilities and capacities of minority and female applicants who do not have the highest qualifications within their own group and who do not receive preference have been reduced by past discrimination. Perhaps some of these applicants would have been most qualified in the absence of past discrimination, not the currently highest-ranking minority and female applicants. Indeed, specific injustices affecting job and school applicants who are not members of the designated groups would have to be considered as well. It is not true that only members of the designated groups would have been most qualified for the affected positions if the present generation of members and nonmembers of these groups had had a reasonably fair
opportunity to develop their abilities and capacities. Hence, the goal of restoring the rightful competitive places of particular individuals becomes a practical impossibility.\(^7\)

If officials cannot identify the counterfactually meritorious minority-group members and women, it might be objected, what is the reasonable action to take? Is it to compensate no one and thereby to victimize more extensively the many counterfactually deserving but actually less-qualified minority-group members and women who will be rejected if individuals are hired, promoted, and admitted on the basis of actual qualifications?\(^7\) What a compensatory program should not do, in contrast to AA, is to commit serious injustices against individual white or Asian males by giving preferential treatment according to race, sex, or ethnicity and thus to confer compensatory benefits on middle- and upper-class minority and female applicants, who cannot reasonably or even plausibly be said to be counterfactually meritorious. Abandoning preferential treatment and refusing to confer compensatory benefits on these minority and female job and school applicants do not mean that no one will be compensated and that those who have been competitively disadvantaged as a result of past injustice will be more extensively victimized.

Proponents of the counterfactual meritocratic argument for AA resist the conclusion that in view of the epistemic problems confronting this defense of AA this policy
should be abandoned. One reply is that "it is useful to reflect on epistemically unavoidable risks in other areas of the social system," for example, the criminal justice system, which presents serious risks not only of finding guilty and punishing innocent persons but also of acquitting and not punishing guilty persons. Nevertheless, we regard the risks as worth taking. Hence, we surely are not unreasonable, this reply argues, to implement a program of AA with the attendant risks of unfair treatment, given the lesser chances of injustice and lesser gravity or seriousness of the injustice of rejecting a deserving white male applicant than of punishing an innocent person.

Even if it is reasonable, however, to support the criminal justice system and to regard the risks of injustice here as worth taking, it is not thereby reasonable to implement a policy of AA. In the first place, the difficulties in establishing the relevant counterfactual claims in hiring and admissions cases greatly exceed the difficulties in obtaining enough evidence to know or to be justified in believing that defendants are guilty or not guilty. Further, the chances or risks of injustice in programs of preferential treatment, which in fact prefer particular individuals because they are black or female and therefore assumed to have had their competitive abilities diminished to a certain degree by past discrimination, greatly exceed the risks of injustice in the criminal justice system. Consider the difference in the chances or risks of injustice.
between judging simply whether or not particular criminal defendants are guilty and judging in addition whether, if they are guilty, they would have been guilty had it not been for a history of societal discrimination. Moreover, although the criminal justice system may be indispensable and the risks of injustice here may be unavoidable and worth taking, it is not reasonable to regard the risks of injustice of any system of criminal justice at all as worth taking, for example, a system lacking important rules and procedures to minimize the risks of convicting and punishing innocent persons. Likewise, even if the institution of compensation is indispensable and the risks of injustice here are unavoidable, preferential treatment as a mode of compensation is not indispensable; and therefore the risks of injustice of preferential treatment are not unavoidable. Again, even if the injustice of rejecting a deserving white or Asian male applicant is less serious than that of convicting and punishing an innocent person in the criminal justice system, it hardly follows that the former injustice is not serious and need not be avoided.

Another reply denies that the epistemic problems facing the defense of AA based on an appeal to the idea of counterfactual meritocracy are irresoluble. This reply suggests that the evidence for the truth of the relevant counterfactuals regarding injured parties can include reference to other individuals who were in a similar position at the time of the injuries and have progressed normally.
Consider, for example, a company that institutes a training program for employees admission to which is based on seniority, which, as generally understood, is a privileged status attained by length of continuous service (as in a company). If in the past the company had discriminated against blacks in hiring, it might be argued, the present black employees would have been wrongfully prevented from amassing as much seniority as they would otherwise have had and their white counterparts have. Because admission to the company's program is based not on skill or competence but simply on seniority, an applicant's competitive position could only have been reduced by the past behavior of the company itself, not by past societal discrimination. Hence, the question whether the qualifications of the beneficiaries of the company's program were unjustly reduced is resolvable in advance. Even if it is granted, however, that this reply provides a plausible solution to the pertinent epistemic problems in certain cases of compensation, namely, training program or promotion cases in which simple seniority, not skill or competence or performance, is the criterion of selection, these cases constitute only a limited class. Apart from the question of the justice of the use of seniority as the sole or primary basis for promotion or admission to training programs, this reply is defective in not providing a reasonable solution in the majority of cases, which primarily include hiring and college and university admissions cases involving selection that depends
on competitive test scores and the possession of refined or sophisticated skills and abilities. The question whether the qualifications of the recipients of preferential treatment in these cases were unjustly reduced to the required degree by past societal discrimination and its effects is not resolvable in the relatively easy way the corresponding question in the training program case is. There also are promotion cases in which skill or competence, not seniority, is the sole or primary criterion of selection.

A further reply objects that the problems for the present argument for AA relating to counterfactual calculations and complications "can be shown to be not at all devastating," since "the risk of unfair treatment of white males can be sharply reduced by establishing minimal differentials between better and lesser (yet acceptable) qualifications." Thus, "a black female would perhaps receive the job if she were slightly less qualified than a white male who happens to be the very best qualified." If "the difference" in qualifications is "now very small," it "seems reasonable to suppose that but for unfair, past discrimination the black female would be better." After all, "only a superficial knowledge of racist and sexist injustice in our country is required to show that unfair treatment has been widespread and touched the lives of almost everyone."82 "It would seem," a commentator writes, "that the case for the appointment of the counterfactually most qualified candidate is stronger the closer the actual
qualifications of the competing candidates and the better the qualifications of the candidate who is to receive preference." Rather than solving the problems that involve counterfactual calculations and complications, however, this reply merely assumes that black and female recipients of preference whose qualifications approximate those of the competing white male candidates not only have been touched by racist or sexist injustice but also have had their qualifications and competitive abilities diminished by the effects of past discrimination. Even if it were true that the recipients of preference have been touched by racist or sexist injustice in some way, it would not thereby be true or even probable that they have been competitively disadvantaged by past discrimination and are the counterfactually most qualified candidates; nor does the empirical evidence support these claims. Indeed, the assertion that middle- and upper-class black and female recipients of preferential treatment are only slightly less qualified than the competing white male candidates for the affected positions, especially those requiring a very high level of knowledge and skill, undermines the claim that these black and female candidates have been competitively disadvantaged by past discrimination.

According to another reply, a policy of preferential treatment is justified when it favors or "is directed at" those "women and minority candidates who are highly qualified," whose potential to be as qualified or more qualified
than competing white males "has not yet been actualized because of past discrimination and prejudice," and who "will normally turn out within a reasonably short time to be as qualified or even more qualified" than competing white males when their selection "is combined with a suitably designed educational enhancement program." Critics of preferential treatment are "right in thinking" that we cannot "tell who would be most qualified in a perfectly just society"; but "we do not need to know who are the most qualified in a perfectly just society to carry out a policy of preferential treatment." We have "to know or reasonably believe" only that "if we appoint certain candidates for preferential treatment and put them through a suitably designed educational enhancement program, they would be as qualified or more qualified than the available white male candidates."  

The preceding reply applies, however, not to current AA programs but only to programs of preferential treatment in which the recipients of preference are highly qualified and have qualifications approximating those of the white males bypassed, since the belief that these preferentially selected candidates will become as qualified as or more qualified than these white male candidates is only reasonable, if at all, concerning these recipients of preference. Further, even if it is reasonable to believe that the preferentially selected candidates would improve their qualifications through the suggested educational enhancement
program, it does not follow that they are less qualified than they would otherwise be and are less qualified than the white males bypassed because of past discrimination and prejudice. Proponents of the preceding argument for preferential treatment cannot correctly infer that the preferentially selected candidates have been unjustly disadvantaged from the fact that they are less qualified than the white males who are displaced. Competing white male applicants may also increase their knowledge and improve their qualifications through such an educational program. Indeed, some white male applicants who are less qualified than the preferentially selected applicants, especially those white males from lower-class or working-class backgrounds, may surpass them in qualifications when put through such an educational program. Moreover, some lower-ranking minority applicants are less qualified than they would otherwise be and are less qualified than some preferentially selected applicants because of past discrimination and prejudice, it might be argued; and therefore at least some preferentially selected applicants have actually benefited from past discrimination and prejudice. Proponents of the present defense of programs of preferential treatment simply assume that the preferentially selected applicants have been unjustly disadvantaged, such as through the denial of equal educational opportunities. However, this assumption is undermined by the claim that the preferentially selected candidates are highly qualified and is contradicted by the
evidence that these applicants typically come from advantaged backgrounds.

Advocating a more individualized approach than the current programs of preferential treatment according to group membership, one reply suggests that AA officials refine the list of features that they take to indicate wrongfully or unjustly reduced competitive abilities. One of the possible ways of doing this, this reply claims, is to reduce or to eliminate preferences for blacks and members of the other designated groups who have affluent backgrounds and good education or who have only recently immigrated to this country. This change reduces the risk that the wrong individuals will receive preference, that is, those blacks and members of the other groups who would not have been most qualified in the absence of past discrimination. A significant risk remains, however, since it is not established that the recipients of preferential treatment in the suggested program are victims of past discrimination, let alone that they likely have had their competitive abilities diminished by the effects of past discrimination to the degree that they would now be the most qualified for the affected positions were it not for past injustice. Actual income and class background, when combined with race, might provide a better approximation to those who would have been most qualified; but this approximation is still a distant one, given the persistent problems involving the counterfactual calculations and complications
and the consideration that present disadvantages may result from many causes distinguishable from past discrimination and may be only tangentially related or not related at all to this discrimination.

The foregoing approaches to the defense of AA based on the idea of counterfactual meritocracy do not solve the problems of identifying accurately those individuals whose abilities have been reduced by past discrimination; specifying precisely the degree to which particular individuals' abilities have been reduced; and establishing that the members of the designated groups who receive preferential treatment would have been, or even probably would have been, the best-qualified applicants for the affected positions if not for the effects of past discrimination. Furthermore, these approaches ignore counterfactually most qualified nonmembers of the designated groups and do not resolve the problem of those who would have been best qualified were it not for past societal discrimination or injustice but who now lack the minimal qualifications for the affected positions in AA. Programs of preferential treatment obviously will not restore to counterfactually meritorious individuals who now lack these qualifications the positions they would have had if not for past injustice. Simply claiming that these individuals lack the potential to acquire the requisite level of knowledge and skill and hence would not have been most qualified anyhow does not successfully rebut this objection. Another reply
to this objection is that competitively disadvantaged minority-group members who now lack even the minimal qualifications for desirable jobs and college and university places can be compensated in other ways, for example, through intensive remedial training. Hence, this problem need not be decisive. However, if these individuals can be compensated in ways other than through preferential treatment in employment and admission to educational institutions, critics of AA can reasonably ask why members of the designated groups who have been much less seriously disadvantaged by past discrimination cannot be compensated in other ways as well, such as through less intensive remedial training.

As an alternative to programs of preferential treatment, critics of AA can point out, programs of remedial education and training have the merits that they avoid the problems involving counterfactual calculations and complications and benefit only those individuals who have actually suffered the competitively disadvantaging effects of past injustice, including those who lack the minimal qualifications for desirable positions. Unlike programs of preferential treatment, these programs would not directly benefit particular individuals because they are black, female, or Hispanic; nor would they ignore nonmembers of the designated groups who have been unjustly placed at a competitive disadvantage. Programs of remedial education and training would also conform the degree of remediation to the degree
of unjustly imposed disadvantage. The aim would be to rectify specific competitive disadvantages suffered by individuals, not to ensure that members of the designated groups achieve a certain level of competence or that these groups achieve approximately proportional representation in the desirable positions in society. Once programs of remedial education and training are instituted and competitively disadvantaged individuals are allowed to compete fairly for desirable positions, hiring, promotion, and admissions processes would be conducted on the basis of comparative qualifications. Other candidates would not have legitimate complaints, since no one can justly demand limited or restricted competition. For those victimized individuals who lack the requisite skills and competence for desirable positions and who are no longer able to acquire these skills and competence, monetary compensation, some writers suggest, is perhaps the best alternative.

An important distinction in the present controversy, some commentators note, is the distinction between the justice of individual cases (such as cases of compensation) and the justice of a practice (such as AA). Thus, even if we were to discover that some cases of AA are just, that is, that the individuals given preference in these cases are counterfactually most qualified, it would not follow that the practice of AA is just. The question of the justice of the entire practice is a very different sort of question. In answering this kind of question about a
practice we must consider how many just cases there are (or
would be if the practice were adopted). The clear answer
regarding the practice AA in straightaway selecting
individuals who happen to be the best-qualified female and
minority applicants for the affected position is that, as
critics of AA maintain, such cases are very few at most.
Hence, in awarding positions in nearly all cases to female
and minority applicants who are not counterfactually most
qualified and denying these positions to the actually best-
qualified white and Asian male applicants, the practice of
AA parcels out far more injustice than justice.

Apart from the problem of judging, and finding a
basis for determining, where a given individual would have
been, what he would have had, or what he would have
achieved under different circumstances, there are serious
problems for an appeal to counterfactual justice. One prob-
lem is that there must be limitations on the application of
the notion of counterfactual justice and the principle that
what people deserve depends on what they would have
achieved if they had not been discriminated against and had
been given a fair opportunity. "It seems implausible to
argue," a commentator writes, that, for example, "a profes-
sorship should be awarded to an unqualified individual sim-
ply because that individual would have been most qualified
in a world in which injustice had never taken place." 92
Similarly, it would be unreasonable to insist that an indi-
vidual who has been discriminatorily deprived of a fair
opportunity for a high school education, a college educa-
tion, or admission to professional school should be awarded
a high school diploma, a college degree, or a law or medi-
cal degree, even if he would have, or it is likely that he
would have, obtained these goods in the absence of past
injustice. The principle of counterfactual justice is best
understood as requiring, it might be suggested, that the
goods awarded as compensation should go to the individuals
within the class of victims of past injustice who satisfy
some qualifying condition, such as having minimal qualifi-
cations and competence for desirable positions. 93 The prin-
ciple will not then apply, however, to victims who have
been so seriously harmed that they are unable to satisfy
the qualifying condition.

Another problem, according to some critics, is that
applying the principle of counterfactual justice amounts to
awarding or recognizing the hypothetical but unproven
effort and achievement of a given individual to the same
degree as the real efforts and achievements of other indi-
viduals, and even to giving precedence to so-called hypo-
thetical desert over actual desert. 94 What an individual
might have accomplished if he had been encouraged to make
the effort and had been afforded the facilities and oppor-
tunities "is not, after all, the same as what another actu-
ally has accomplished." 95 The "most obvious flaw" of the
argument for AA that depends on the adequacy of counterfac-
tual claims, one writer remarks, is that it counts one
individual's "possible effort" for "as much as" another individual's "actual effort." Indeed, unless restricted, the appeal to counterfactual justice endorses giving individuals credit for abilities they do not possess; actions they have not performed; efforts they have not made; and honors, grades, and degrees they have not earned through actual effort and performance. Even some advocates of AA concede that, for example, a contestant in an athletic competition who has been unjustly prevented from developing his skills to the fullest should not be awarded the prize in this particular contest, although he may be deserving of or have a valid claim to other relevant forms of compensation, such as a special training program to help him make up for lost time. Since actual effort, performance, and achievement create desert or entitlement in a way that merely possible effort, performance, and so on, do not, preferential treatment to restore precisely the competitive position that individuals would have had if not for the effects of past injustice would not be desirable or acceptable, critics argue, even if it were possible.  

There is a tendency in competitive contests to use the word "desert" in two ways, namely, in the ordinary sense of "worthiness" and in the sense of "qualification," thereby obscuring the important distinction between desert bases and qualifying conditions. In competitive contexts, the desert basis is the preeminent possession of the skill selected as the basis of competition, such as a race or
jumping contest, whereas the qualifying condition is the satisfaction of the conditions for winning or being victorious specified by the rules. Even when this distinction is thus obscured, it is "reintroduced in new language: deserving a prize is distinguished from deserving to win a prize." In contests of skill, the individual who deserves the prize is the one who has demonstrably satisfied the conditions of victory, such as by crossing the finish line first or jumping the highest distance off the ground. The individual who deserves to win is the one who is most skilled, but he may not for some reason be the one who does win. Awarding prizes, grades, and so on, to those who deserve to get them—i.e., those who are most skilled or who possess to the appropriate degree the quality being assessed—instead of those who qualify for them and thus are entitled to them contravenes the controlling rules and is at variance with, rather than required by, justice. Recall that desert is not identical with justice and that justice does not always require that people be given what they deserve, for example, when attempting to bring about the deserved outcome (e.g., that the best athlete wins the race) would have unjust side effects. Justice sometimes demands rule-following, recognition of qualification, and respect for entitlement. Therefore, even if it were granted that what people deserve depends on what they would have achieved if they had been given a fair opportunity and that an individual, such as a recipient of prefer-
preferential treatment in AA, deserves x because he would have achieved it if not for the effects of past injustice and not because he preeminently possesses the skill that is the basis of competition, he would not thereby be entitled to x. Hence, there may be injustice in seeing that he receives it, such as by contravening the rules that specify the victory conditions in competitive contexts like employment and admission to educational institutions.
Notes


4. Ibid.

5. Sher, Desert, 128.


7. Ibid., 68; and Paul, "Affirmative Action."


14. Ibid.


22. Ibid.


25. Ibid.

26. Ibid., 71.

27. See Bowie and Simon, Political Order, 257-58; and Levin, "Reverse Discrimination," 139-40.


37. Ibid., 102.


41. Ibid.

42. Ibid.

43. Ibid.

44. Ibid.

45. Ibid.

46. Ibid.
47. Sher, "Reverse Discrimination," 78.
50. Ibid., 65.
52. Sher, "Preferential Hiring," 54.
53. Ibid.
55. Ibid.
60. Ibid., 101.
61. Ibid.
62. Ibid.
63. Fullinwider, Reverse Discrimination, 246.
64. Ibid.
65. Ibid.
73. Sher, "Preferential Hiring," 53.


75. Sher, "Preferential Hiring," 53.


77. Ibid., 216.

78. Ibid.


80. Sher, "Preferential Hiring," 56; and Mosley and Capaldi, Affirmative Action, 10-11.


85. Ibid., 289.

86. Sher, "Preferential Hiring," 55.

87. Fishkin, Justice, 97.


89. Goldman, Reverse Discrimination, 133.

90. Ibid., 138.

91. Gross, Discrimination in Reverse, 140.


93. Ibid.


95. Ibid., 130.


98. See Sher, "Reverse Discrimination," 76; and Goldman, Reverse Discrimination, 130.


100. Ibid.

101. Ibid.

102. Ibid.

103. Miller, "Desert and Merit."
Chapter 6
The Pragmatic Justification of AA

Appealing to considerations of convenience and efficiency, one compensatory argument for AA maintains that whether or not all blacks and members of the other designated groups have been harmed by past discrimination, enough of them have been to make it administratively efficient to prefer applicants according to race, sex, or ethnicity. Likewise, even if not all white males have benefited from past discrimination against the specified minorities and women, enough of them have to make it administratively efficient to impose the burden of compensation on white male job and school applicants. Just as "it is not feasible" to base a program of compensation on "the demonstration that specific individuals have been harmed by discrimination," so "it is infeasible" and unnecessary "to base it on showing that specific individuals have benefited from discrimination" or have benefited "more than others," given that a high proportion of the group whose members are made to pay compensation, for example, white males, have benefited from past discrimination. Hence, proponents of this argument for AA may admit that the congruence between compensation and degree of victimization or between burden of compensation and degree of unjust benefit is not perfect; but they argue on the basis of administrative efficiency that it is convenient to allow group membership to function as a stand-in for the degree of injury and the degree of unjust benefit.
In the present, nonideal state of affairs, some proponents of AA claim, "it is highly unlikely that ideal principles of compensatory justice can or should be applied. Matters are just too complex to permit case-by-case treatment." Consider, for example, "the factors that might have to be weighed" in "providing reparations to African Americans on an individual basis":

Compare, in this context, the circumstances of a Mississippi sharecropper, a Harlem welfare mother, a Fisk University professor, a successful jazz performer, an unemployed young man living in a Chicago slum, a political leader in Detroit, and a kindergarten child in a predominantly white suburban school. Each would have to prove the amount of his or damages as an individual. . . . An attempt to individualize the compensation awarded in a program of black reparations would have to weigh so many imponderable elements that . . . the recoveries might in the end be more capricious than accurate.

The problems in verifying that particular individuals have harmed in specific ways by discrimination, whether directly or indirectly, are insurmountable, these proponents of AA insist. "We cannot demonstrate the particulars of most cases" of discrimination, a proponent of AA says. Another advocate of AA writes, "Overt discrimination on an individual basis is difficult and often impossible to prove; this is why the notion of 'pattern of discrimination' has been so important legally." Since "most discrimination has been covert, institutional, customary," she further writes, "no evidence of a specific act of overt discrimination may be available, for often no such event occurs." Hence, requiring "a specific determination of past discrimination against
a specific individual," AA defenders hold, has "the effect of imposing such a high standard of proof" that "very few cases, if any, will satisfy the standard." Expectedly, many who really deserve compensation will not receive it. Further, the "outrageous" proposal that ideal principles of compensatory justice should be applied in the present case, an advocate of AA insists, "places the onus of proving harm from past discrimination squarely on the shoulders of the individuals concerned." Applying ideal principles of compensatory justice "would require" that "each individual's case should be investigated separately in order to discover the harm that he or she has suffered," and hence that to receive compensatory benefits individuals come forth and prove prior discrimination and desert of compensation. The focus on conformity with ideal principles of compensatory justice places an "almost unbearable burden on the resources of an individual to provide sufficient, precise data" documenting discrimination. "Individual blacks and women do not, for the most part," a proponent of AA writes, "have time, money, confidence or know-how to engage in such investigations."

Instituting a compensatory program that is in accord with abstract or ideal principles of compensatory justice and that is administered on an individual basis, some proponents of AA assert, would be not only impractical but also too costly. Thus, "the bureaucracy that would be required to verify and evaluate claims would dwarf the huge bureaucracy
that already exists"; and "the overwhelming cost of undertaking an investigation of the circumstances of everyone who may have suffered discrimination, including all blacks and women," an advocate of AA writes, "is sufficient alone to guarantee that the state would never undertake it."15

Influenced by such considerations as the seemingly irresoluble problems and difficulties in handling compensatory claims on an individual basis, some proponents of AA argue that compensation should be made on a group basis. Advocating a pragmatic justification of AA in nonideal situations, they argue that given the statistical premise that "almost all" blacks or members of the other designated groups "have been victimized by discrimination" or "have suffered significantly from discrimination," we are justified pragmatically in acting as if all blacks or members of the other groups have been victimized.16 Group-based programs, which "are probably the only effective and administratively feasible way" to provide compensation to blacks and the other designated groups, are justified "in terms of the injuries that almost all of the recipients have suffered—not in terms of the race of the recipients."17

To elucidate the preceding claim, proponents of the present argument for AA distinguish between the justifying and administrative bases for a program.20 The justifying basis for a program is "the characteristic which is the reason for having the program," and the administrative basis is "the characteristic which is used by administrators to
decide who is to be served by the program." Thus, the justifying basis for a program of reparations "would be the injuries that many blacks suffer and the special needs that many blacks have because of discrimination." The administrative basis for distributing the program's benefits would be a characteristic, such as race, which is "easier to detect" than these injuries and needs and is "highly correlated with the justifying basis." These proponents of AA assume here that "it is sometimes justifiable for reasons of administrative efficiency to use as part of the administrative basis for a program a characteristic such as race which would be implausible as a justifying basis." The justification of preferential treatment for blacks and the other designated groups, the present argument claims, derives from the administrative feasibility of this program in comparison with the high cost and impracticality of administering a program on an individual basis in accordance with ideal principles of compensatory justice.

Although there is only a high correlation between being black, for example, and having suffered harm from past discrimination and deserving compensation and thus preferential treatment for the group will occasionally result in undeserved benefits for individuals—"the correlation between being selected as a remedial affirmative action candidate and suffering harm from the relevant past discrimination must be somewhere around 95 percent"—the balance of justice, it is argued, favors such treatment. "The viable
alternatives seem to be either award of deserved compensation in the great majority of cases and occasional undeserved benefit" or "compensation on an individual basis, which would require demonstration of past injustice in court or before a special administrative body," it is said, "so that the cost and difficulty of the operation would result in far fewer awards of deserved reparation." "To have compensation which is only almost always deserved" is "better" than to have "a program which in practice would amount to almost no compensation at all, so that a policy which would not be accepted in an ideally just world ... becomes best in the present situation." "

In reply to the objection that AA is unjust in the distribution of compensatory benefits, proponents of the pragmatic justification of AA allow that the use of a gross criterion—i.e., a characteristic that, although irrelevant in itself, is useful as a statistical indicator of a relevant characteristic28—like race as an administrative basis results "in a certain degree of unfairness," that is, "in a certain degree of both over- and underinclusiveness." The administrative basis is overinclusive "if the justifying basis is a characteristic which occurs in fewer individuals than the characteristic which is the administrative basis." The administrative basis is underinclusive, on the other hand, "if the justifying basis is a characteristic which occurs in more individuals than the characteristic which is the administrative basis." Proponents of the pragmatic
defense of AA admit that "programs designed to help victims of discrimination" benefit some individuals who have not been harmed by discrimination and do not benefit some individuals who have been. These advocates of AA maintain, however, that the use of race as an administrative basis "does help to decrease administrative costs so that more resources can be directed to those in need." The residual unfairness of this use of race can be outweighed, they claim, by the increase in the efficiency of the distribution of compensation.

According to the argument that AA constitutes reverse discrimination (RDA), AA is unjust because it is discriminatory. Since the original discriminatory practice directed against a victimized group was unjust because it was based on possession of an irrelevant characteristic, such as race, and therefore since it is unjust to deny a benefit or impose a burden on someone because of possession of an irrelevant characteristic, this argument holds, it must also be unjust to give members of this group favored treatment because of possession of that same irrelevant characteristic. Hence, AA is unjust because it is based on possession of the same irrelevant characteristic on which the original discrimination was based. The practice of AA is continuing to treat or to use "the morally irrelevant as if it were relevant" and is "still engaging in discrimination, albeit reverse discrimination." The RDA is intended to rebut the self-contradictory, inconsistent thinking in the compensatory
justification of AA.\textsuperscript{36} The self-contradiction or inconsistency results from condemning as unjust the original treatment of blacks, as well as women and Hispanics, because it was based on possession of a morally irrelevant characteristic and, in the name of compensation, approving of programs of preferential treatment, which award positions to some individuals and deny them to others on the basis of that morally irrelevant characteristic.

In response, some defenders of AA deny that this policy is based on or grounded in the possession of the same irrelevant characteristic that was the basis for past discrimination.\textsuperscript{37} The basis for extending special benefits to a black man now because of past discrimination against blacks, they claim, "is not that he is a black man, but that he was previously subject to unfair treatment because he was black." Although "the former characteristic was and is morally irrelevant," they say, "the latter characteristic is very relevant if it is assumed that it is desirable or obligatory to make compensation for past injustices," Therefore, since extending "special considerations to those who have suffered from discrimination need not involve continuing to treat a morally irrelevant characteristic as if it were relevant,"\textsuperscript{38} AA is not unjust because it is discriminatory. Hence, "since race is not the basis for compensatory programs" and "is not held to be relevant in defending compensatory programs," these advocates of AA argue, "there is no inconsistency in condemning racial discrimination while
favoring compensatory programs for blacks" and "no inconsistency with the original claim that race is irrelevant to how people should be treated."³⁹

However, the preceding reply does not undermine the RDA or the charge of contradiction or inconsistency. "Being previously subject to unfair treatment because he was black" is a complex expression incorporating two clearly distinguishable components, "being previously subject to unfair treatment" and "because he was black." The first component provides the basis of compensation, and the second component provides the basis of discrimination. The reason that a person was discriminated against or unjustly treated is not what properly grounds compensation but simply the fact that, and the extent to which, he was discriminated against or unjustly treated.⁴⁰ Black persons are owed compensation because they were discriminated against or unjustly treated, not because of any fact relating to their race. Furthermore, AA in fact explicitly uses racial, sexual, and ethnic classifications in extending special benefits to blacks and other group members indiscriminately and not just to those individuals who were previously subject to unfair treatment.

The proponents of the pragmatic justification of AA reply to the RDA and the charge of contradiction or inconsistency not only by "denying that race is the justifying basis for compensatory programs" but by insisting that race is the administrative basis for such programs. Because "there will be a high correlation between being black and
having suffered" the "losses and needs resulting from slavery and discrimination," these proponents of AA argue, they "can allow, without inconsistency, that race can serve as part of the administrative basis for such a program."41 However, even though the proponents of the pragmatic defense of AA deny that race is the justifying basis for compensatory programs, the characteristic of race, along with the characteristics of sex and ethnicity, still is the basis on which quality jobs and college and university places are allocated to individuals in AA programs. The use of these characteristics in the past in hiring and admissions to deny positions to individuals is generally condemned as unjust and morally unacceptable; but the present use of these characteristics to award positions to some individuals and to deny them to others is, according to AA supporters, morally acceptable.

A policy that is defended as a way of compensating for past discrimination should conform to the requirements of compensatory justice; but AA dismisses them. AA is not justified on grounds of compensatory justice even if the appeal to group membership in a compensatory policy may be administratively justified under certain conditions, for example, when a high proportion of members of a group have been victimized and when this appeal results in an increase in efficiency, that is, when it channels resources more efficiently and conveniently.
The argument that we are pragmatically justified in implementing a policy of AA relies on the statistical premise that almost all blacks, as well as members of the other designated groups, have suffered harm from past discrimination. A proponent of this argument writes that "in a case where one is distributing something as important as educational and employment opportunities, and where one is using racial classifications to do so, one would probably want to say that there must be a very high correlation" between group membership and harm from past discrimination. However, proponents of AA have to provide empirical evidence to substantiate the statistical premise; that they think this premise is obviously true is not sufficient. Furthermore, the correlation between group membership and harm from past discrimination for the designated groups may be quite different. For example, this correlation presumably is not as high for women or Hispanics as it is for blacks. Moreover, blacks, along with the other designated groups, can be divided into various subgroups, such as lower-class, middle-class, and upper-class blacks; and the correlation between group membership and harm from past discrimination for these subgroups may also be quite different. Thus, this correlation presumably is not as high for middle- and upper-class blacks or Hispanics as it is for lower-class blacks or Hispanics. Race and poverty, deprivation, psychological difficulties, and scarcity of available opportunities correlate more highly and more accurately than race
alone with unjust treatment. Hence, even if the statistical premise were true, the relevant question in assessing the claim that a policy of AA is pragmatically justified would be whether the correlation between group membership and harm from past discrimination is high for the subgroups containing only the recipients of preference in AA. However, since AA awards preference to group members indiscriminately and since selection in hiring and admissions still depends on relative qualifications and past opportunities for acquiring qualifications and skills, the recipients of preference for quality or higher-level jobs and places in colleges and universities are likely to be those who come from relatively advantaged, not disadvantaged, backgrounds and who thus are less likely to have suffered harm from past discrimination. For these individuals, the correlation between group membership and having suffered harm from past discrimination is not likely to be high.

As a policy of compensation, AA is not simply over- and underinclusive to some degree in extending special benefits according to group membership. In using the characteristics of race, sex, and ethnicity as administrative bases, AA not only ignores group members who have been severely harmed by past discrimination but also explicitly excludes nonmembers who have been harmed by discrimination or injustice, including some white males. Hence, proponents of the pragmatic argument for AA seriously minimize or underestimate the so-called residual unfairness of AA. They also erroneously
claim that this unfairness can be outweighed by the increase in the efficiency of the distribution of compensation resulting from the use of race and the other characteristics as administrative bases. The declared rationale for adopting the administrative approach is to channel resources to the victimized more efficiently, but AA does not achieve this goal. Indeed, when there are significant numbers of members and nonmembers of the designated groups who have been severely harmed by discrimination or injustice and when assistance is not provided to those individuals who have the strongest compensatory claims, as in AA, there will be a decrease in efficiency. The use of race and similar characteristics as administrative bases does not channel resources to the victimized more efficiently.

To deal with the problem of overinclusiveness, a defender of a race-based policy of compensation might suggest that easily identifiable racial criteria continue to be used for reasons of convenience and efficiency but that they be supplemented with other identifiable characteristics to raise the correlation between group membership and harm from past discrimination. He might suggest that "by adding criteria conjunctively we could raise the correlation between the justifying and administrative bases for the policy as high as we wish or as justice demands." For example, rather than directing a policy toward all blacks we could direct it toward blacks from families with incomes below a certain level or from certain geographical areas. However,
raising the correlation between the justifying and administrative bases by narrowing the specification of the group designated to receive preference "until virtually all members have been treated unjustly, amounts to administering a program on an individual basis." Officials will have to determine not only whether individuals belong to the narrowly specified group but also whether virtually all individuals within that group have suffered harm from past discrimination. Even for those individuals within the narrowly specified group whose incomes fall below a prescribed level, the correlation between group membership and harm from past discrimination need not be very high, since people may have low incomes for reasons other than discrimination. When the group is sufficiently narrowly specified, completing the necessary investigations will be as administratively inefficient and as difficult or complex, critics observe, as immediately using the justifying basis itself and administering a program on an individual basis.

A possible remedy for underinclusiveness, it is suggested, would be to add disjunctive clauses that include other gross criteria, for example, being "black or Chicano or Puerto Rican or Filipino or American Indian." This proposal to expand the use of gross criteria, however, will not ensure or even make it probable or likely that unjustly treated individuals who belong to groups in the expanded list will receive benefits. A suggested remedy for the underinclusiveness of programs that use lists of groups
claimed to be disadvantaged or victimized as selection criteria would be to allow victimized individuals who do not belong to any of the listed groups to apply for compensation by "presenting a documented claim." However, if compensatory claims in these cases, which would admittedly require individual investigations, can and should be evaluated on an individual basis in accordance with ideal principles of compensatory justice, critics will question why the claims of members of the listed groups cannot or should not be similarly evaluated.

Contrary to the pragmatic defense of AA, a program of compensation that is administratively based on the characteristics of race, sex, and ethnicity is not the only viable group-based alternative to a compensatory program administered on an individual basis. Thus, "it is far from clear" or "it is by no means self-evident," some commentators write, that AA is "the best policy from an administrative standpoint" or that "classification by race, sex, or ethnic background is any more efficient or easier to apply than alternative classifications based on," for example, "some index of income, educational, and health deficiencies." Such an alternative approach "would provide compensation to seriously deprived members of all groups," including deprived whites, since "there is likely to be a high correlation between serious deprivation and being treated unjustly, at least in the affluent countries." Such an approach "seems morally more acceptable and no less
efficient" than AA.

In claiming that abstract or ideal principles of compensatory justice are not applicable in present, nonideal situations, proponents of the pragmatic defense of AA exaggerate the costs and the difficulties of implementing a compensatory program administered on an individual basis. Thus, there already are agencies, departments, boards, and commissions that investigate and handle individual claims, such as the Equal Employment Opportunity Commission (EEOC) and the Civil Rights Division of the Justice Department. Indeed, in a wide variety of contexts, including employment, education, social security, health care, welfare, pay, taxation, and the civil and criminal justice systems, institutions, agencies, departments, and commissions evaluate individual claims in allocating benefits and burdens. Hence, applying ideal principles of compensatory justice and administering a compensatory program on an individual basis would not require the creation of an additional huge bureaucracy or involve an overwhelmingly and unacceptably high cost for the state and would not place an almost unbearable burden on the resources of an individual, such as by having to hire investigators, to prove harm from past discrimination. Furthermore, information about the socioeconomic and educational backgrounds of specific individuals—e.g., that they come from middle- or upper-class families and have attended quality or even academically selective and socially exclusive schools—can provide evidence that they have not been
victimized or disadvantaged by past discrimination. There also are types of evidence of harm from past discrimination other than racial, sexual, and ethnic characteristics that provide a solider and more adequate basis for compensation, that are not insuperably difficult to show or to prove, that do not reduce to such gross criteria as income and geographical area, and that are not limited to specific acts of overt discrimination. Thus, information that an individual was forced to attend a racially segregated, grossly inferior school can furnish evidence of harm from past discrimination and can provide grounds for appropriate compensation. In addition, documentation that a company with regular openings for positions requiring only a fixed level of competence has in the past hired few or no members of a particular minority group, conjoined with information that a certain individual is a member of this minority group and applied for a job in this company, can provide evidence of harm from past discrimination and grounds for compensation. To be strong or compelling, however, the evidence of injury or harm from past discrimination that includes the actual figures of employment for the specified minority groups must be supplemented with data about the availability of these groups, the willingness of members of these groups to accept this employment, and the objective qualifications of those group members who were able and willing to apply.

There are several prominent examples of large-scale reparations programs administered on an individual basis.
"The most interesting historical example" is the program of reparations to Jews victimized by the Nazis that was instituted in West Germany after the Second World War. "Under this program large numbers of individual Jews received direct cash payments to compensate for the losses they had suffered under the Nazi regime." Individual Jews "were eligible to receive payments if they could demonstrate damage to health, reduction of income, loss of freedom, property losses, or impairment of professional or economic advancement." In certain circumstances, "dependents of those killed by the Nazis also received compensation." Imagine, by contrast, a reparations program that made payments to Jews indiscriminately, including wealthy American Jews. The difficulties of administering a program of compensation on an individual basis are more than offset, some writers insist, by the advantages from the point of view of justice of avoiding such unpalatable consequences. A more recent example is the program of reparations to Japanese Americans interned with great loss of property during the Second World War.

Proponents of the pragmatic justification of AA minimize the difficulties or exaggerate the ease of identifying and verifying group membership and of administering a program of compensation on a group basis. There are problems of definition and proof of membership in the groups designated to receive preference. These problems involve stating with precision the criteria for membership in a preferred
minority group and determining which individuals are members. Thus, difficulties arise over whether individuals must have a certain percentage of minority ancestry (e.g., if one black grandparent is sufficient to establish blackness, is one black great-grandparent also sufficient?), must have a certain culture or geographic origin, or must be easily identifiable as a minority-group member to be eligible for preference. The implementation of preferential programs requires that such lines be clearly drawn. An instructive illustration is the case of a California contractor who received millions of dollars in set-aside contracts for minority-owned businesses despite being only one sixty-fourth American Indian. Further, individuals from Spain or of Spanish descent, sometimes those merely having a Spanish surname, and sometimes non-Spanish Europeans who come from countries having the Spanish culture are included as AA candidates; but those of Portuguese or Brazilian origin, for example, are excluded. In addition, "it does seem likely," one commentator remarks, "that a readily identifiable black would have suffered more . . . from discrimination than one who looks white." Problems also arise over whether "newly immigrated Africans, Haitians, etc.," should be included as AA candidates, given that the justifying basis of AAs "past harm from discrimination." Proponents of the pragmatic justification of AA claim not only that the demand that we identify the specific individuals harmed by discrimination is impractical but also
that the claimed requirement of ideal compensatory justice
that compensation match or equal the losses, injuries, or
harm suffered is impractical.\(^7\) This requirement assumes
incorrectly, these proponents of AA maintain, that it is
possible to quantify all losses or harms or to quantify in
monetary terms the value of the losses of a limb, an eye or
eyesight, reputation, family members, or life; the losses
involved in pain or suffering; or the loss of years of a
per's life or a lifetime of discrimination (when he was
wrongfully imprisoned or discriminatorily denied a decent
job or professional career).\(^5\) What constitutes just compen­sation for such losses or harms? Monetary payments cannot
adequately make up for such losses or harms, it is claimed.\(^6\)
However, the difficulty of assigning monetary value to cer­
tain kinds of nonmonetary harm or the absence of exact cri­
teria for measuring such harms in allocating compensation
for them "is not a good reason for not having some sort of
compensatory policy."\(^7\) or for concluding that no compen­
sation is owed and "should never (and does not on court) bar
payment of some compensation,"\(^8\) the proper determination of
which is guided by ideal principles of compensatory justice,
such as the principle that "individuals should be compen­sated differentially in proportion to past harm."\(^9\) For cer­
tain kinds of injury or harm, monetary payments cannot pro­
vide full compensation; but they can provide the best com­
pensation available.
In defending the administrative use of race to dis­pense compensatory benefits and to impose the burden of com­pensation, the present argument for AA makes the empirical claim that almost all white males have benefited from past discrimination against the specified minorities and women. However, the present argument for AA does not substantiate this claim. That proponents of this argument believe this claim is true or think it obviously true is again insuffi­cient. Like the universal premise that all white males have benefited from past discrimination, the statistical premise must be defended by argument; but neither the universal premise nor the statistical premise is supported by the empirical evidence. Even if it were true that a high per­centage of white males have benefited from past discrimina­tion, AA would not thereby be pragmatically justified. White males can also be subdivided into various groups, such as lower-class, working-class, middle-class, and upper-class white males; and the correlation between group membership and benefit from past discrimination for these subgroups may be quite different. Thus, "it seems more likely," one writer asserts, that "whites who are already well-off and have comfortable jobs" are "the ones who have benefited" from past discrimination; but predominantly younger and working-class and lower-class whites are the ones who "bear the brunt of AA." Moreover, in punishing or penalizing and in general acting in a negative way toward classes of people, some writers note, we consider it unacceptable to
act even on high correlations. There is a recognized moral asymmetry between positive and negative action on the basis of group correlations, such as racial or ethnic ones. We regard it as more objectionable morally to impose a penalty on an individual on the basis of group correlations than to confer some benefit on an individual on the basis of such correlations. Certainly, we would consider it morally repugnant to punish or to penalize every member of a racial or ethnic group or group members indiscriminately simply because a high proportion of group members committed some crime or immoral act.

Some critics of the attempted justification of AA that appeals to the distinction between the justifying and administrative bases for a program argue that this defense of AA can be refuted, undermined, or discredited by analogy. Thus, "by parallel reasoning it can be argued that the original discrimination was not on the basis of a morally irrelevant characteristic. Racists do not discriminate against blacks simply because they are black" but because, racists claim, "blacks as a class are inferior in certain relevant respects." Reasoning similarly to the proponents of the pragmatic defense of AA, racists could attempt to justify their discriminatory practices by contending that they treat blacks differently, not on the morally irrelevant characteristic of race, but on the basis of morally relevant characteristics that are associated or correlated with being black, for example, such undesirable characteristics or
traits for employment or higher education as the lack of
cognitive skills or abilities and the lack of industrious-
ness and reliability. For racists, then, it might be
claimed, race is the administrative basis for their differ­
tential treatment of blacks and is correlated with some char­
acteristic that is the justifying basis for such treatment.
Critics maintain that if the proponents of the present
defense of AA can argue that race is not a justifying basis
racists can too. However, since this argument obviously will
not work for racists as a way of showing they do not dis­
 criminate, critics conclude, it will not work for these
defenders of AA either.

Asserting that "for differential treatment to be dis­
 criminatory (and unjust for that reason) it is necessary
that it be based on an irrelevant characteristic or on a
false claim about the correlation between characteris­
tics," proponents of the pragmatic defense of AA argue
that the racists' position rests on false assumptions or
beliefs about a high correlation between race and some
undesirable characteristic or relevant deficiency. Hence,
these AA proponents' counterargument proceeds, they can
deploy the justifying-administrative basis distinction with­
out making an equally good defense available to the
racists.

Problems arise for proponents of the pragmatic justi­
fication of AA, however, when the characteristics of race,
sex, and ethnicity are statistically correlated with
characteristics that are relevant to job or academic performance. Gains in administrative convenience and efficiency can pragmatically justify policies that appeal to statistical correlations supported by the empirical evidence; that use race, sex, or ethnicity to assign benefits and costs; and that disadvantage minority-group members or individual women. Thus, an employer may refuse to hire women or may give preference in hiring to men as warehouse workers on the basis of the correlation between gender and lack of physical strength—i.e., because he believes correctly that most women are unable to lift the heavy boxes stored in the warehouse—and the high costs of evaluating every applicant individually relative to the probability of finding qualified women. Further, a company that had reliable information that a high proportion of black or Hispanic workers in a certain industry were frequently absent or performed unsatisfactorily on the job, that blacks or Hispanics generally have inferior aptitudes to whites for supervisory positions, that the costs to the company of inadequate supervisors were great, and that the costs of conducting individual inquiries were significant in relation to the probability of finding qualified blacks or Hispanics would be pragmatically or administratively justified in adopting a policy of preference for whites in hiring and promotions. Also, given the statistical generalization that 73 percent of blacks and only 34 percent of whites fail to graduate within five years and the high costs of
extensive individualized consideration or evaluation of applicants, a university would be administratively justified in preferring whites in admissions. Hence, the differential treatment of individuals, including members of the designated groups, on the basis of such features as race, sex, and ethnicity can maximize profits and cost savings when the cost of such treatment is "lower than the transaction cost of evaluating candidates on an individual basis." Indeed, the "failure to engage in statistical discrimination can cost firms a lot of money." Policies that are administratively justified on grounds of convenience and efficiency need not rely on high correlations between characteristics. For example, companies charge lower automobile and life insurance rates for women because women have a lower risk of accidents on average than men and tend to live longer than men. Likewise, "if there are differences in accident rates and life expectancy between whites and blacks, as there are," companies would be administratively justified in taking this fact into account in charging insurance rates.

As critics of the pragmatic argument for AA point out, administrative convenience and efficiency have not been accepted as legitimate reasons for imposing special burdens on the designated minorities and women. The exclusion of those blacks and members of the other designated groups who do not have the undesirable characteristic or relevant deficiency is considered too high a price to
pay for administrative efficiency. "Personal injustices to competent blacks and women could not be rationalized in this way," one commentator writes. Although, according to proponents of AA, administrative convenience and efficiency do not justify disadvantaging minority-group members or individual women, critics of AA deny that administrative convenience and efficiency are good enough reasons for disadvantaging individual white males or anyone because of race, sex, or ethnicity. Policies and practices that use these characteristics as statistical indicators of the absence of qualifications are morally objectionable even when the characteristics of race, sex, and ethnicity are statistically correlated to some degree with characteristics that are relevant to selection for positions. Such policies and practices are also legally objectionable, for example, an employment practice of using race or ethnicity as a criterion for hiring drivers when some racial or ethnic groups have significantly higher rates of alcohol abuse. Such policies and practices are, one commentator remarks, "obviously unfair" to those applicants belonging to the groups "who do not have the problem at issue." They violate the right to treatment as an individual in treating persons differently, not in virtue of the persons' own possession of the relevant deficiency, but in virtue of the persons' membership in a group that on average or disproportionately possesses this deficiency. Persons are entitled to be compared with others on the basis of individual characteristics they
and the others actually possess and not on the basis of characteristics attributed to the groups they and the others are members of.

Policies that are defended on grounds of administrative convenience and efficiency can be morally objectionable even when they exclude or disadvantage individuals on the basis of characteristics other than native ones like race, sex, and ethnicity. Thus, suppose that a university discovers not only that the presence in an applicant's background of a family mired in poverty for generations and a father who lacks a university education is "an excellent predictor of academic failure" but also that verifying the presence of these factors in particular cases "actually is less costly" than administering an admissions test. "We surely would think it unfair," a commentator says, if a university "eliminated from consideration" candidates who come from families mired in poverty for generations and whose fathers lack a university education. Like policies that use race as an administrative basis, this policy is unjust in not evaluating candidates on the basis of their individual possession of the relevant skills and abilities.

There are morally acceptable policies in college and university admissions, it might be objected, that, "on grounds of administrative ease or efficiency, employ statistical correlations between characteristics of applicants, which are considered as credentials, and actual qualifications for performance in positions. Thus, "it is not
necessarily objectionable" for a professional school to refuse to consider candidates with grade point averages below 3.0 and test scores below a certain minimum on the grounds that "80 percent of those admitted" with grades and test scores below these levels "would fail to do well at the graduate level and that designing more extensive individualized tests, while perhaps more predictive, would involve prohibitive administrative costs." However, the administrative basis, that is, academic credentials, and the correlations used in normal admissions policies are very different from the administrative bases and the statistical generalizations or correlations used in administratively convenient and efficient but morally and legally objectionable policies, for example, that a high percentage of blacks fail to do well at the graduate or professional school level. Credentials correlate with subsequent academic performance because they, unlike race, are direct measures or indicators of an individual's possession of the skills and abilities relevant to successful academic performance. An individual in the group of those having grade point averages and test scores below certain levels lacks or is deficient in these skills and abilities, according to academic indicators, and is highly likely to fail to do well at the graduate or professional school level.

"Efficiency in administering large-scale programs often requires," some AA defenders insist, "that detailed investigations of individual cases be kept to a minimum, and
this means that many allocative decisions will have to be made on the basis of gross but easily discernible characteristics." The "degree of unfairness," that is, the "degree of both over- and underinclusiveness," that may result "would probably not be an intolerable one from the perspective of fairness and efficiency." 103 "Most classifications used in legislation are both over- and underinclusive to some extent," these AA defenders assert; "and the importance of having clear boundaries that are administratively workable," such as a maximum income in a poverty program, "requires that some looseness be tolerated." 104 It is impossible, other writers say, to formulate rules of eligibility for benefits for any social program that will not irrationally include some unintended beneficiaries and exclude some intended beneficiaries. 105 However, even if large-scale social programs—such as a poverty program or a health program that inoculates everyone in a community to eliminate a disease which "60 percent of the people have but which is difficult to detect except in advanced stages" 106—ineluctably result in a minimal or tolerable degree of unfairness, AA programs result in a degree of unfairness or injustice that is neither minimal nor tolerable. Unlike morally acceptable large-scale social programs, AA programs do not simply assist more than those who have the characteristic that is the justifying basis or assist all those who have this characteristic and only occasionally assist those who do not. Further, AA programs treat individuals unjustly in
distributing the costs.

In determining whether AA is morally justified, we have to recognize, some advocates of AA emphasize, that if there is a difference "between sacrificing justice to efficiency in order to right a wrong and making a similar sacrifice for efficiency's sake alone." It is crucial to understand, they insist, that the approach adopted in AA programs, with its use of the characteristic of race as an administrative basis, must be construed as having "moral as pragmatic force." The point of adopting the pragmatic approach in AA programs is "to minimize injustice by providing compensation to a high proportion of those who are entitled to it" with only occasional undeserved benefit and by imposing a less costly and "less severe burden on the rest of the community than would implementation of ideal principles of compensatory justice." Given that the high cost and impracticality of implementing ideal principles of compensatory justice and administering a compensatory program on an individual basis will result in "far fewer awards of deserved reparation," it is less unjust "to award compensation that is deserved in almost all cases than to have a program that in practice would amount to almost no compensation at all." According to a variant of the preceding argument for AA, even if AA results in injustice, compensatory considerations are overriding. If we abandon AA, it is likely that no compensation will be made at all. The choice is not between
an ideally just compensatory policy and a relatively unjust one but between the latter and no compensation at all.\textsuperscript{109}

The claim that "the pragmatic approach cuts costs of administration is indeed initially plausible," one commentator writes; but the claim that "it minimizes injustice as well is far more controversial and thus requires significant additional support."\textsuperscript{110} Indeed, in using race as an administrative basis and dispensing benefits to group members indiscriminately, AA increases rather than minimizes injustice by conferring compensatory benefits on a high proportion of group members who are not entitled to them while disregarding members and nonmembers of the designated groups who are entitled to them and by unjustly imposing the burden of compensation on individual white (and Asian) males. Hence, since there are feasible alternatives to AA which are, even if not ideally just, far less unjust than AA, we can reject the claim that alternative programs in practice would amount to almost no compensation at all or that with the abandonment of AA it is likely that no compensation will be made at all.
Notes


3. Ibid.


17. Ibid., 33.


20. Ibid.


23. Alan H. Goldman, "Reparations to Individuals or Groups?" in Affirmative Action Debate, ed. Cahn, 35.
26. Ibid.
27. Ibid.
30. Ibid.
31. Ibid., 148.
32. Ibid.
33. Bowie and Simon, Political Order, 259.
34. Ibid., 256-57.
38. Ibid.
41. Nickel, "Compensatory Programs," 147-48
46. Bowie and Simon, Political Order, 259-60.
47. Goldman, Reverse Discrimination, 97.
48. Ibid.
49. Ibid.
51. Ibid.
52. Ibid.; and Goldman, Reverse Discrimination, 97-98.
54. Ibid., 341.
55. Rowan, Conflicts of Rights, 108.
56. Bowie and Simon, Political Order, 260.
57. Rowan, Conflicts of Rights, 108.
58. Bowie and Simon, Political Order, 260.
59. Ibid.
62. Ibid.
66. Ibid., 100.
69. Ibid., 174; and Goldman, Reverse Discrimination, 98.
70. Tomasson et al., Affirmative Action, 177.
71. Ibid., 177-78; and Taylor, Good Intentions, 136-37.
72. Goldman, Reverse Discrimination, 98.
73. Ibid.
74. Velasquez, "Compensatory Justice."
76. Velasquez, "Compensatory Justice."
78. Goldman, Reverse Discrimination, 75.
80. Rowan, Conflicts of Rights, 113.
82. Gross, Discrimination in Reverse, 87.
84. Ibid.; and Goldman, Reverse Discrimination, 100.
87. Ibid.
88. Goldman, Reverse Discrimination, 100.
89. Nickel, "Discrimination"; and Goldman, Reverse Discrimination, 100.
90. Posner, "Preferential Treatment," 21; and Fullinwider, Reverse Discrimination, 75.
91. Williams, "Campus Racism," 38.
92. D'Souza, End of Racism, 278.
93. Jencks, Rethinking Social Policy, 45.
95. Ibid.
97. Goldman, Reverse Discrimination, 100.
98. Jencks, Rethinking Social Policy, 44.
99. Ibid.
101. Ibid.
105. Mosley and Capaldi, Affirmative Action, 89.
Chapter 7
Overriding Rights

The relationship of indebtedness holds between the community, not white males, and the specified minorities and women, another defense of AA claims. The community is justified in adopting a policy of AA and thus in imposing the burden of compensating these minorities and women on white male applicants in order to pay its debt, this defense of AA argues, even if we grant that the white male applicant has a right to an equal chance at such benefits as the community has available for distribution to the members and hence "has a right to an equal chance at the job." Thus, even without the assumptions that white males are not innocent, that they are responsible for the past injustices, or that have benefited from these injustices, the community can justifiably exact a sacrifice from white male applicants by overriding or setting aside their relevant rights in order that it can pay the debt of compensation it owes. The community as a whole is responsible for the past injustices since the discriminatory practices against the specified minorities and women were not limited to isolated, private actions but were widespread and public as well. This defense of AA therefore rests on the contention that the debt of compensation is owed to blacks, the other designated minorities, and women by the community and that the existence of this debt provides the justification of AA, even though this policy
involves overriding or setting aside certain rights of white male applicants.\(^5\)

To opt for a policy of preferential treatment as compensation, the present argument for AA stresses, "is not to make the young white male applicants themselves make amends for any wrongs done to blacks and women." Under this policy, "no one is asked to give up a job which is already his." Rather, "the job for which the white male applicant competes isn't his, but the community's, and it is the hiring officer who gives it to the black or woman in the community's name." Proponents of this argument concede that "the white male is asked to give up his equal chance at the job." However, "that is not something he pays to the black or woman by way of making amends; it is something the community takes away from him in order that it may make amends." Nevertheless, since the community "is able to make amends for its wrongs only by taking something away from him, something which, after all, we are supposing he has a right to," the "community does impose a burden on him."\(^6\)

Sometimes a right can be overridden without this being a violation, that is, without injustice, the present argument for AA holds. Thus, an advocate of AA writes:

\[
\text{Now it is, I think, widely believed that we may, without injustice, refuse to grant a man what he has a right to only if either someone else has a conflicting and more stringent right, or there is some very great benefit to be obtained by doing so—perhaps that a disaster of some kind is thereby averted.}
\]

However, if these are the only grounds for overriding rights, "then there really is trouble for preferential
hiring," proponents of this argument for AA acknowledge. "For what more stringent could be thought to override the right of the white male applicant for an equal chance?"

Moreover, "what great benefit" is obtained or "what disaster" is averted "by declaring for the black or the woman straightaway"? "But in fact," these defenders of AA insist, "there are other ways in which a right may be overridden," for instance, to pay a debt.

The present defense of AA offers two examples which are supposed to be cases of overriding a right without injustice to pay a debt of gratitude and to be analogous to the community's overriding white male applicants' rights to pay a debt of compensation to blacks, the other minorities, and women. The first example involves an eating club which by majority vote gives one member, Smith, preferential seating privileges for six months out of gratitude for his services to the club. That is, if Smith and another club member arrive at the same time and there is only one table available, Smith gets it first. Like Smith, the other club members have "a right to an equal chance at such benefits as the club has available for distribution to the members"; however, "there is no injustice in a majority's refusing to grant the members this equal chance, in the name of a debt of gratitude to Smith." The second example involves veterans' preference (VP). The federal government and forty-seven states give preference to veterans who take the civil service examination. The federal government and
most states simply add ten points to the scores of disabled veterans or their wives and five points to the scores of nondisabled veterans. Seven states give absolute preference to those veterans who pass the examination. \(^{13}\) "Suppose two candidates for a civil service job have equally good test scores," a proponent of AA writes, "but that there is only one job available. We could decide between them by cointossing." However, "in fact we do allow for declaring for \(A\) straightaway, where \(A\) is a veteran, and \(R\) is not." She, along with other proponents of AA, argues that "on the assumption that the veteran has served his country, the country owes him something"; and "it seems plain that giving him preference is a not unjust way in which part of that debt of gratitude can be paid."\(^{14}\)

The second example is important and much more fitting than the first example, some commentators remark, because giving preference to veterans in employment is structurally the same as giving preference to blacks and the other groups in employment. \(^{15}\) Thus, in both cases a factor not directly related to job performance is an employer's criterion of selection. Further, VP is established by law, and proponents of AA believe that it ought to be mandated or approved by law. Moreover, VP is justified as a way of paying a debt of gratitude. Giving veterans preference in public employment is the way the country can repay and honor them for their contribution. AA is justified, proponents of AA hold, as a way of paying a debt of compensation to
blacks and the other designated groups. Again, in both cases persons assumed to be innocent bear the burden of the community's debt.\textsuperscript{16} Hence, just as veterans legitimately receive preference in public employment as payment for services they have performed for society, so can the specified minorities and women be justifiably given preference in employment and admission to educational institutions.\textsuperscript{17} Since programs of preferential treatment as compensation to blacks and the other designated groups are analogous to special hiring considerations for veterans, proponents of AA argue, AA is justified if VP is. If we regard preference for veterans as justified, we should similarly regard racial preferences as justified.\textsuperscript{18} Hence, those who approve of and support VP but disapprove of and oppose AA are inconsistent. Consistency requires that those who approve of and support VP approve of and support AA.

However, the examples of overriding a right to pay a debt of gratitude that the present defense of AA offers are not analogous to the community's overriding white male applicants' rights in order to pay a debt of compensation to blacks, the other specified minorities, and women and hence do not provide convincing support for the claim that important rights, such as the rights of white male applicants, can be overridden, set aside, or discounted without violation or injustice.\textsuperscript{19}

In the eating club example, the deprivation caused club members by preferential seating privileges for some club members is a mere inconvenience or trivial burden, that is,
waiting a few minutes until another table is available; and
the supposed right of club members to an equal chance at
such benefits as the club has available for distribution to
the members is weak and trivial. This right is overridden
whenever the club distributes available benefits without
randomizing among all club members. By contrast, the depre­
vation imposed on white males by AA is not a mere inconve­
nience or trivial burden, and the rights at stake in the AA
case are not weak or trivial. The right to an equal chance
at the job, which proponents of the present argument for AA
say they are supposing the white male applicant has, derives
from the weak and implausible right of every member of the
community to an equal chance at such benefits as the commu­
nity has available for distribution to the members. Thus,
"there are cases," these proponents of AA concede, in which
a member of the community "may, without the slightest impro­
priety, be deprived of this equal chance," for example, the
hiring of university faculty members. "For it is plainly not
required that the university's hiring officer decide who
gets the available job by randomizing amongst all the commu­
nity members . . . who want it." Indeed, the supposed
right to an equal chance is routinely overridden in the dis­
tribution of benefits available to the community since such
distribution often does not randomize among all community
members, as in regular hiring and admissions procedures.
Further, these proponents of AA themselves claim that "the
university's student customers" have "rights to good teach­
teaching" and that these rights "are surely more stringent than each member's right (if each has such a right) to an equal chance at the job."\textsuperscript{22}

Since the supposed right of the white male applicant to an equal chance at the job is weak and easily overridden, the same right of blacks and members of the other designated groups is as well. Violations of this right are not serious or urgent, and the case for compensating victims of these violations is correspondingly weak. Even if such rights as the right to an equal chance at a job may be overridden in certain circumstances, for example, to pay a debt of gratitude or compensation, it hardly follows that more stringent rights may be overridden in the same circumstances and hence that AA is justified in overriding the fundamental individual moral rights of white male applicants. Critics of AA can reasonably ask whether proponents of the present argument for AA are prepared to say that there would be no injustice in setting aside or discounting such rights of individuals as the right to fairness in the criminal justice system, the right to an equal vote, and even the claimed right to continue in jobs they occupy in order to pay a debt of gratitude to veterans or, in the case of this claimed right, to make more jobs available more quickly to the specified minorities and women. Critics of AA can also reasonably ask whether these proponents of AA would agree that the rights of university student-customers to good teaching may not be overridden to pay a debt of
gratitude or a debt of compensation and that the preferen-
tial hiring of veterans or minorities as teachers in the
university is unjust, since, these proponents of AA also
claim, a university "does not merely act irrationally, but
indeed violates the rights of its student-customers if it
does not" provide "the best teachers it can afford." 23
Another question for these defenders of AA is whether they
would be prepared to say even concerning the eating club
example that some rights of club members may not be overrid-
den to pay a debt of gratitude.

Contrary to the present defense of AA, it is not plain
that VP is not unjust. This defense of AA relies on the
standard legal acceptance of VP as evidence that it clearly
is not unjust; but, as some commentators point out, the
legal acceptance of VP is predicated on the assumption that
there is no right to equal opportunity or equal considera-
tion in public employment. 24 In the absence of such a right,
"the state has little difficulty in justifying, at least
legally, the use of preferential hiring to 'reward those
veterans who . . . have served their country in time of
war.'" 25 However, the legal acceptance or permissibility of
VP is not decisive for the moral assessment of this program.
That VP is not unjust is not plain if we assume or accept
that each job applicant has a moral right to equal opportu-
nity or equal consideration. 26 Given that there are rights
of this sort, preference given to veterans is morally objec-
tionable on the grounds that it violates the rights of those
bypassed. Therefore, since the present defense of AA does not establish that in the VP case individuals' rights are overridden without injustice, the second example offered does not support the allegedly analogous claim that white applicants' rights are overridden without violation or injustice.

What is important and noteworthy about arguments against AA, according to one commentator, is that similar arguments are not made more frequently against other policies and programs that embody the AA model, such as VP. Americans reject AA "because it is a violation of cherished principles of equal opportunity and meritocracy"; but, this commentator notes, "outright employment preferences" for veterans who take the civil service examination—"which, ironically enough, was designed to ensure merit hiring"—are "enshrined in federal and state law." Those who condemn AA as a violation of cherished principles but approve of VP are inconsistent, therefore, since not only racial preferences but veterans' preferences violate these principles.

To the criticism that AA extends preference to well-off or undeprived minority-group members and women at the expense of white males who are worse off or are disadvantaged, proponents of the present defense of AA respond that opting for a policy of AA "may of course mean that some black or woman is preferred to some white male who as a matter of fact has had a harder life than the black or woman" or who "may be financially less well off" than the black
or woman given preference. "But so may opting for a policy of veterans' preference mean that a healthy, unscarred, middle class veteran is preferred to a poor, struggling, scarred, nonveteran." Employment preference is sometimes given to "veterans who are more affluent than the nonveterans who are thereby excluded from jobs." Indeed, "opting for any policy other than hard-life preference," such as a policy advocating a random procedure of drawing straws or tossing coins," may also mean," a defender of AA says, "that in a given case the candidate with the hardest life loses out." Hence, "that a white male with a specially hard history may lose out" under a policy of AA "cannot possibly be any objection to it. . . ." Just as a policy of VP can justify hiring an affluent or a middle-class veteran over a poor, lower-class, struggling nonveteran, defenders of AA argue, so can AA justify hiring a relatively undeprived member of one of the designated groups over a more disadvantaged nonmember of these groups.

The relevant objection to AA, however, contends not simply that AA directly benefits members of the designated groups over nonmembers who have had a harder life but that AA confers compensatory benefits primarily on group members who have not been harmed by past discrimination or have not suffered its disadvantaging effects, even by displacing some nonmembers from poor or lower-class backgrounds who may themselves be victims of discrimination or injustice. If the stated reason for giving preference in employment to
an individual who is a veteran is simply that he performed a
certain service for the country, preference should be given,
as in VP, to anyone who is a veteran and who thus performed
this service. Likewise, if the stated reason for giving
preference to blacks, the other minorities, and women is
that they have been harmed by past discrimination or have
been unjustly treated, preference should be given, unlike in
AA, only to those who have been so harmed or treated and to
anyone who has been similarly harmed or treated.

Some writers critical of AA believe, one proponent of
AA claims, that "'veterans' benefits proceed under the plau­
sible assumption that all veterans have been disadvantaged,
at least by loss of time and consequent lack of advancement
in their jobs."

If critics of AA who approve of VP assume
that all veterans have been disadvantaged or regard VP as
"'repayment for unpleasant services rendered by all veter­
ans,'" this proponent of AA questions whether these critics
of AA have "forgotten the rear-echelon warriors who got a
soft deal" or "profited but eluded detection" and asks
why, "if they are willing to generalize about veterans,"
thy are "unprepared to believe that every nonwhite citizen
who has spent much time in the trenches over here must have
experienced plenty of unfairness." However, VP directly
benefits individuals who are known to have served in the
military, whereas AA awards preferences to blacks and mem­
ers of the other designated groups indiscriminately and
directly benefits individuals who, according to the
empirical evidence, have not suffered the disadvantaging effects of past discrimination. Veterans are given preference in employment, supporters of VP maintain, because they performed a unique and vital service for the country, which is potentially hazardous, involves a loss of freedom, and often involves economic and material sacrifice. More sophisticated critics of AA who also approve of VP do not assume that all veterans have had a hard life or have had to perform difficult, unpleasant, or dangerous tasks. A veterans' programs more analogous to AA is one that purports to benefit veterans who have been disabled or seriously injured or have served in combat but that in fact primarily benefits veterans who do not satisfy the stated conditions of eligibility to receive benefits.

Conceding that AA imposes the burden of making amends for the injustice done to blacks and women on white male applicants by denying or setting aside their rights, proponents of the present defense of AA themselves raise the question why these individuals should "pay the cost of the community's amends-making." On AA critics' formulation, the question is, What justifies the community in setting aside white male applicants' rights to pay a debt or to fulfill a duty of compensation to minorities and women that it has? The mere fact that the community has a debt or duty of compensation does not justify it in taking any action it pleases to discharge the debt or to fulfill the duty, given that there are moral constraints on the actions and policies
of the community and on what it may do to achieve its goals, including the discharging of its debts.\textsuperscript{37} Even proponents of the present argument for AA would presumably reject some methods or means of discharging community obligations, for example, dismissing nonveterans from jobs and awarding them to veterans and giving veterans special treatment in political elections or in the criminal justice system. Hence, these proponents of AA do not provide an adequate basis for setting aside or discounting white male applicants' rights as a means of discharging the community's debt of compensation to minorities and women. "Debts of gratitude and compensation," one commentator writes, "do not standardly legitimize overriding anyone's fundamental rights."\textsuperscript{38}

Rather than directly addressing the problem of the defense of the claim that the community's debt of compensation justifies it in overriding or setting aside white male applicants' rights, proponents of AA assert:

If there were some appropriate way in which the community could make amends to its blacks and women, some way which did not require depriving anyone of anything he has a right to, then that would be the best course of action for it to take. Or if there were any way some way in which the costs could be shared by everyone, and not imposed entirely on the young white male job applicants, then that would be, if not the best, then anyway better than opting for a policy of preferential hiring.\textsuperscript{39}

"But in fact the nature of the wrongs done is such as to make jobs the best and most suitable form of compensation," proponents of the present argument for AA claim. "What blacks and women were denied was full membership in the community," they insist; "and nothing can more
appropriately make amends for that wrong than precisely what will make them feel they now have it. And that means jobs."\(^{40}\)

If the preceding response of AA defenders is an endorsement of the principle that a group may override or set side the rights of its nonculpable members in order to pay the so-called best and most suitable form of compensation, their response fails. This principle will not withstand critical examination\(^ {41}\) even if it is granted that the best form of compensation matches, unlike in AA programs, the specific injury or loss suffered. Suppose, for example, that X has stolen "a rare and elaborately engraved hunting rifle" from Y and that the rifle is later lost or destroyed. A can pay Y "the best form of compensation" by giving him Z's rifle, which is "one of the few other such rifles in existence" and perhaps "the only other model in existence"; but "this is clearly not a morally justifiable option."\(^ {42}\) Solely in virtue of his debt to Y, X is not required or permitted to take Z's rifle to give to Y. The rifle is not X's to give, and nothing about the fact that X owes Y justifies X in taking it.\(^ {43}\) A more fitting example is that when some community officials steal a rare and expensive item of property from a community member that is subsequently lost or destroyed, the community's rectifying or making amends for this injustice by expropriating an item of property from another community member is morally impermissible. Hence, establishing what is the best form of compensation does not
thereby determine what is the morally appropriate form of compensation or the morally permissible means of payment available to the debtor. 44

Proponents of the present defense of AA do not regard overriding the rights that white males, as well as others, are said to have to continue in jobs they occupy as a morally acceptable mode of compensation, even though dismissing white males from jobs they hold would be a way of paying the best form of compensation by making more jobs available to minorities and women more quickly. Their response to the problem of defending the claim that the community's debt of compensation justifies it in overriding white male applicants' rights implies that this option would be justified. Their response also implies that, contrary to other views hold, a university's overriding the rights of student-customers to good teaching in preferentially hiring minority and female faculty members is a way of paying the best form of compensation and is therefore morally acceptable.

Even if it is granted, then, that jobs are the best and most suitable form of compensation from the point of view of the recipients, it does not follow that AA is a morally justified form of compensation. As some critics point out, those being compelled to pay compensation have claims that have to be considered. In particular, they have a claim not to be singled out to pay the costs of compensation when they are neither perpetrators nor beneficiaries of past injustice. 45 Furthermore, in setting aside or discounting
the rights of white male applicants to pay compensation, the community is paying compensation "in stolen coin," that is, "with something that does not belong to it,"\textsuperscript{46} just as the community does when, as in the earlier example, it expropriates an item of property from a nonculpable member to compensate for the theft and loss or destruction of a rare and expensive item of property by some community officials. Therefore, since proponents of AA do not convincingly and successfully argue that a group may override the rights of its nonculpable members to pay the best form of compensation, they fail to show that AA is not unjust. Sometimes the community may have to institute a form of compensation that is not the best and most suitable form from the point of view of the recipients in order to avoid doing injustice to those compelled to pay the costs, such as distributing the costs evenly among the entire community.\textsuperscript{47}

A suggested reply to the foregoing argument against AA is that it "rests on the covert and undefended assumption" that the white male applicant's right to equal opportunity or equal consideration is "more important" than the black, female, or Hispanic applicant's right to compensation. The foregoing argument against AA rests "on the fact that such a policy overrides (and thus violates) someone's rights"; but, this reply maintains, "someone's rights will be overridden both by the adoption of a policy of preference and by the non-adoption of such a policy."\textsuperscript{48} In the present case, the rights of the white male and black applicants are in
conflict. To adopt AA is to override the white male applicant's right to equal opportunity or equal consideration, and to refuse to adopt AA is to deny the black applicant's right to compensation. However, even if it is granted that a right can be justifiably overridden by a more stringent right, the present reply founders since there is not a genuine conflict of rights here and the argument against AA does not rest on the assumption in question. There would be such a conflict if the black applicant's right to compensation were a right to anything from anyone that would remedy his loss and if preferentially awarding a job or university place were the only means of compensating him. The black applicant and the better-qualified white applicant each would have a claim to the same resource, the job or university place, but only one claim could be accommodated. However, not only is preference in hiring or admissions not the only way of compensating a member of the designated groups, but also the black, female, or Hispanic applicant's right to compensation is a "right against the community to be compensated by whatever resources the community may legitimately offer." If, as critics of AA maintain, preference in employment or admissions violates the white male applicant's right to equal opportunity or equal consideration, such preference is not a morally permissible item for the community to offer and thus is not within the scope of the resources the minority or female applicant can justifiably claim as a matter of right. If proponents of AA intend to
argue that there is a conflict of rights in the present case and that the relevant rights of white male applicants can be justifiably overridden, their argument is vulnerable to the objection that it rests on the undefended assumption that the black, female, or Hispanic applicant's right to compensation is more stringent and more important than the white applicant's rights to equal opportunity and equal consideration.

Even if programs of preferential treatment merely handicapped the qualifications of minority and female applicants, such as by adding points to their scores on a competitive examination, instead of simply reserving positions for them, these programs would still be morally objectionable in discriminating against white male applicants and violating their rights. Furthermore, even programs of minimal AA, that is, those that extend preference only to minority and female candidates when they and their white male competitors are equally qualified, are unjust. These programs are not morally justified even under this restrictive condition, which is at most only rarely met for positions entailing open-ended qualifications, such as university teacher or other profession, in contrast to jobs involving relatively unskilled labor and some set of minimal qualifications, such as assembly-line worker. Such programs, as one commentator writes, "are far from trivial in their implications, since they substantially affect the probability that members of other (nonminority) groups will be chosen." Instead of an
equal chance in such cases, white males "must lose out." They "must do better than equally well in the competitive process" to "gain a position." If minimal AA is instituted rather than some random procedure, white males will be automatically and unfairly excluded from some position which they might have obtained under the random alternative. Consider people's reaction to minimal preference when it is practiced against rather than in favor of the specified minority groups and women. For example, if an employer consistently refused to hire equally qualified blacks, or a university consistently refused to admit equally qualified blacks, this practice "would constitute objectionable discrimination," as one commentator remarks, "even if he were willing to hire blacks when they were more qualified than their competitors." Hence, even when preference for some racial groups over others takes this minimal form, "we still rightly consider it discrimination."56

The argument that the community is justified in adopting a policy of AA and overriding white male applicants' rights to pay its debt of compensation to the designated minorities and women incorrectly implies that a policy of preference and overriding the rights of white males can be justifiably extended to contexts beyond hiring and admissions in which members of the designated groups were denied full membership in the community or suffered the effects of this denial, such as academic grading and the awarding of degrees, the awarding of professional licenses,
the allocation of scarce medical resources, voting and the awarding of elective political offices, and the criminal justice system.

Rather than defending preference for minorities and women according to group membership, one view argues that a policy of preferential treatment and overriding the rights of individuals to jobs is justified "for all those individuals discriminated against in the past in hiring or promotion" and thus denied jobs they "otherwise would have received." Individuals acquire "prima facie" rights—i.e., rights which are "subject to exceptive clauses for compensatory and distributive reasons" relating to "the rule for hiring the most competent"—to "various positions by satisfying the rule through their efforts." The principle that "victims of injustice generally should be compensated" must "take precedence" over "further application of the distributive rule." Specific suspensions of further application of this rule are required "until those who formerly deserved positions but were denied them are compensated in kind by being granted the positions as they open up." Thus, "distribution of positions is kept as consistent as possible through time with the distribution that would have resulted from continuous application of the principle." Hence, "the apparent violations" of the distributive rule "for compensatory reasons, rather than being truly inconsistent with the application" of this rule, are "necessary to its maintenance." The present view defends opting for the claims
of past victims over the competing claims of the most qualified by asserting that "once a person has legitimately acquired a position, he does not lose his right to continue occupying it is someone else with slightly better qualifications becomes available." Since "according to the continuous application of the relevant distributive rule the past victim of discrimination should have been occupying a position in the organization from the time at which he first applied," this view holds, "no opening should be thought to exist in the present at all, so that there is nothing for which the white male can legitimately apply." The job in question "belongs to," or "is already owed to," the "past victim of discrimination, as it should have belonged to him from the beginning, and so the new applicant must wait for the next genuine opening."62 The preceding argument fails to establish, however, that a policy of compensatory preference is morally justified even for those, such as blacks and women, discriminated against in hiring or promotions. First of all, this argument does not effectively answer the objection that this policy unjustly distributes the burden of compensation since it extracts payment of compensation not from the culpable institution that owes compensation but from a nonculpable individual by denying him a quality job. Proponents of this argument reply that this individual "is not being asked to pay from his present holdings, to give up anything that is already his."66 However, this reply is also made by
some defenders of AA; and just as a minority victim of past
discrimination in hiring or promotions suffered a serious
loss even though he was not forced to give up anything that
was already his, so the nonculpable individual passed over,
such as a white male applicant in AA, suffers a serious
loss by being prevented from attaining a quality job or
even a career. Some proponents of this argument concede
that when "literal restoration in kind can not be achieved
(or should not for other reasons of justice)," another form
of compensation may have to be accepted "as second
best." Also, the rights at stake in a policy of preferen-
tial treatment are not prima facie rights to a job but fun-
damental individual moral rights that govern and apply to
not only the context of employment but also the context of
admission to educational institutions and other contexts as
well.

Furthermore, the present argument for compensatory
preferential treatment fails to show that the principle of
compensation must take precedence over further application
of the distributive principle because applying the former
principle in a program of preferential treatment does not
keep the distribution of jobs as consistent as possible
through time with the distribution that would have resulted
from continuous application of the distributive principle.
The victim of preferential treatment is denied the position
he would have had under continuous application of the dis-
tributive rule; and the job that allegedly belongs to and
is awarded to the victim of past discrimination is not the position he would have had under continuous application of this rule.

Moreover, the present argument for compensatory preferential treatment does not establish that the principle that a person does not lose his right to continue occupying a position he has legitimately acquired if someone else with slightly better qualifications becomes available is applicable to cases of compensation, and that the preferentially awarded job belongs to the recipient because it should have belonged to him from the beginning. This job is not a position that he has legitimately acquired and has a right to continue occupying; not is it the position that he should have been occupying from the time at which he first applied. Jobs are not like commodities or commercial products that are distributed on a first-come, first-served basis. For the unjust denial of a product, or the sale of a defective product, to a shopper, a morally acceptable remedy may be to reserve the next product for this shopper even though another shopper is denied the opportunity to purchase the item that is reserved and must wait for the next available item. The principle appealed to in this argument for preference, in any event, does not apply to cases of preference, like many cases of AA, in which the individuals denied jobs have more than merely slightly better qualifications than the recipients of preference. There also are jobs, such as places on professional athletic
teams and jobs which involve contracts that are renewable after a certain time, which an individual does not have a right to continue occupying.

Finally, the present argument for compensatory preference does not provide a remedy for discrimination in admission to educational institutions or in other contexts. The place awarded in preferential admissions, for instance, is not a position that, the proponents of this argument can even plausibly claim, the past victim of discrimination should have been occupying from the time at which he first applied or belongs to him, "as it should have belonged to him from the beginning." Also, is this argument implying that just as an individual "denied a job when more qualified than all others" should now be "given a job when less qualified," so, for example, an individual denied an award for achievement, such as in the cinema or in science, when most deserving, should now be given such an award when less deserving than others or an individual convicted of a crime when innocent should now be acquitted of a crime when not innocent?
Notes

2. Ibid., 54, 57.
3. Ibid., 56.
7. Ibid., 68.
8. Ibid.
9. Ibid.
10. Ibid., 56-58.
11. Ibid., 56-57.
12. Ibid., 57.
15. Fullinwider, Reverse Discrimination, 47.
16. Ibid.
17. Simon, "Preferential Hiring," 64.
20. Ibid., 46.
22. Ibid.
23. Ibid., 52-53.
24. Fullinwider, Reverse Discrimination, 47.
25. Ibid., 48.
26. Ibid.
27. Skrentny, Affirmative Action, 37.
29. Ezorsky, Racism and Justice, 79.
31. Ezorsky, Racism and Justice, 79.
33. Simon, "Preferential Hiring," 64.
35. Ibid., 145-46.
38. Ibid., 224, n. 26.
40. Ibid.
42. Ibid.
43. Ibid., 87-88.
44. Ibid., 88.
48. Fullinwider, Reverse Discrimination, 49.
49. Ibid., 48-49.
50. Ibid., 49.
51. Ibid.
52. Ibid.


54. Fishkin, Justice, 86.


56. Fishkin, Justice, 86.

57. Goldman, Reverse Discrimination, 120.


60. Ibid., 68.

61. Ibid., 66.

62. Ibid., 126.

63. Ibid.

64. Mosley and Capaldi, Affirmative Action, 25.

65. Goldman, Reverse Discrimination, 126.

66. Ibid., 121.

67. Ibid., 74-75.

68. Ibid., 122.
Chapter 8
AA as Group Compensation

Dissatisfied with the previous, individual-oriented arguments for AA and maintaining that the preceding examination of AA has failed to understand the meaning of the compensatory justification of this policy, some proponents of AA abandon the individualistic interpretation of the compensatory justification in favor of the group interpretation and argue that AA is intended to yield compensatory justice for groups rather than individuals. These proponents of AA claim that discrimination was practiced against the group and therefore the group should be compensated. Preferential treatment in AA is justified as compensation for the past discrimination and injustice blacks and the other designated groups suffered as groups and the present, lingering effects of past injustice these groups suffer. On the group interpretation of the compensatory defense of AA, this policy is intended to benefit individuals as members of the designated groups, that is, qua members of the victimized groups and not qua individuals. Hence, according to the group interpretation, AA favors individuals, not on their own behalf, but on behalf of the groups to which they belong.

In thus shifting attention from consideration of individuals to consideration of groups, the present argument for AA construes the moral issue in the AA debate not as one of individual rights and individual compensation but as one of group rights and group compensation. Given the shift from
individual to group compensation, defenders of AA maintain, the compensatory justification of AA on the group interpretation avoids the serious problems and objections that beset the individualistic interpretation, namely, those concerning the investigation of the circumstances of individuals and those based on fairness or justice to individuals. Thus, since compensation is owed to the group, according to the present approach, the problem of identifying individual blacks who are victims of discrimination is beside the point; it is group claims, not individual ones, that have to be weighed. AA programs do not have to identify individuals who have been unjustly treated. Hence, AA avoids the objection that it does not mandate or even recommend finding out whether the individual recipients of preference have actually suffered any injustice that would warrant compensation for them. Furthermore, any members of the group can be justly offered special benefits as compensation. The objection that AA arbitrarily discriminates in favor of some group members thus becomes irrelevant. Moreover, the group-based defense of AA shows clearly why special benefits may be extended to current group members who have not themselves been discriminated against or harmed by discrimination. The right of the victimized group to compensation is satisfied merely by affording advantages to group members indiscriminately. This defense of AA also eliminates the requirement of compensating individuals according to the degree to which they have been unjustly treated and avoids the difficulty of
saying how particular individuals would have fared in the absence of past injustice. Again, since compensation is owed to the designated groups as such, defenders of AA can readily acknowledge that some individual white males may have stronger compensatory claims than some individual blacks, women, or Hispanics.

Wanting "to give direct moral status to the defining characteristics of wronged groups," for example, being being, female, or Hispanic, proponents of the present defense of AA argue that "special help" to groups as such "can be justified in terms of a principle requiring reparations to wronged groups." According to one variant of the present argument for AA, this principle of compensatory justice asserts that "in order to restore the balance of justice when an injustice has been committed to a group of persons, some form of compensation or reparations must be made to that group." Thus, "if there has been an established social practice (as distinct from an individual's action) of treating any member of a certain class of persons in a certain way on the ground that they have characteristic C" and "if this practice has involved the doing of an injustice to C-persons," this variant says, "then the principle of compensatory justice requires that C-persons as such be compensated in some way." The "victim was the class of C-persons as a group, since they were the collective target of an institutionalized practice of unjust treatment." "When there has been institutionalized discrimination against
persons who have a certain morally irrelevant characteristic," this variant claims, "the effect of this principle is make this characteristic relevant for purposes of repara-
tions." Although possession of characteristic C is morally irrelevant to how persons should be treated, it has become relevant because of the application of the unjust discriminatory practice itself. Characteristic C, in other words, for example, being black, has become "a characteristic whose moral relevance is entailed by the principle of compensatory justice." Since the characteristic which defines the group is essentially tied to the discriminatory social practice, given that "the injustices done to a person are based on the fact he has characteristic C," "reparations must be made available to all who have this characteristic."

Since "characteristic C is morally relevant to how C-
persons are to be treated if compensatory justice is to be done to them," the "policy of extending special benefits, opportunities, or advantages to the class of C-persons as such" is "justified." Even an individual C-person who "was not himself one of those who suffered injustice as a result of the past social practice" nevertheless has "a right (based on his being a member of the class of C-persons) to receive the benefits extended to all C-persons as such." Programs of compensation are "not directed toward any 'assignable' individual (to use Bentham's apt phrase), but rather are directed toward any member of an 'assignable' group (the class of C-persons) who wishes to take advantage
of, or to qualify for, the compensatory benefits offered to the group as a whole.\textsuperscript{17}

Proponents of the preceding variant of the group-based compensatory argument for AA conclude that critics' assumption that compensatory justice applies to the relations of individuals to other individuals but not to organized social practices and whole classes of persons "completely disregards what, morally speaking, is the most hideous aspect of the injustices of human history: those carried out systematically and directed toward whole groups of men and women as groups." Even if society "provides for compensation to each member of the group, not qua member of the group but qua person who has been unjustly treated . . ., it is leaving justice undone," since society is "denying the specific obligation it owes to, and the specific right it has created in, the group as such" through its past use of membership in the group "as a ground for unjust treatment. Whatever duties of justice are owed by individuals to other individuals, institutionalized injustice demands institutional compensation."\textsuperscript{18}

Another variant of the group-based compensatory justification of AA claims that "by using the characteristic of being black as an identifying characteristic to discriminate against people, a person has wronged the group, blacks." Given that "people have an obligation to give reparations to groups they have wronged," this variant argues, "he thus has an obligation to make reparations to the group." According
to this variant, "since the obligation is to the group, no specific individual has a right to reparation"' but "since the group is not an organized one like a state, church, or corporation, the only way to provide reparations to the group is to provide them to members of the group."19

The counterfactual version of the group-based compensatory argument for AA maintains that AA is justified as a means of compensating blacks, women, and Hispanics as groups for the present, lingering effects of past discrimination and injustice by placing these groups in the position they would have been in were it not for past injustice. This variant claims that the gross underrepresentation of the designated groups in the desirable and elite positions in society is a legacy of past racial, sexual, and ethnic discrimination and that in the absence of this discrimination blacks and the other designated groups would have higher, that is, approximately proportional, representation in the quality jobs and places in colleges and universities.20 Compensatory justice demands, this variant holds, that victimized groups be placed in the position they would have enjoyed in the absence of previous injustice. AA satisfies this demand by approximating what AA advocates estimate the proportions of the designated groups would be in various job categories and college and university places, such as places in professional school, if past discrimination had not taken place.
An alternative formulation of the counterfactual variant of the present argument for AA maintains that AA is justified as a means of benefiting the previously discriminated-against groups because they were unjustly deprived of their fair, that is, proportional, shares of society's goods. AA satisfies the requirement of compensatory justice that these groups be restored their fair shares of the desirable positions in society.21

When injustice to a group has resulted from a discriminatory social practice, the obligation to compensate the group, the defense of AA as a policy of group compensation argues, is "an obligation that falls on society in general, not on any particular person. For it is the society in general that, through its established social practice, brought upon itself the obligation." Everyone has a duty "to support and comply with" the social policy of AA "being carried out by his government," for "everyone in the society (if it is just) contributes his fair share to the total cost of that policy, whether or not he has, personally, done an injustice to a C-person." However, an individual who "has himself treated a particular person unjustly" has a "special obligation" of compensation "which he owes to that particular C-person."22

The group-based compensatory justification of AA, however, fails to refute or to undermine the objections to AA based on principles of compensatory justice and noncompensatory moral considerations. This defense of AA founders even if it
is granted that there is a principle of compensatory justice requiring reparations to wronged groups and that there has been an established social practice of unjust treatment directed against C-persons, that is, blacks, along with women and Hispanics, because they are C. This argument for AA does not show that AA is in conformity with an adequate theory or account of group injury and group compensation and satisfies the criteria or conditions for group compensation, that is, that AA compensates groups who have been wronged and are owed compensation as groups.

To begin with, it is not immediately clear what saying that injury is made to a group means. This statement seems to have two quite different meanings. Thus, in speaking of a group composed of individuals being injured and wronged as a group, we might mean only that each member of the group has been injured and wronged, for example, individual members of a particular religious group having been treated unjustly because they belong to the group. In this sense, the group has been injured as an aggregation. Speaking about groups in this sense is a summary or an elliptical way of speaking about individuals. On the other hand, we might speak of the group being injured and wronged not simply as an aggregation but as a collective entity. In this sense, injury to the group is not reducible to or analyzable into injury to the individual members. An example of injury to a group in this sense is a state, church, or corporation subjected to a discriminatory or an unfair tax or economic
burden. The group-based compensatory defense of AA seems directed toward or committed to group injury in the collective sense. Indeed, the collective, not the aggregative, sense of injury to a group is the sense required by the argument for AA as group compensation. If by injury to a group proponents of this argument mean only injury to the individual members, the previous objections to individual-based arguments for AA are relevant and have force. Some proponents of AA and some commentators, however, incorrectly understand or interpret the claim that blacks as a group, for example, have been wronged and are owed compensation in the aggregative sense. Thus, one writer says that if "blacks as a group deserve inverse discrimination, it will be because some claim" like "all blacks have been discriminated against unjustly in the past and deserve compensation now" is "true." Some variants of the group-based compensatory justification of AA do not provide grounds for holding that the injuries resulting from the past institutionalized practice of unjust treatment constitute wrongs to blacks and the other designated groups in the collective sense. Statements that there has been an established social practice of discriminating against or unjustly treating members of the class of C-persons because they are C or of using the characteristic of being C as an identifying characteristic to discriminate against people and that there has been "a social practice in which unjust actions were directed toward
C-person as such do not justify the claim that the victim is the class of C-persons as a group and not simply those C-persons who, proponents of the present argument for AA assert, were discriminated against or unjustly treated by the social practice. Members of the class of C-persons, not the class of C-persons as a group, were discriminated against or unjustly treated by the social practice because they are C. These proponents of AA incorrectly infer that the group defined by characteristic C is the victim of the institutionalized practice of unjust treatment and that C-persons as such should be compensated on the grounds that this practice discriminated against or unjustly treated per-persons because they have characteristic C.

In making such statements as that discrimination is a phenomenon addressed or directed against a class and that the class against which discrimination is addressed or directed is the victim of discrimination, proponents of AA as a policy of group compensation fail to notice that they are talking about two different classes and making two distinct claims. The class against which discrimination is addressed or directed in the first statement is transformed into the class that is the victim of discrimination in the second statement. The source of the confusion, equivocation, or ambiguity here lies in the failure to recognize that discrimination is addressed or directed against a class in the trivial sense that discrimination against individuals
is always based on some property or characteristic common to others and defining a class. If X discriminates against some persons because they are D, for example, Jewish, the class against which this discrimination is directed is the class of D-persons as such; but the class of direct victims is the class that contains only those Jewish persons actually discriminated against. In holding that the class of C-persons as such or the group defined by characteristic C is the victim of injustice and should be compensated, AA proponents ignore or fail to recognize the distinction between the characteristic that is the basis of discrimination or unjust treatment, such as C—i.e., discriminating against someone because he is C—and the characteristic that is the basis of compensation, namely, having been unjustly treated, and not simply having characteristic C. As noted earlier, the reason persons were discriminated against is not what properly grounds compensation to them but simply the fact that, and the degree to which, they were discriminated against. Of course, to establish that some treatment is unjust, we have to inquire into whether the characteristic on which this treatment was based is morally irrelevant; but this characteristic is distinct from the characteristic that is the basis of compensation.

In claiming that the class of C-persons as such or the group defined by characteristic C was the victim of injustice, proponents of the group-based compensatory justification of AA do not specify the nature of the injustice the
the class or group supposedly suffered other than to say
that the class or group was the collective target of an
institutionalized practice of unjust treatment and that
unjust actions were directed against C-persons as such. The
unjust treatment of minority groups in the past involved,
advocates of the compensatory defense of AA insist, such
tangible injuries as the loss or denial of employment, edu­
cation, decent housing, adequate medical care, voting
rights, and fair treatment in the criminal justice system,
as well as such intangible injuries as insult, humiliation,
contempt, and disrespect.30 These injuries and injustices
were suffered by members of the group; individual members
were the victims of unjust actions, not the group as such.
The kinds of goods unjustly denied, such as quality jobs and
places in professional school, are possessed or enjoyed by
individuals, not the class of C-persons or the group as
such.

Even if it is true that in discriminating against
some persons because they are C a social practice injures
not only the interests of those discriminated against but
also the interests of other C-persons, perhaps because this
discrimination causes these C-persons to take insult or to
feel diminished respect31 or because these persons identify
with the failures as well as the achievements of other group
members, the desired conclusion that the group as such has
been wronged and is owed compensation does not follow. Such
indirect, secondary effects of discrimination against some
group members are also injuries suffered by individuals; and the fact there may be such interconnections among group members and certain groups of individuals may be harmed or benefited together does not establish the desired conclusion. 32

The group itself, it might be suggested, has an interest, for example, racial equality or perhaps cultural stability, that is harmed when individual members of the group are discriminated against or treated unjustly as part of an established social practice. "We can easily enough comprehend," a commentator writes, "that individual blacks have interests in being treated equally with individuals of other races"; and a group "can be the object of a person's interest." Thus, a black could desire equal treatment not only "for himself but for all blacks and in this sense desire equal treatment for the group." He could "further desire such things as that average black income be equal to average white income." If many or most blacks share this desire, "policies which raised the average income of blacks" would satisfy not only "the interests of those whose incomes actually improved but the interests of other blacks as well." We could then say that "raising average income for blacks," like raising black representation in business and the professions, "would satisfy 'group interests.'"33 However, these interests "would be simply the group-oriented interests of individual blacks"; and "the sum of them could not be the group interest."34 AA advocates are seeking. Hence, when individual members of the group are
discriminated against, it is the interests of individual members of the group, not the group interest, that are harmed. Another suggestion is that there is a group interest in preserving black culture, for example, or in providing a strong black cultural structure. However, cultural stability or a strong cultural framework may be viewed, some writers sympathetic to these notions say, as a means to benefiting individual members of the group or satisfying their interests, such as through "ensuring the autonomy of the individual members of the culture," since "it is only through" such a framework that "persons can know the range and nature of life options available to them." 35

Even if it were granted that, as the counterfactual variant of the group-based compensatory justification of AA claims, the underrepresentation of the specified minority groups in the desirable and valuable places in the social institutions is a consequence of past discrimination, the conclusion that these groups as such have been injured and wronged would not follow. The underrepresentation of these groups would be the consequence of discrimination against individual members and the deprivation of opportunities to acquire and to develop the necessary qualifications and competence suffered by individual members.

To the objection that the groups designated to receive preference in AA do not conform to the model of groups capable of being injured in the sense the present argument for AA requires, one reply insists that "blacks and women
constitute 'groups' in the sociological sense" since "they have a distinct existence and identity apart from those specific individuals who happen to be their members at a given point in time," and "most especially among blacks, there is a sense of identification, of 'we-ness,' among the members of the group." Moreover, this reply contends, "blacks and women are very special types of social groups" because they "are in a disadvantaged position" as a result of "the actions of others." Another reply maintains that blacks, as well as Hispanics, are a "genuine group"; members of the group share a culture and the group constitutes a cultural group even if, as some writers hold, there is not a high degree of interdependence or interaction among group members. According to this reply, other factors, such as common values and ideals, may also serve to define a cultural group. Such replies, however, do not successfully rebut the present objection to the attempted justification of AA as group compensation. This objection does not deny that the specified minority groups and women constitute groups in the sociological sense, as do also, for example, the aged, Southerners, Bostonians, circus people, plumbers, golfers, and the blind; nor does it deny that at least some of the designated groups may be described as cultural groups in some sense. Rather, it denies that blacks and the other designated groups are the sorts of groups that can be injured and wronged as collective entities and not merely as aggregations, and hence denies that injury to the designated
groups is irreducible to injury to the individual members. Furthermore, the fact that racial, sexual, and ethnic groups are said to be disadvantaged when and because disproportionally large numbers of members of the groups are disadvantaged does not show that the groups as such are subjects of or have claims of justice.

The kinds of groups that paradigmatically can be injured and wronged as groups and as collective entities are corporate or organized groups. For these sorts of groups, injury to the group is not simply reducible to injury to the individual members. "A corporate group is not a mere collection, assemblage, class, assortment, or crowd, but a union of persons organized for common action." It has an internal structure or organization and a common decision-making mechanism. Corporate groups "can perform acts generically different than the acts performed by the individuals in them." Examples of corporate groups are the United States, General Motors, and the Roman Catholic Church.

According to one suggestion, the group-based compensatory defense of AA can be understood as claiming that blacks are morally a people or nation and thus qualify as a corporate group. However, if a nation is a population whose members are presumably bound together by one or more common characteristics, such as a common language, race, culture, and history and common values, blacks still would not qualify as a corporate group. The black nation would lack any internal structure or organization and a common
decision-making mechanism and thus "would not be a true union of persons." Even if it were granted that there is a principle requiring compensation to wronged groups and that the groups specified by proponents of AA are owed compensation as groups, the claim that AA policies are morally acceptable instruments for compensating groups would not directly follow. The premise that AA extends compensatory benefits to members of the group does not imply the desired conclusion that AA compensates the group as such. The problem for defenders of AA is to specify the relation between group compensation and distribution of benefits among individual members and to show how benefiting individual members compensates the group. Some defenders of AA assume that since compensation is owed to the group each member of the group has a right to receive compensatory benefits. Other defenders of AA deny that each group member has this right since the right to compensation remains a group right but hold that the only way to provide reparations to the group is to provide benefits to members of the group since the group is not an organized one like a state, church, or corporation. According to some writers sympathetic to the idea of compensation to "black Americans for damages inflicted by slavery and subsequent discrimination," however, compensation, such as in the form of monetary payments, can be made "not to individuals but to representative groups, to be used for projects beneficial to the black community as a
whole." 48

To critics who "reject the notion that compensation might be due to blacks-as-a-group," some defenders of AA reply that the conditions these critics think are required "for a group to have rights or be the appropriate object of compensation" are "stronger than necessary for group compensation." These conditions are that "there must be (1) similarity of purpose and interaction among the group's members, (2) specific damages that cannot be assigned to individuals within the group, and (3) an official body to receive compensation." These defenders of AA argue that "contemporary class actions provide remedies to groups that do not fit these conditions." 49 For example, suppose a company has cheated consumers by putting only 9 ounces of instant coffee in jars advertised as containing 10 ounces. An appropriate remedy would be to order the company to sell an equivalent number of jars containing 11 ounces for the regular price of a 10 ounce jar, even though the benefits would go to future purchasers of instant coffee, who would not be the same as the previous purchasers of that brand of instant coffee. 50 Denying that any of the conditions supposedly requisite for group compensation are met in this case, a defender of AA writes:

The similarity of purpose of group members is merely to consume that brand of instant coffee. There is no general interaction among consumers of instant coffee. Specific damages can be assigned to individuals within the group, for only those who purchased such jars were injured by 10 percent of the price of each jar purchased. Finally, no official body exists to receive
However, proponents of AA who have difficulty in seeing any other way to provide compensation to the groups than to provide benefits to members of the groups fail to recognize that the groups have been injured and wronged only as aggregations, that is, as groups composed of individuals who were unjustly treated, and not as collective entities. When a group has been injured as an aggregation, not only is injury to the group reducible to injury to the individual members but compensatory benefits are properly provided to the individual members, each of whom has a right to compensation.

In the AA case, neither compensation to the group nor injury to the group conforms to the collective model. Thus, "it is at least plausible to think," one commentator writes, "that if a group has been injured as a collective, compensation ought to be made to the collective as well, and not to individual members as such." If, for example, a particular religious group as such has been discriminated against or unjustly treated, such as by the imposition of a tax burden not imposed on similar groups, compensation ought to be made to the group as a collective entity, such as by granting it a special tax benefit in the future, and not to individual members of the group. Giving a tax refund to individual members of the group does not compensate the group but benefits the members qua individuals. The previous example of a remedy to coffee purchasers is not an instructive
illustration of compensation to a group in the sense required by the argument for AA as group compensation, since the remedy simply offers benefits to individuals for wrongs to individuals.

The counterfactual variant of the group-based compensatory argument for AA maintains, it may be recalled, that AA satisfies the demands of compensatory justice that the designated groups be placed in the position they would have had if they had not been wronged and hence that they be given proportional representation in the desirable positions, such as places in professional school. This variant relies on the familiar but problematic assumption that if there had been no previous discrimination the percentages of the designated groups in quality jobs, law, medicine, engineering, and so on, would be approximately equal to their percentages of the total population. As argued earlier, the empirical evidence disconfirms, or does not support, this assumption. Further, it is reasonable to believe that in the absence of previous discrimination and injustice the representation of the specified minority groups in the desirable positions now would approximate what it would be without the intervention of AA programs. Thus, "without slavery," one legal scholar writes, "it is possible, indeed probable, that the black population in the United States would be insignificant." Also, since, advocates of AA claim, blacks and Hispanics are disproportionally poor and disadvantaged because of the history of injustices against them and since,
according to sociological data, disadvantaged racial and ethnic groups in American society have many more children than nondisadvantaged groups have, a reasonable conclusion is that one effect of past discrimination and injustice is a large minority population in this country. Perhaps, in addition, with a significantly smaller minority population in the United States, fewer minority-group members would have been inclined to immigrate to this country. Furthermore, even if the counterfactual or proportionality assumption were true, it would not follow that blacks and the other designated groups as such have valid compensatory claims to proportional percentages of the desirable positions, given that these groups' disproportionately low representation in these positions would be the consequence of discrimination against individual members of these groups and the unjust competitive disadvantage suffered by individual members. Do AA defenders wish to argue that the designated groups have rights to proportional shares of the quality jobs and the places in colleges and universities as compensation because past discrimination violated their rights to such shares?

The group-based compensatory defense of AA does not convincingly or successfully argue that principles of individual compensation are inapplicable in the present case and are inadequate here to satisfy the demands of justice. This defense of AA rests on the mistaken conception that principles of individual compensation apply "to the relations of one individual to another, but not to organized social
practices and whole classes of persons with respect to whom
the goals and methods of the practices are identified and
pursued. Principles of individual compensation apply to
the institutionalized practice of unjust treatment of per¬
sons because they have characteristic C; but these prinici­
ples do not regard the class of C-persons as such or the
group defined by characteristic C, as opposed to the group
of individuals unjustly treated because they are C, as the
victim of injustice who is owed compensation. Critics of AA
as group compensation do not assume that principles of com­
 pensatory justice apply to the relations of one individual
to another and to duties owed by individuals to other indi­
viduals but not to organized social practices and whole
classes of persons. Hence, they do not completely disregard
what AA proponents describe as morally the most hideous
aspect of the injustices of human history, namely, that
these injustices were carried out systematically and
directed against whole groups of men and women as groups.
Proponents of AA present "a false dilemma" when they sug­
gest, critics charge, that compensation to the class of C-
persons or the group as such is "the only alternative to
disregarding the injustices of institutionalized discrimina­
tion against groups." Society can "give great emphasis to
the injustices involved in such discrimination through means
other than those of imitating the structure of such inquis­tices" in its compensatory mechanisms, such as by providing
compensation to individual victims, condemning such
practices, making them illegal, and providing enforcement mechanisms.\textsuperscript{59}

Applying the principle of group compensation on the AA model to programs of reparations or compensation, such as the large-scale program of reparations to Jewish victims of Nazi persecution, has morally unacceptable implications. Consider, for example, a program of reparations described by one commentator as "outrageous"\textsuperscript{60} that made payments to Jews untouched by Nazi persecution, including wealthy American Jews, while ignoring and leaving uncompensated actual victims of Nazi crimes. Similarly, an implication of the claim that blacks, women, and Hispanics are owed compensation as groups is that the obligation to compensate these groups can be fulfilled by extending special benefits to group members who have not suffered injustice as a result of the past institutionalized practice. Indeed, on the present argument for AA, this obligation can be fulfilled by offering benefits to group members indiscriminately even when all the current members of the designated groups are completely unaffected by past discrimination. The group-based compensatory argument for AA has the further implication that group members who have suffered injustice as a result of the past social practice are not more deserving of compensatory benefits in AA than individuals who merely happen to share the characteristic that was the basis of discrimination in the institutionalized practice. In fact, this argument implies that an individual member of one of the designated groups
who has been discriminated against or unjustly treated may have nothing coming to him at all if someone having the same group characteristic has received compensatory benefits, although, according to proponents of this argument, he may have a "special right" to compensation from an individual who has treated him unjustly and who therefore "has brought upon himself a special obligation which he owes" to that victim.

A variant of the argument that AA is justified as group compensation has the implication that reserving more than the proportional percentages of the desirable positions in employment and higher education for the designated groups in current AA programs would be justified. Thus, when a racial or an ethnic group, for example, was wrongfully deprived of its fair, that is, its proportional, share of positions in employment and admission to educational institutions because of a discriminatory social practice, this variant argues, the group should now receive more than a proportional share of these positions as compensation. Simply to give the designated groups the percentages of the desirable positions they would now have in the absence of past discrimination is not sufficient since there is a backlog or accumulation of positions previously denied.

The logic of group-based compensatory argument for AA implies that groups other than the specified minorities and women who were wronged are also entitled to compensation. the list of groups who have a history of subjection to
discrimination or who were the target of systematic and pervasive discrimination is broader than that of the groups designated for preference in AA. Accordingly, the present selection of the groups to receive compensatory benefits, critics of AA maintain, is arbitrary. One reply is that the formerly discriminated-against groups not eligible to receive compensatory benefits in AA, such as Jews and Asians, are doing well enough; that is, they are relatively affluent and well-educated groups and are well represented in the desirable positions in society. Critics of AA respond, however, that the relevant question here from the standpoint of compensatory justice concerns not who fails to do well but who was discriminated against or wronged. Given the principle of group compensation, each of the previously discriminated-against groups not designated to receive preference in AA is entitled to compensation for past wrongs even if society decides to restrict the application of this principle.

If, as proponents of the group-based compensatory justification of AA claim, the obligation to compensate for the past injustice falls on society in general and not on any particular individual, AA is hardly an appropriate compensatory mechanism, since it does not exact redress from society as a whole or the government. Although proponents of this argument for AA claim that everyone in society has a duty to support and to comply with social policies like AA, not everyone in society contributes his fair share of the
jobs being filled but also excludes individual white males who clearly are not those who "would not be in line for jobs at all" or those marginally qualified applicants who would not have acquired the positions in question were it not for past injustice. Consider, for example, that owing to AA, between 1970 and 1990 more than 40 percent of all new police officer jobs went to blacks; this percentage is more than three times the percentage of blacks in the general population. 72

There also are numerous cases of preference in employment in which a single position, such as a faculty position in a university mathematics or physics department, not a cluster of positions, is reserved for a minority group and the white male bypassed is highly, not merely marginally qualified. AA proponents cannot reasonably claim that the particular position reserved in such cases would have been acquired by a minority-group member if there had been no previous discrimination. Indeed, given the assumption that the specified minority groups would have proportional percentages of the desirable positions were it not for past discrimination, the particular job now reserved in such cases of preference would not have been acquired by a member of the specified minority groups, critics of AA can reasonably argue, since in the absence of past discrimination these groups would have proportional percentages of the desirable jobs already occupied. In preferential admissions too, many of the white, and Asian, males bypassed have high
Despite the objection that AA commits injustices against white males in distributing the burden of compensation, the counterfactual variant of the group-based compensatory argument for AA maintains that white males cannot legitimately complain of injustice to themselves through group compensation that reduces the percentage of white males in the desirable positions in society. According to this variant, white males stand "to benefit from their present unfair advantage" in the distribution of the desirable positions, an advantage "which is maintained by the continued lack of maximally qualified minority-group candidates who could acquire positions. And the latter is attributable to past and present discrimination." In AA, this variant argues, white males are not required "to give up as compensation to minorities anything to which they are otherwise entitled." They are being asked to relinquish "only an unfair present advantage" and "their continuing unfair monopoly on" the desirable positions. AA thus "places white males as a group in no worse a position than they deserve to be according to fair distributive rules, independently of any compensation for past injustice." Hence, "it is not unjust" that white males "relinquish positions to which they erroneously believe themselves entitled." The individual white males "who will be losing" positions through a policy of AA "are precisely those marginally qualified ones who would not have acquired the positions in
question if women and minorities had been proportionally represented from the beginning, that is, if no prior discrimination had occurred."70

Contrary to the counterfactual variant of the argument for AA as group compensation, AA treats individual white males unjustly in significantly reducing the representation of white males in the desirable positions. First of all, the empirical evidence disconfirms, or does not support, the claims that the representation of white males in the desirable positions in the absence of AA is a consequence of past discrimination against the specified minorities and women and that the white males denied positions in AA would not have acquired the positions in question had previous discrimination not taken place. However, even if it were granted that in the absence of past discrimination white males would have a significantly lower percentage of the desirable positions and the maximally or best-qualified applicants, it still would not follow that the individual white males who are prevented from acquiring positions cannot legitimately complain of injustice in being made to bear the burden of compensation. Thus, since AA reserves disproportionally large percentages of the new jobs for the designated minority groups, such as by adopting hiring and promotion schemes of one minority for every white male, in order to achieve the proportional representation of these groups in the various job categories, AA not only gives white males a disproportionally low percentage of the
qualifications, such as GPAs of 3.6 or above and SAT scores of 1300 or higher, and are not merely marginally qualified.

Further, the counterfactual variant of the group-based compensatory argument for AA allows that reserving more than proportional percentages of the desirable positions for the designated minority groups and thereby disproportionately excluding white males from these positions would be justified not only in employment but also in admission to educational institutions. Given these minority groups' high dropout and failure rates, it can be argued, such a policy would more quickly eliminate such effects of past discrimination as the underrepresentation of these groups among degree recipients and among those in the professions.

Moreover, marginally qualified or lower-ranking white male applicants may be victims of injustice through AA even if white males would have a lower percentage of the desirable positions had it not been for past discrimination. Thus, by adopting part of AA proponents' own reasoning critics of AA can argue that "racial injustice has affected whites differentially" and that in the absence of this injustice some presently higher-ranking, advantaged whites would not have better qualifications than some whites bypassed in AA, such as those from poor, lower-class, or working-class backgrounds.

Even if it were granted that some white males who are prevented from acquiring quality jobs or college or university places through AA would not have acquired the affected
positions had it not been for past injustice, the claim that these white males cannot legitimately complain of injustice to themselves would not follow. The objection here is that AA treats these white males unjustly not because it is believed that they would have acquired these positions in a just world but because they are better qualified than the applicants awarded these positions in AA, not hypothetical minority, or female, applicants. Analogously, a runner in a race who finishes first can rightly complain of injustice to himself when the individual who finishes fourth is awarded the winning prize, even if another member of this individual's racial or ethnic group who was unjustly barred from entering the race or unjustly deprived of the opportunities to develop his abilities would have won the race.  

The argument that a policy of AA is justified as a means of compensating certain previously discriminated-against groups fails to establish, then, that the issue of the moral justification of AA has been misconstrued as one of individual rights and individual compensation and that when the issue is conceived as one of group rights and group compensation, "the Argument from Compensatory Justice is effective."  

The argument that AA is a morally justified policy of group compensation, furthermore, is not an advance over the previous compensatory arguments in avoiding or disarming the principal noncompensatory objections to AA. Notwithstanding the shift from individual to group compensation, AA remains
vulnerable to the objections that it violates principles of distributive justice and fundamental individual moral rights. Thus, a proponent of AA as group compensation acknowledges that "it is true that the principles of distributive justice were transgressed by the past treatment of C-persons precisely because, according to those principles, characteristic C is morally irrelevant as a ground for treating persons in a certain way." However, AA is an established social practice of using the characteristic (C) of being black, female, or Hispanic as an identifying characteristic to discriminate in favor of some persons and against others and of unjustly treating any member of a class of persons who lack characteristic C in a certain way, that is, denying him a quality job or college or university place, on the morally irrelevant ground that he lacks characteristic C. In the name of group compensation, AA not only benefits many persons because they are black, female, or Hispanic but also disadvantages and imposes serious losses on many persons because they are not members of the groups defined by these characteristics. The criterion for discrimination now is no longer C, as in the past social practice, but non-C, that is, being white, or Asian, and male. Even if AA does not deprive white males as a group of a majority of the desirable positions, it still treats individual white males unjustly.

In defending AA "one may simply hold that there is no justifiable moral rule which, when correctly applied,
supports discriminating against blacks," a proponent of AA as group compensation argues, "but there is one which supports discriminating in favor of them." However, even if those advocating AA "do not intend, at least initially, to discriminate against anyone" but "mean only to discriminate in favor" of the designated groups, the problem is that "it is very much to be doubted," one critic of AA says, whether "it is possible to discriminate in favor of some without discriminating against others by the very same act." Indeed, "prejudicially discriminating in favor of a G vis-a-vis an H is not to deny the job to the H as a consequence of favoring the G," another critic writes, "but to deny it to him in favoring the G. The prejudicial award and the prejudicial denial are correlative aspects of one act." If the decision to hire or admit X over Y when they are competing for a position is based on X's race or ethnicity and not on merit or qualifications, critics maintain, the selection of X is a case of racial or ethnic discrimination against Y. Therefore, since AA selects individuals because they are black, female, or Hispanic, it discriminates against other individuals who are not members of the groups defined by these characteristics. Would not defenders of AA agree that a policy that discrimimates in favor of individuals because they are white to achieve some social goal, for example, racial or ethnic diversity on athletic teams or increased opportunities for poor or disadvantaged whites, discriminates against individuals who are nonwhite?
In claiming that the denial of positions to individual white males in AA is not discriminatory or unjust, defenders of AA as group compensation face a further troubling question. The question is, Once the proportional representation of the designated groups in the desirable positions is achieved and the alleged group effects of past discrimination have been remedied, would these defenders of AA say that denying positions, such as faculty positions in a university mathematics or physics department, to blacks or Hispanics who are the best-qualified applicants for these positions in order to preserve or not to exceed the level of representation that blacks or Hispanics supposedly would have had in the absence of past discrimination is also not discriminatory or unjust?

Despite the group interpretation of the compensatory justification of AA, this policy still is vulnerable to the objection that it generates a kind of vicious regress, that is, a nonterminating process of compensation and injustice that reintroduces the initial problem of compensating for past injustice in the proposed solution, and is therefore unacceptable as a general compensatory instrument. AA generates this regress because it has wronged the group, white males, in being an established social practice that involves unjustly treating any person who is white and male on the ground that he is white and male or using the conjunctive characteristic, white and male, as an identifying characteristic to discriminate against persons. The principle of
compensatory justice therefore requires, it can be argued, that white males as such be compensated through preference in employment and admission to educational institutions.

The argument for AA as group compensation provides equal justification for morally objectionable compensatory policies that apply different and lower or less stringent standards to the designated groups, particularly the minorities, in contexts other than hiring and admissions in which there has been an institutionalized practice of unjust treatment of blacks, women, and Hispanics, it is claimed, or in which these groups suffer the disadvantaging effects of past injustice. Thus, this argument would justify compensatory policies that give the designated groups proportional percentages of the high grades, honors, and degrees awarded by colleges and universities, such as by skewing the grading process to favor members of the designated groups and by establishing lower graduation requirements for members of these groups; that yield for these groups proportional shares of the professional licenses awarded, such as by setting lower passing scores for group members than nonmembers in licensure examinations; and that, in employment, give members of the designated groups higher job evaluations than nonmembers for the same or inferior levels of performance, and maintain these groups' percentages in the various job categories by not penalizing or dismissing group members for levels of performance or types of conduct that would result in penalties for or the dismissal of
nonmembers. The present argument for AA would also justify a compensatory policy that yields for the designated groups average earnings or incomes equal to those of other groups, such as by paying members of the designated groups higher salaries than nonmembers for the same or lower-level jobs and by imposing lower tax burdens on group members who have the same or even substantially higher incomes than nonmembers. Further, this argument would justify compensatory policies that give the designated groups proportional shares of the scarce medical resources allocated, often at the expense of medically needier nonmembers; that reduce group disparities in political power and influence by establishing lower age requirements for voting for group members than nonmembers and by reserving proportional shares of the elective political offices for the designated groups; and that, in the criminal justice system, reduce dramatically and limit the percentages of the designated groups subject to arrest, indictment, trial, conviction, and imprisonment, such as by instituting procedures that make it more difficult to convict group members than nonmembers of crimes and by imposing more lenient sentences on group members than nonmembers convicted of the same or even less serious crimes.

A publicized defense of AA as a policy of group compensation argues that preferential treatment on the basis of race, sex, or ethnicity to correct past discrimination against the specified minority groups and women is morally
justified because it is analogous to a policy of school desegregation, which is generally held to be justified. The latter policy has sought "to correct the admittedly immoral segregation practices of the past" and has made essential use of a group classification, that is, race, in formulating a remedy. However, some critics of AA reject the assumption of this argument that AA is relevantly similar or analogous to a policy of school desegregation. In school desegregation, unlike in preferential hiring and admissions, these critics maintain, no benefits are withheld from anyone on grounds of race. The measures to implement a policy of school desegregation, such as busing black pupils from neighborhood schools to formerly white schools and busing white pupils from neighborhood schools to formerly black schools, "were indeed race conscious," one critic writes, "because only in that way could remedy be provided for earlier wrongs done by the state." Desegregating public schools has secured "the nondiscriminatory admission of all students to public schools." "The key difference" between these policies which the present defense of AA "overlooks," another critic says, is that "in correcting the immorality of past segregation we are not discriminating against white students." In school desegregation, white students "are not being injured or deprived of anything by the color of their classmates' skin" and "may profit in virtue of desegregation." In AA, by contrast, "racial discrimination does occur and benefits are
arbitrarily withheld, for some persons are excluded from consideration for employment, admission, and promotion solely because of their race or sex." 87

Other critics of AA hold, however, that a policy of school desegregation by race, such as by forced or mandatory busing, is morally unacceptable, even if it is legally required or permissible. In school desegregation, white students, as well as black students, are compelled to attend or are prevented from attending certain schools because of their race. White and black students are deprived on the basis of race of such benefits as the opportunity to attend neighborhood schools, the comfort and security of familiar surroundings, the closeness of these schools to home, and the presence in these schools of siblings and neighborhood friends. 88 Therefore, a policy of school desegregation by race does not secure the nondiscriminatory admission of all students to public schools. The morally correct remedy for state-imposed school segregation is ending assignment to schools by race, and thus ending the busing of black students from their neighborhoods to black schools; it is not the assignment of students to schools on the basis of race to overcome an officially defined racial imbalance in the schools. Construing or conceiving desegregation as overcoming or eliminating racial imbalance has unacceptable implications, for example, that theaters, stadiums, restaurants, buses, trains, and so on, are not desegregated if they have a racial imbalance among their customers or in the
customers' seating arrangements, even though people are free from barriers or exclusion because of race and are not prevented from going to theaters or restaurants or riding on buses or trains they choose or from sitting where they choose.

Even if it were granted that group compensation is required in the present situation by principles of compensatory justice, the claim that AA is a morally justified means of compensating for past discrimination would not follow. Some proponents of the group-based compensatory argument for AA seem to recognize that there are moral constraints on compensatory policies, including policies of group compensation. Thus, one proponent of AA as group compensation writes, "It is assumed, of course, that this practice will be consistent with all other principles of justice that may apply to the action-types which are involved in carrying it out." The group-based compensatory argument for AA "at best justifies it as a prima facie principle," another proponent of AA as group compensation says. "So it might be outweighed by other principles."
Notes

1. See Fullinwider, "Reverse Discrimination and Equal Opportunity," 178, citing such arguments as those in Boxill, Blacks and Social Justice, 153 ff.


4. Ibid., 199-200.

5. Fullinwider, Reverse Discrimination, 57.


7. Simon, "Preferential Hiring," 65; and Fullinwider, Reverse Discrimination, 58.


11. Ibid., 14.


15. Ibid.


18. Ibid., 14.


28. Ibid., 59.


34. Ibid.


41. Ibid., 64.

42. Ibid., 62.

43. Ibid., 61

44. Ibid., 63.
45. Ibid., 64.

46. Ibid.


50. Ibid.

51. Ibid., 459.

52. Bowie and Simon, Political Order, 262.

53. Ibid.


56. Sowell, Race, 195.


59. Ibid.

60. Fishkin, Justice, 124.


68. Ibid., 114.


70. Goldman, Reverse Discrimination, 113-14.


73. Amdur, "Compensatory Justice," 100.

74. Goldman, Reverse Discrimination, 116-17; and Mosley and Capaldi, Affirmative Action, 47.

75. Fullinwider, Reverse Discrimination, 57-58.


78. Gross, Discrimination in Reverse, 84-85.


81. Ibid.

82. Ibid.


85. Ibid., 103.


Chapter 9
The Meritocratic Justification of AA

A policy of AA "probably can be defended best," some commentators say, "on grounds other than compensatory ones." Even if the compensatory defense of AA "is inadequate, other defenses might be stronger." Attempted noncompensatory justifications of AA are either meritocratic or forward looking. In the present chapter I shall critically examine the meritocratic justification, and in the following chapters I shall critically examine the forward-looking justifications.

Proponents of the meritocratic justification of AA object that the use of the expression "preferential discrimination" or "preferential treatment" to describe the policy of AA is "out of order" and rests on the "faulty assumption" that "race- and gender-conscious affirmative action policies are 'preferential,'" that is, that they go "beyond the qualifications of candidates and, in effect," give "extra points for race, ethnicity, or gender." These proponents of AA do not reject "the principle that the most qualified candidate should secure the position"; but they do deny that preferential treatment in hiring and admissions is taking place in AA, even though race, as well as sex and ethnicity, is used as a criterion of selection. There are ways of invoking an applicant's membership in a designated group, they claim, that do not involve preferential treatment, such as by viewing race, sex, or ethnicity as a qualification. Thus, in giving "positive weight to
race, ethnicity, and gender," AA programs "do not involve the selection of less qualified over more qualified candidates" because being black, Hispanic, or female is "relevant to deciding which candidate is most qualified." Membership in the designated groups is an indicator of "an increased likelihood of successful job performance" or the willingness and ability to serve certain social goals. Hence, the present defense of AA argues, there are meritocratic reasons for hiring and admitting members of the specified minority groups and women.

According to proponents of the meritocratic justification of AA, critics of AA mistakenly think that the less qualified are being hired, promoted, or admitted because they interpret the notion of qualifications too narrowly and fail to notice that being black, female, or Hispanic can be a qualification. If only standard qualifications are considered, members of the designated groups may be less qualified than nonmembers. However, the meritocratic argument for AA appeals to the view that the standard notion of qualifications and standard criteria of merit should be reexamined and broadened to encompass such characteristics as race, sex, and ethnicity. The minority-group members and women selected in AA thus are more qualified, in the expanded sense, than the white males passed over. Since race, sex, and ethnicity are relevant factors in hiring and admissions and the white males bypassed are not as qualified in some valued activity, such as serving as a role model for
minorities and women or contributing to diversity, as the minorities and women selected, AA does not involve preferential treatment and is not really a form of discrimination. Therefore, AA does not violate the rights of or commit injustices against the white males who are disfavored or lose out in the competition for quality jobs and college and university places.

One meritocratic reason for hiring and admitting minorities and women, the present argument for AA claims, is to meet the need to create minority and female role models "in the professions, the university, and the corporation as inspirations" for other minorities and women "to aspire to careers they otherwise would have feared to enter."\textsuperscript{9} Minorities and women in faculty positions and other positions of authority and influence serve as role models for minority and female students and other minorities and women. Without AA, however, few members of these groups would occupy university or other positions of authority and influence.\textsuperscript{10} Thus, "the proportion of black and women faculty members in the larger universities (particularly as one moves up the ladder of rank)" would be "very much smaller," proponents of the meritocratic argument for AA say, "than the proportion of blacks and women in the society at large—even, in the case of women, than the proportion of them amongst recipients of Ph.D. degrees from those very same universities." As a result, "black and women students" would "suffer a constricting of ambition."\textsuperscript{11} For minorities and women "to
develop the motivation to succeed in attaining" university positions or "similar positions or related ones in the professions, they must be able to see that people like them can succeed." They "need to see members of their own race or sex who are accepted, successful professionals." Blacks, women, and Hispanics in such positions demonstrate that members of their own group can perform effectively in faculty positions and other positions of authority and influence. Minorities and women "may identify with such models and hence secure the special stimulation that will enable them to succeed." Diversity is valuable in colleges and universities, as well as in other areas, proponents of the meritocratic argument for AA claim; and AA leads to a more diverse educational community and promotes multiculturalism and the emphasis on specific forms of diversity, such as race, culture, and gender, and their recognition and accommodation in American society. Hiring a diverse group of faculty members and admitting a diverse student body are educationally beneficial in promoting intellectual diversity on campus. A more racially, sexually, and ethnically diverse academic community, it is argued, will be a more intellectually diverse academic community. A diverse educational community "sharpens intellectual debate and enhances the quality of higher education." Further, race, sex, and ethnicity are significant indicators of the ability to contribute to intellectual diversity and the educational process.
Therefore, race, sex, or ethnicity "can be a qualification, and recognizing that and counting it in the selection process is actually meritocratic, not preferential." 21

In academic contexts, intellectual diversity is "especially important because of its role in promoting intellectual inquiry and discourse," proponents the meritocratic argument for AA assert. "Intellectual discourse functions best when different perspectives and different points of view are represented." A "homogeneous group of people fails to see weaknesses that might have been apparent to someone from outside the prevailing consensus." Minorities and women are likely to bring different viewpoints to and to illuminate discussion and to challenge "received views in ways that contribute to our knowledge." 22 Moreover, a racially, sexually, and ethnically diverse student body is important, according to some proponents of AA, because the "main goal" of colleges "is education, the scope of which reaches beyond the classroom, and exposure to a diverse student body is seen by administrators as an integral part of 'training people for a multicultural habitat.'" 23 Education "in an increasingly multicultural society such as our own" involves inducing "different groups to learn to understand each other and get along." 24 In addition, diversity is said to be valuable in the workplace in increasing the pool of skilled workers and providing a more stimulating and more productive work environment. 25
The fact that race, along with sex and ethnicity, can be, or often is, an important qualification, proponents of the meritocratic argument for AA claim, is acknowledged in a wide range of occupations and professions. Thus, the specified minorities and women are particularly well-suited to teach certain academic subjects. They are able to provide expertise in and to teach new or nontraditional fields, such as African-American studies, women's studies, and feminism. The expectation is, AA proponents say, that the specified minorities and women will be disproportionately represented in these fields because they are likely to be interested in the questions these fields address—and, it is suggested, likely to have sympathy and experience with the subject matter to be taught—and thus to be motivated to acquire the qualifications needed to contribute to these fields. They also are able to be especially effective in teaching students of their own race, sex, or ethnicity. Thus, "blacks learn better from a black, women from a woman." Proffered explanations are that members of these groups share life experiences and a consciousness that cannot be understood or communicated by white male professors; that blacks mistrust the whites who teach them and as a result they "simply do not learn as well, or progress as far, as they would if taught by blacks"; and that "it is precisely by virtue of having a role model right in the classroom that blacks do learn better from a black, women from a woman." Proponents of the meritocratic argument for
AA claim, furthermore, that minorities and women as faculty members can play special roles in advising and counseling minority and female students. Black students on a largely white campus, for example, "might feel, with some justice, that other blacks are especially likely to understand their special problems as whites cannot."

According to proponents of the meritocratic justification of AA, minorities relate better to and feel more comfortable with members of their own racial or ethnic group in the professions and other jobs and occupations. Blacks and other minorities are likely to feel more comfortable with professionals, such as lawyers and doctors, who share their race or ethnicity and cultural heritage and who thus are "sensitive to their attitudes and circumstances" and "can truly understand them." Also, because many black citizens relate better to black police officers than to white police officers, for example, black police officers on an urban police force are more effective on account of their race. Accordingly, minority lawyers, doctors, professors, police officers, and so on, are better able to serve members of their own group.

Selecting a candidate on the basis of race, proponents of the meritocratic justification of AA maintain, can therefore enhance the efficiency of an operation or enterprise. Sometimes the success of an operation or enterprise depends not only on individuals' skills but also on how well individuals interact with others. Some jobs, such as so-called
service jobs—e.g., teacher, health worker, social worker, police officer, and government official—may be done most efficiently by a workforce that is racially or ethnically representative of the population within which it works. Consequently, an urban police force, for example, that selects applicants with the best "independent and objectively measurable skills" and ends up with "an entirely or predominantly white police force," proponents of AA hold, "may not end up with the most productive or effective operation." Hence, hiring decisions should take into account such factors as the likelihood that minority police officers will be able to relate especially well to the population of minority communities that a police force which serves a diverse population and reflects that diversity will be able to deal more effectively with various community problems. In other situations, race-conscious selection may not yield more effective or more successful job or other performance; but such selection can serve certain social goals, such as racial balance in the universities and the professions.

Moreover, professional schools should serve the community as a whole, proponents of the present defense of AA assert; but without the intervention of AA minority-group members and women would be greatly underrepresented in the professions. Hence, a meritocratic reason for admitting minorities and women to law and medical schools is to provide adequate legal and medical services to women and especially to poverty-stricken, grossly underserved minority
Minority lawyers and doctors are more likely than whites to serve their own minority communities. Thus, a minority candidate for professional training "may be 'more qualified' than rivals," an advocate of AA writes, "because he appears willing and able to meet an urgent social need, and it is a reasonable hypothesis that most candidates with this qualification are going to be nonwhite."  

Appealing to an expanded notion of qualifications in claiming that the minorities and women selected in AA programs are more qualified than the white males bypassed, proponents of the meritocratic justification of AA insist that these minorities and women are "'less qualified'" than their white male rivals "only if we uncritically equate being more qualified," for example, to receive admission to law or medical school, "with 'having higher scores and grades.'" Indeed, critics of AA speak of "'someone who had the proper grades' for admission—as if only such factors were germane." For critics of AA, allocating college and university places on the basis of merit "means," according to AA proponents, "relying entirely on predicted college grades" and considering only "an applicant's past accomplishments, treating admission as a prize that goes to the most deserving." Defenders of AA on meritocratic grounds contend, however, that "people do not qualify" for admission to college or professional school "the way a Girl Scout qualifies for a merit badge—by tying certain knots—or the way a discus thrower qualifies for the gold medal. There are other
paradigms of qualifying." That is, "personality and other 'noncognitive factors' influence the selection of both whites and nonwhites." Admissions officials "weigh 'institutional, professional, and societal needs,'"49 such as the need for future black leaders and the need for racial diversity in the universities and the professions, and consider applicants' future accomplishments. Hence, colleges and universities in their admissions decisions not only consider race, sex, and ethnicity in favoring minorities and women but also consider other nonacademic and nonintellectual factors in favoring applicants who, for example, have a parent who is an alumnus or alumna, come from wealthy families and are "likely to exert a lot of influence on the world" and "may also give the college a lot of money,"50 can play the violin or trombone, or can play basketball or football.

"We define merit, in other words, in order to achieve social purposes,"51 proponents of the present defense of AA maintain; and thus the notion of who is best qualified cannot be separated from social policy questions about who can best fulfill societal or institutional goals.52 These proponents of AA claim, for example, that although "law schools do rely heavily on intelligence tests for admission," these "intellectual standards are justified, not because they regard the clever, but because they seem to serve a useful social policy."53 "Law schools weigh all factors that they feel will bring about good social ends."54 Therefore, since
the criteria for deciding which applicants should be accepted to professional school, for example, are not necessarily intellectual and cannot be separated from social policy questions concerning who can best fulfill societal or institutional goals, the best-qualified applicant as measured by standard qualifications is not necessarily the one who merits admission. To achieve certain social purposes, such as racial balance in the professions, defenders of AA conclude, "there is nothing in the idea of individual merit that stands in the way of our treating race as one kind of merit." To achieve certain social purposes, such as racial balance in the professions, defenders of AA conclude, "there is nothing in the idea of individual merit that stands in the way of our treating race as one kind of merit." 56

Surely, if an admissions policy of favoring a student who is the offspring of an alumnus, comes from a wealthy family, lives in a sparsely populated state, or is skilled at basketball is justified, defenders of AA on meritocratic grounds argue, so too is the selection of minority-group members and women who are less qualified than their white male rivals according to standard qualifications. There is no rational basis for excluding consideration of a minority applicant's race or ethnicity in the admissions process, these defenders of AA insist, while including consideration of other nonacademic and nonintellectual factors. Proponents of the meritocratic justification of AA face the initial difficulty of providing evidence to substantiate the empirical claims of nonaccidental statistical correlations between race, sex, and ethnicity and other factors, such as diversity in academic viewpoints and expertise
in nontraditional fields, that this attempted justification relies on. These empirical claims assert that the characteristics of race, sex, and ethnicity are correlated with and indicate an increased likelihood of successful job performance or a greater willingness and ability to serve certain social goals; but these claims engender a number of problems and questions. Thus, are minorities and women in faculty positions or other positions of authority and influence necessary or merely helpful as role models for other minorities and women? Can only those of a particular race, sex, or ethnicity serve as role models for members of that particular group? Are minorities and women particularly well-suited to teach certain academic subjects and to teach minority minority and female students? Do minority and female students learn better from teachers of their own race, sex, or ethnicity? Are minority and female faculty members better or more effective than others in advising and counseling minority and female students? Will the minority-group members and women selected in AA contribute to intellectual diversity? Is it clear that all members of the groups covered by AA programs share perspectives on most issues or that their perspectives differ from those of others in many cases? Is there an urgent social need for adequate legal and medical services in minority communities? If so, will AA programs in professional school admissions meet this need? Is it likely that minority-group members with law or medical degrees will work in underserved
minority communities? Are minority lawyers and doctors more likely than whites to have the human qualities, such as sensitivity and understanding, desired for serving minority clients and patients?

Furthermore, appeal to the view that standard qualifications or standard criteria of merit should be broadened or expanded does not automatically justify AA programs, since these programs do not merely take race, sex, and ethnicity into account in the selection process but make them decisive and have them outweigh significant disparities in standard qualifications. AA programs thus subordinate academic and intellectual criteria to such nonacademic and nonintellectual criteria in the selection process. Consider, for example, that these programs sometimes select black and Hispanic applicants for admission to professional school who have scores of 35 or lower on tests of academic and intellectual skills and abstract knowledge and undergraduate GPAs of 2.4 or lower even though competing white male applicants who are bypassed have test scores of 95 and undergraduate GPAs of 3.8.

Moreover, the specific meritocratic arguments given for hiring and admitting minorities and women do not entail or require the proportional representation of the designated groups that AA seeks to achieve. Thus, concerning the role model argument, "so long as a significant number of members of a minority group" enter the legal and medical professions, for example, and succeed in them, as one commentator
writes, "others will know" that these professions are "not closed to them. There is no basis for requiring proportional representation." Concerning the argument for diversity in colleges, there does not appear to be a rational connection between seeking proportional representation of the specified minorities and enhancing the quality of the educational experience. Advocates of AA face such problems as showing that communication between blacks and whites which enriches the educational process requires that the student body be 12 percent black rather than 6 or 7 percent black.

The view that standard meritocratic criteria should be broadened or expanded does not imply that only minority or female applicants may be evaluated and selected on the basis of expanded criteria of merit; but AA programs evaluate and select only members of the designated groups on the basis of these criteria. Further, AA programs do not apply expanded meritocratic criteria within the designated groups. Rather, they choose among members of these groups on the basis of standard qualifications. Even if it is accepted that standard meritocratic criteria should be reexamined and broadened, anyone who satisfies expanded or nonstandard meritocratic criteria—such as the ability to motivate or to serve as an example for students, the ability to contribute to intellectual diversity, and the willingness to practice law or medicine in underserved minority communities—should receive special consideration in the selection process,
irrespective of the individual's race, sex, or ethnicity. Not all minority-group members or women are likely to be helpful to minority or female students and to be effective in teaching and motivating them, some commentators remark; and in some cases, white males may teach these students superbly and be best at motivating them. Moreover, when factors that are correlated with race, sex, or ethnicity, such as expertise in new or nontraditional fields, are easily measurable in themselves, for example, through submitted written work, and when judgments of individual qualifications are obtainable and reliable, some writers insist, racial, sexual, or ethnic generalizations and statistical correlations should be irrelevant and thus should not be relied on in hiring or admissions decisions.

The contention that the variety of criteria traditionally used by colleges and universities in the admissions process provide a precedent for the use of race, sex, and ethnicity in AA programs does not disarm or undermine the objection that AA involves preferential treatment and is not morally justified. The crucial moral question here, as critics emphasize, concerns not what the usual or traditional admissions practices of colleges and universities are but what their admissions practices should be. "From the fact that something is or was done," a writer remarks, "it scarcely follows that it ought to be done." Consider that colleges and universities have historically practiced discrimination in hiring and admissions not only
against the designated groups but also against other groups, including Jews, Asians, and Catholics, purportedly to serve some social goal, such as diversity.

As applied in the meritocratic argument for AA, the view that standard qualifications should be reexamined and broadened or expanded has disquieting, counterintuitive implications. One such implication is that we may be unable to say whether applicant A is more qualified than applicant B for a certain position unless we know which racial or ethnic groups A and B are members of, even though we possess information that A has vastly superior standard qualifications. A further implication is the acceptability of such judgments as that applicant C is more qualified than applicant D for admission to medical school because C is a member of a racial group that is underrepresented in the student body and in the medical profession, even though C has scored 35 on tests of academic and intellectual skills and scientific knowledge and has an undergraduate GPA of 2.38 and D has scored 95 on these tests and has an undergraduate GPA of 3.8. Indeed, the view that standard qualifications should be reexamined and broadened or expanded countenances such judgments as that applicant E is more qualified for admission to college than applicant F, who has superior academic and intellectual skills, because E's father is an alumnus, E comes from a wealthy family and may give the college a lot of money, he lives in a sparsely populated state, he can play the violin, or he is skilled at playing basketball. In
colleges and universities, moreover, the application of the expanded notion of qualifications creates two classes of faculty members and students, namely, those who are most qualified in the standard sense and those who are most qualified in the expanded sense. One result, a writer warns, is that "there may well develop a tendency to forget that given the opportunity, there is no reason to expect minority-group members or women to be less qualified than anyone else in any sense of 'qualified.'" If race, sex, and ethnicity can be qualifications, as the meritocratic argument for AA claims, they can also be disqualifications. Allowing these characteristics "to have a bearing on a hiring decision," one writer observes, "might make for trouble of a kind that blacks and women would not be at all happy with." That is, there may be meritocratic reasons for selecting white males over minorities or women who are more qualified according to standard qualifications. In certain circumstances, efficiency-related considerations and societal and institutional goals provide a rationale for practices that treat being white and male as a qualification and being black, female, or Hispanic as a disqualification. "Once race is permitted to count as a job qualification," a commentator writes, "there is no way of preventing the racial sword from cutting both ways." Hence, whether the position that favors AA and holds that race, sex, or ethnicity can be a legitimate job qualification is principled and consistent depends on the willingness of proponents of the
position to accept all its implications; and some of these may be disturbing and difficult to accept.  

Thus, the claim that being black or female is a qualification in a teacher because blacks and women are able to teach people of their own race or sex better than white males can and black and female students learn better from teachers of their own race or sex suggests that being white and male can be a qualification in a teacher when white males teach white male students better than others can and white male students learn better from white male teachers, perhaps because, for some of these students, being in a class taught by a woman, for example, makes them feel uncomfortable and interferes with their work.  Further, if being black or female is a qualification to teach such subjects as African-American studies and women's studies, being white and male can be a qualification to teach such subjects as European history, Russian history, mathematics, and science. Moreover, "if contribution to diversity is relevant to qualifications," a commentator writes, "white males who can contribute to intellectual diversity in a variety of ways might sometimes be favored over women and people of color whose views are not unusual or are already well represented." Again, being white and male can be a qualification when people feel more comfortable with, react or respond better to, or prefer white males in certain jobs and occupations, for example, firefighter, police officer in a white—i.e., entirely or predominantly—neighborhood,
supervisor in a white workforce, principal in a white school, academic adviser, and lawyer or doctor serving a white population. Being white and male can even be a qualification for selection for athletic teams, for example, when the goal is to achieve racial diversity, that is, to have athletic teams reflect the racial composition of the communities in which they are located, or to counteract the negative stereotype that certain minorities, who are overrepresented on these teams, have greater physical ability but lesser intellectual ability than whites. Thus, a white candidate for a basketball team can said to be more qualified, in the expanded sense, than a minority candidate who has superior physical skills and is a better player. If intellectual standards are justified because they seem to serve a useful social policy and nonintellectual criteria also serve such a policy, for example, in deciding which applicants should be accepted to professional school, critics can reasonably argue, physical standards are justified because they seem to serve a useful social policy and nonphysical criteria can also serve such a policy in deciding which candidates should be selected for athletic teams.

To the alleged objection that the meritocratic argument for AA implies that racist policies and practices can be justified, some defenders of AA reply that the claim that race can be construed as a kind of merit is "subject to the qualification 'when society's objectives legitimately relate
to race.'" That is, "only legitimate objectives," such as "the promotion of racial harmony," proponents of AA hold, "may be taken into account in defining merit," and not such objectives as "the maintenance of white supremacy." This reply contends that supporters of AA can point to legitimate goals not available to racists or segregationists. Taking being white as a qualification, another reply in favor of AA insists, gives consideration to or accommodates the prejudices and biases of whites, such as a restaurant or a car dealer that gives preference to white applicants for jobs as waiters or salespersons because it fears the loss of white business. However, in arguing that being white and male can be a qualification and being black, female, or Hispanic a disqualification, critics of the meritocratic defense of AA are not saying that this defense implies that racist and sexist policies and practices can be justified. Rather, they are maintaining that just as proponents of AA claim that there are meritocratic reasons for selecting minorities and women over white males who are more qualified in the standard sense, so it can be claimed that there are meritocratic reasons for selecting white males over minorities and women who are more qualified in the standard sense. Further, if regarding being black, female, or Hispanic as a qualification does not give consideration to or accommodate the prejudices and biases of blacks, women, or Hispanics, then regarding being white and male as a qualification need not give consideration to or accommodate the prejudices and
biases of whites or white males.

If proponents of the meritocratic defense of AA deny that being white and male may be considered a qualification and membership in the designated racial, sexual, and ethnic groups a disqualification, even if efficiency and societal and institutional goals are sacrificed, critics can reasonably ask why it is not also illegitimate or unacceptable to regard being black, female, or Hispanic as a qualification and being white and male as a disqualification. If it is a fact, for example, that white males generally learn better from white males and "if it would be improper" to take this fact "to be reason to think being a white male is a qualification in a teacher, then how shall we take its analogue," a writer asks, "to be reason to think being black, or being a woman, is a qualification in a teacher?" If the position in defense of AA is that members of the designated groups may be favored or advantaged but not disfavored or disadvantaged for efficiency-related, societal, or institutional reasons, this position is not principled or consistent.

Considerations of pragmatism and efficiency, including people's preferences for or more favorable reaction to members of their own race, sex, or ethnicity in certain jobs, "provide a rationale for all sorts of practices," a writer says, "that are currently illegal and should almost certainly remain so," such as the practice of businesses of preferring white applicants in hiring to accommodate the prejudices of a racist clientele. Some people who fear the
consequences of allowing race to count as a qualification and letting employers make race-conscious decisions and who prefer more strongly that blacks not be disfavored than that they be favored, another writer suggests, might decide that race or color not be considered at all in the hiring or selection process. Regarding race, sex, or ethnicity as a qualification and relying in the selection process on such considerations as individuals' compatibility with fellow workers and people's preferences for or more favorable reaction to members of their own group in certain jobs, some writers emphasize, open the way for prejudice and often lead to injustice and therefore, they maintain, should be rejected. Although characteristics like race and ethnicity may affect how an individual functions in a position because of others' reaction to him, the focus in the selection process should be on the individual's capacity to perform, or his ability to master, the specific tasks of the position.

In claiming that merit is defined in order to achieve social purposes and hence that race can be legitimately regarded as a merit or qualification, the meritocratic argument for AA provided a basis or rationale for morally objectionable policies that restrict the vocational and educational opportunities of nonmembers of the groups favored in AA. Thus, on the present argument for AA, a policy of achieving racial and ethnic diversity in colleges and universities, the professions, and the labor force as a whole by reducing and limiting the percentages of
overrepresented groups, such as Jews and Asians, in desirable positions would be meritocratically justified. Also, to achieve the social purpose of reducing anti-semitism, for example, a policy of limiting the percentage of Jews who could be teachers in a city's public school system and regarding being non-Jewish as a qualification for being a teacher in the system would be meritocratically justified. 84

Contrary to principles of justice, the meritocratic defense of AA also provides a rationale for treating such nonstandard criteria as race and ethnicity as relevant in contexts beyond hiring and admissions, namely, to serve useful social policies or to bring about good social ends. Thus, race and ethnicity may be considered relevant in academic grading and the awarding of degrees to increase the percentages of minorities receiving high grades, honors, and degrees; in the awarding of professional licenses to increase the percentages of minorities in the professions, such as law and medicine, and to provide minority role models; and in the awarding of prizes for intellectual or physical achievement to inspire other minority-group members to such achievement. Race and ethnicity may also be treated as relevant in allocating scarce medical resources to reduce group disproportions or disparities in health problems and in access to quality medical care; in voting and in allocating elective political offices to increase the numbers or percentages of minorities holding political offices and to enhance minority political power and
influence; and in the criminal justice system to significantly reduce the overrepresentation of minorities in the prison population and thereby eliminate negative stereotypes.

Despite claiming that merit is defined in order to achieve social purposes, proponents of the meritocratic justification of AA do not avoid or disarm the objection that AA involves preferential treatment and is discriminatory and unjust in refusing to select the candidates who are most qualified in the standard sense and who thus, according to distributive justice, best satisfy the relevant criteria in hiring and admissions. To avoid or to disarm this objection, the meritocratic argument for AA would have to show that the characteristics of race, sex, and ethnicity are indeed qualifications, that is, criteria narrowly determined by principles of distributive justice to be relevant in hiring and admissions, and not simply criteria claimed to be relevant in the selection process in judgments about who can best fulfill social purposes or serve social goals. The relevant criterion of selection in hiring and admissions, it may be recalled, is the demonstrated capacity to perform the specific tasks required by the position in question. In hiring and admissions, characteristics like race, sex, and ethnicity may be related to the achievement of social purposes or may serve useful social policies; but they are not thereby qualifications. Hence, rather than being in accord with principles of distributive justice, selection on the
basis of such expanded or nonstandard criteria as being a member of a specified minority group, being the offspring of an alumnus, having wealthy parents, and being a good basketball player conflicts with the requirements of distributive justice.

The claims of proponents of the meritocratic defense of AA that we define merit in order to achieve social purposes and that the notion of who is best qualified cannot be separated from judgments about who can best fulfill or serve societal or institutional purposes and goals are, in the words of one commentator, "quite patently untenable." He asserts that "it may be true that we pay attention to merit" or qualifications "because of society's needs" and consider the needs of society paramount in deciding whether, for example, there should be law or medical schools in the first place. However, this statement is "plainly not the same as saying ('in other words') that we define merit in terms of society's needs" and that the relevance and appropriateness of hiring and admissions criteria are determined simply by those social purposes and goals that officials want the hiring and admissions processes to serve. The meritocratic defense of AA distorts the notions of merit and qualifications in attempting to legitimize certain kinds of selection practices, particularly those practices usually engaged in by colleges and universities, and collapses the principles of distributive justice governing the selection process into utilitarian principles, thus erasing the
important distinction between justice-based and utility-based criteria of selection.

What criteria are morally relevant in selection—i.e., from the point of view of justice—is not determined simply by officials' decisions regarding the various social purposes and goals they want the selection process to serve but dictated by principles of distributive justice on the basis of the purpose or objective of the subject or activity in which distributions are made. The relevance of criteria in selection is thus determined not extrinsically but intrinsically, that is, by the nature or purpose of the subject or activity in question. When we have a clear idea of what certain goods are being allocated for, as earlier noted, we have a clear idea of what criteria are relevant. Thus, if we are hiring bookkeepers, the basic criterion of selection is the ability to add and subtract; and if we are hiring barbers, the basic criterion is the ability to cut hair well. A relevant criterion in these cases is not, for example, the ability to serve the social goal of increasing the percentage of minority bookkeepers or barbers. Hence, the best-qualified candidate for selection in hiring or admissions is the one who best satisfies the relevant criteria, not the one who best serves some social purpose or goal deemed desirable by AA or other officials.

Proponents of AA could argue that although such characteristics as race, sex, and ethnicity are not qualifications and hence are not criteria determined to be relevant
by principles of distributive justice, these characteristics are criteria of selection justified on utilitarian grounds. Thus, on this argument, to achieve social purposes or to serve useful social policies may require us to set aside or may justify setting aside merit or qualifications and considerations of justice in the selection process. This argument, however, is a quite different argument from the one presented by proponents of the meritocratic defense of AA. 89

Contrary to the claim of some proponents of AA that colleges' main goal is education whose scope reaches beyond the classroom, it is education in a narrow sense, not in some vague or broad sense, that is the central concern of colleges and universities. The fundamental purpose of these institutions is to provide education in this narrow sense, as well as to conduct research; and education in this sense is the activity for which white male and other applicants are seeking admission or acceptance. Thus, the specific purpose of colleges and universities, as indicated by what they are fundamentally engaged in and not by what admissions officials say or do, is to provide instruction in academic disciplines, such as history, economics, and chemistry, and to award degrees to those who have successfully completed the course of study. In the name of selecting the most qualified candidates, however, AA programs in higher education seek to use institutions devoted to education and training in academic disciplines to serve other purposes and
goals and to promote forms of social change that AA proponents consider desirable. The valued activity for which white male applicants to colleges and universities are seeking admission is education in academic disciplines and not, for example, serving as a role model for minorities or women, becoming a leader in a minority community, contributing to diversity, increasing minority representation in the student body and the professions, or enlarging a minority group's middle class. In AA programs, therefore, white male applicants are denied admission to educational institutions on the basis of criteria that are irrelevant to the activity for which they are seeking admission or acceptance.

Since the nature or purpose of the subject or activity in question determines the relevance of criteria in the selection process, the criteria that should be used in admissions, according to distributive justice, are those criteria relevant to the performance of the requisite tasks, namely, academic study and the earning of degrees. The qualities relevant to the performance of these tasks and the criteria used in assigning grades and awarding degrees are academic and intellectual; and it is academic and intellectual criteria that should be used in the admissions process. In this process, however, colleges and universities not only take into account but give a decisive role to qualities that are nonacademic and nonintellectual and that are irrelevant to academic study, the assigning of grades, and the
awarding of degrees and whose use in the admissions process is in conflict with the fulfillment of the fundamental purpose of colleges and universities.

The concentration in the admissions process on applicants' grades and test scores, some defenders of AA object, obscures the fact that there are nonacademic and nonintellectual qualities related to being a good lawyer or doctor, for example, and serving clients or patients, such as rapport and empathy, and that minority lawyers and doctors are likely to have the greatest rapport and empathy with members of their own minority communities. However, AA programs, however, do not measure or compare such nonacademic and nonintellectual qualities in evaluating and selecting applicants; and they cannot simply assume that minority applicants with lower grades and test scores possess these qualities to a greater degree than the standardly best-qualified applicants, even when the people served are minorities. Even if such human qualities as rapport and empathy may be among the qualities we would expect of a good lawyer or doctor and even if we could measure and compare these qualities in evaluating applicants, these qualities are not essential or fundamental and should not be used in deciding who is best qualified for admission to professional school. Indeed, as some writers point out, these qualities are not nearly as important as, for example, scientific knowledge and medical competence. Bad bedside manners may make people feel uneasy; but they do not cause patients' deaths, while medical
ignorance and incompetence often does.\(^91\)

Some writers who endorse the view that standard meritocratic criteria should be reexamined and broadened and hold that "there is nothing wrong in principle" with considering extracurricular talents, such as the ability to play the violin and the ability to play quarterback, in the admissions process reject the claim that race is a criterion of merit or a qualification. Race is not "a talent," these writers maintain, but "a matter of chance."\(^92\) However, "if color of skin cannot be construed as a kind of merit because it is not an achievement," some defenders of AA might object, "what about intelligence? Surely, admissions procedures have treated this as a kind of merit, yet it is a function of genes, and possibly environment, which are in no sense achievements."\(^93\) As some commentators observe in responding to this objection, although "intelligence is relevant to merit" and is a crucial ingredient in an applicant's acquiring the qualifications and skills for law or medical school, for example, intelligence is "not itself a kind of merit." The best-qualified candidate is selected "not for his native intelligence per se" but for his academic and intellectual performance, that is, "for his efforts in putting that intelligence to use."\(^94\) However, although such nonacademic and nonintellectual qualities as the ability to play quarterback may be considered talents, they are not academic talents and hence are not relevant to instruction in academic disciplines, the assigning of
grades, and the awarding of degrees (unless a student is seeking a degree in music). Colleges and universities do not assign grades or award degrees on the basis of the possession of such talents.

Finally, AA proponents' objection that to allocate quality jobs and college and university places on the basis of standard qualifications alone is to treat selection as an award or a prize for past performance or accomplishments is seriously misconceived. Candidates selected for admission to colleges or universities on the basis of standard qualifications are not being rewarded for past performance or accomplishments but are selected for their demonstrated capacity to do the work or to perform the tasks in question. Candidates admitted to law or medical school, for example, because they are best qualified in the standard sense are selected not simply because they have the highest undergraduate grades and test scores but because they have, as indicated by standard credentials, the best skills and the most knowledge and competence for the study of law or medicine. Opponents of the meritocratic defense of AA do not uncritically equate being more qualified to receive education and training in law or medicine with having higher undergraduate grades and test scores; nor do they hold that people qualify for such education and training the way a discus thrower qualifies for an Olympic gold medal. A more appropriate contrast between selection on the basis of standard qualifications and AA and usual admissions
practices of colleges and universities involves the way a discuss thrower qualifies and is selected for the Olympic team, that is, on the basis of performance in pre-Olympic competitions, and not on the basis of such factors as being a member of a racial group that is underrepresented on the team, being the offspring of a former member of the team, or having wealthy parents and perhaps becoming a major financial contributor to the team.
Notes

4. Ibid.
17. Will Kymlicka, *Contemporary Political Philosophy*, 327.
20. Ibid., 60.
22. Ibid.


32. See Paul, "Affirmative Action."


34. Ibid., 48.

35. Bowie and Simon, Political Order, 266.


38. Fullinwider, Reverse Discrimination, 87.

39. Ibid., 87-88.

40. Ibid., 87.

41. Bowie and Simon, Political Order, 3d ed., 221.

42. Fullinwider, Reverse Discrimination, 87.

43. Bowie and Simon, Political Order, 266.

44. Ibid.; and Mosley and Capaldi, Affirmative Action, 51-52.

45. Wolff, Political Philosophy, 208; and Mosley and Capaldi, Affirmative Action, 52.

46. Thalberg, "Reverse-Discrimination Debate," 140.

47. Ibid.

49. Thalberg, "Reverse-Discrimination Debate," 140.


60. Ibid., 357-58


65. Ibid., 8, n. 18.


70. Ibid.


73. Ibid., 81.


76. This point is based on the discussion in Cottingham, "Race and Individual Merit," 528.


79. Wasserman, "Discrimination"; and Nickel, "Discrimination."


84. This example is used in Posner, "Preferential Treatment," 20, to make a different point.


86. Ibid., 528.

87. Ibid., 525.

88. Ibid., 528.

89. Ibid., 528-29.


94. Ibid.
Chapter 10

Nonutilitarian Forward-Looking Justifications of AA

Perhaps the strongest justification of AA, some commentators remark, seeks neither to rectify past injustice, like the backward-looking justification, nor to expand the notion of merit or qualifications, like the meritocratic justification of AA. Instead, the aim of AA, according to some proponents of this policy, is "to promote certain highly desirable forms of social change." The best or only successful attempted justification of AA, these defenders of AA argue, is one that appeals to the desirable future consequences of the policy of achieving a state of affairs in which the representation of the designated racial, sexual, and ethnic groups in the various types of desirable positions in society is proportionate to their numbers or percentages in the population or the relevant labor pool. The justification of AA lies entirely in these consequences. The forward-looking justification of AA "makes no essential reference" to past injustice and defends AA "entirely as a means to some desirable future goal," although consequentialist arguments depend greatly "upon the moral imperative derived from historical, rectificatory arguments," a writer says, and in the absence of historical injustices "would not be nearly as compelling." Even when the goal is to eliminate disparities or inequalities that were in fact caused by past injustice, the rationale for eliminating them is not that they were caused by past
injustice. Depending on the particular form of the justification that looks entirely to the future, the desirable consequences or kinds of social change that AA programs seek to promote or to bring about include equal opportunity, equality, social justice, and increases in overall well-being or the general welfare.

A genuinely forward-looking or future-looking justification of AA, proponents of this approach point out, avoids such problems as establishing the extremely complicated causal connections between past injustice and the current situation of groups or individuals, for example, documenting the effects of past injustice on specific individuals and specifying the degree to which any given individual would be better off in the absence of past injustice. The forward-looking approach, however, still faces the difficult challenge of marshalling empirical evidence to substantiate its factual claims about the good or desirable consequences and projected benefits of AA.

A forward-looking justification of AA can be either utilitarian or nonutilitarian. The utilitarian form argues that AA promotes overall well-being or is conducive to the general welfare. Nonutilitarian forms defend AA as a way of promoting or achieving equal opportunity, equality, or social justice. I shall critically examine the nonutilitarian justifications of AA in the present chapter and the utilitarian justification, which has become increasingly prominent and influential in the AA debate, in the
One, form of the nonutilitarian forward-looking justification of AA appeals to the ideal or principle of equal opportunity. The variants of this equal opportunity argument for AA defend this policy as a means of ending discrimination and achieving equal opportunity in the present; as a way of achieving nondiscrimination and equal opportunity in the future; or as a method of overcoming social, economic, educational, and motivational disadvantages and creating the conditions for equal opportunity in the future.

The first variant of the equal opportunity justification of AA argues that AA is a corrective to continuing discrimination in employment and admissions processes. AA is justified as a mechanism for correcting biased and discriminatory employment and admissions practices and procedures and achieving nondiscrimination and implementing equal opportunity in the present. AA is "a way of insuring," an AA advocate says, that minorities and women who "want to present themselves as qualified candidates" and to "be assured of having a fair chance" have "that chance." According to this justification, AA is "a corrective to a 'normal' decision-making process that has gone wrong," that is, a process in which "the jobs, promotions, or whatever" are not "awarded to the best qualified individuals." AA,
in contrast to usual selection procedures, AA proponents claim, is "justified as an effective method" of eliminating and overcoming statistical disparities between groups caused by ongoing discrimination; countering "the prejudice, conscious or otherwise, that corrupts judgments of merit"; and "making sure that the best qualified win out, despite the prejudices that inescapably operate against them."

AA corrects deviations from "numerical projections of the percentage of women or minorities who would be hired or selected" by employment or admissions officers "under a fair and unbiased selection procedure." According to supporters of AA, these deviations and deficiencies in the representation of the specified minority groups and women in the desirable positions in society are the consequences of continuing discrimination against these groups. AA programs specify the targets or goals that institutions, academic and nonacademic, are to achieve, namely, the hiring or selection of minorities and women in the various categories of desirable positions in proportion to their percentages in the relevant applicant pool. These goals are based on the numerical projections specifying the percentages of the designated groups in these positions in the absence of present discrimination. To correct current discrimination, proponents of AA argue, a policy of AA and the use of goals and numerical projections as instruments must be instituted. Without AA and these instruments, discrimination against the designated minority groups and women will
American society has long been characterized by racism, which still is, proponents of the present defense of AA insist, "strongly ingrained in contemporary society." These AA advocates point to what they say is "the ongoing frequency and strength with which racism continues to be practiced," even if "the frequency of the overt variety may be declining." Although racism has often been "overt and intentional," racist actions "need not be conscious or intentional"; they "may well merely reflect an unexamined disposition that a person rarely stops to consider." Conscious and unconscious bias and discrimination still infect the selection process, defenders of AA claim, and pervert selection procedures in employment and admission to educational institutions. Officials assessing applicants' qualifications and making selection decisions are prejudiced against the specified minorities and women; as a result, qualified minorities and women continue to be harmed by prejudice, whether conscious or unconscious, and negative stereotypes, such as the beliefs that blacks are less intelligent than whites and that women are less rational than men or lack quantitative skills. Prejudice and demeaning stereotypes pervert or distort the selection process by, for example, influencing employment and admissions officers to systematically underrate the qualifications or underestimate the skills of minority and female applicants, perhaps "without even realizing" they are "doing so," and
to perceive minorities and women who are the most highly qualified applicants to be less qualified than competing white males and to reject them. Even employers who do not regard "race as a disqualification or negative factor" have a "deeply ingrained prejudice" which induces them to "give different weight to the same attributes presented by Black and White applicants" and "negative weight to irrelevant attributes found more frequently in Black applicants." 

The present argument for AA relies on an expansion of the scope of the phenomenon of discrimination, or a shift in the meaning of the term "discrimination," that goes beyond the conscious and deliberate or intentional exclusion or mistreatment of people or conduct that expresses contempt for or prejudice against a group of people and embraces what is called "institutional racism" or "institutional discrimination," which includes various actions and practices that are apparently neutral or unbiased on the surface but have a "disproportionate adverse impact" or "disparate impact" on particular groups. Thus, institutional racism or discrimination includes unconscious discrimination, that is, discriminatory behavior that involves relying on negative stereotypes one is unaware of, unconsciously following old customs, or unintentionally considering irrelevant characteristics in the selection process; statistical discrimination, which involves the use of characteristics, like race, sex, and ethnicity, that are statistical indicators of the lack or absence of...
characteristics that are relevant for a position; and appeal to reaction qualifications, which involves actions and practices that are not based on prejudice against or contempt for members of a group and do not express conscious or unconscious prejudice but accommodate or conform to the prejudices of other people, such as an employer's hiring less-qualified whites as car salespersons or restaurant workers because he fears that his racist clientele will not patronize his business if he hires blacks instead.31

Another form of institutional racism or discrimination is the method of hiring or selection through personal connections, which involves filling positions through a networking process or system of informal contacts or relationships, such as word-of-mouth advertising and recruiting practices and the requirement of recommendations from several current employees.32 Thus, since whites disproportionately hold the sorts of positions being filled and tend to network with or to have informal contacts or relationships with other whites, AA advocates maintain, "the discriminatory effect on blacks is substantial."33 Distinguished also is a type of institutional discrimination which involves actions and practices that, though "fair in form" and "race-neutral," are alleged to transmit the legacy of discrimination and thus to be "discriminatory in operation."34 These allocative actions and practices are said to perpetuate the harmful effects of past discrimination and
exclusion, for instance, practices that apply such criteria as seniority, record of work experience, and scores on standardized tests in the selection process. Such practices benefit whites disproportionately at the expense of blacks and other minorities, it is claimed, because of the past discrimination that led to less seniority, an inferior record of work experience, and inferior educational opportunities for members of these groups. It might be noted, however, that not only test scores but other criteria for being qualified, such as grades and even knowledge, skills, and competence, can also be claimed to have been lowered as a result of past discrimination.

The present justification of AA thus relies on an expansive understanding of nondiscrimination that goes well beyond the interpretation according to which "a policy of distributing scarce positions among applicants is one of nondiscrimination if such factors as race, religion, sex, ethnic background are not taken into consideration in the selection process." Further, formally fair, "facially neutral," and "bias-free" selection procedures, it is argued, cannot overcome institutional racism, which is "so strongly ingrained in contemporary society that it can only be overcome through AA policies." In fact, advocates of AA insist that "racism often shows itself" outside the contexts of employment and admissions and "in ways not captured in the measure of how much a single person has specific access to (in terms of material goods or
opportunities)." for example, in the "denigration and marginalization" of minorities that takes place "in the media, entertainment, public art, modes of dress, popular music, and the like." Statistical disparities and the lack of proportional representation of the specified minorities and women in the desirable positions in society are evidence of present discrimination, supporters of AA argue, since these discrepancies are the effects of continuing discrimination against members of these groups in employment and admission to educational institutions. Not only did racial, sexual, and ethnic discrimination exist before the establishment of AA programs, but also, AA proponents claim, this discrimination would exist in the absence of these programs and even continues decades after the institution of AA. "Surely, it would be unreasonable to deny" that "African Americans and other minorities" suffer from "current discrimination," as well as from "the continuing effects of past discrimination." There is "plenty of evidence" or "widespread evidence" of present discrimination not only against these minorities but also against "women in the United States." AA advocates cite recent data showing, for example, they say, that blacks compose only 3 percent and Hispanics only 2 percent of full-time college and university faculty members; blacks are only 3 percent of the physicians and lawyers; blacks hold only 0.6 percent and Hispanics only 0.4 percent of the senior managerial positions "in Fortune
1000 industrial and Fortune 500 service companies. Other statistical data cited are said to indicate that just over 24 percent of full-time college and university members are women. At research universities, only 20 percent of faculty members are women, although nearly 40 percent of faculty members at public junior colleges are women. In the natural sciences, only 15 percent of faculty members are women. Further, "women now hold 70 percent of white-collar positions but only 10 percent of management positions. There are only two women CEOs in Fortune 1000 companies." In addition, "women with identical credentials are promoted at approximately one-half the rate of their male counterparts." Thus, since the specified minority groups and women are not proportionally represented in the professions and other desirable positions, it is argued, discrimination against these minorities and women is continuing. "Any deviation between Blacks and Whites from strict proportionality in the distribution of current goods," an AA advocate declares, "is evidence of racism."

Proponents of the present justification of AA thus take statistical parity as the relevant standard for determining the existence of current discrimination: if blacks and the other groups "do not enjoy proportionate representation in quality professions, then discrimination is presumed to be ongoing." Conceding that "arguments utilizing statistical disparities are sound only on the condition that these discrepancies have been caused by
discrimination," AA advocates maintain that this additional claim can be defended "when viewed as an inference to the best explanation."

That is, they conclude that ongoing discrimination is the cause of the relevant statistical disparities on the grounds that this claim best explains the discrepancies.

However, not only are deviations from statistical parity or arithmetical proportionality not proof of discrimination, but even from such facts as that discriminatory practices often result in racial or ethnic disparities it hardly follows that present discrimination is the cause of the discrepancies at issue. AA defenders cannot reasonably simply assume that reference to present discrimination is the most plausible explanation of these discrepancies and dismiss alternatives as implausible or less plausible. They do not derive this conclusion or correctly infer the existence of continuing discrimination from a rigorous and thorough analysis of the pertinent statistical data; and they do not take into account differentiating criteria relating to the relevant statistical disparities. Defenders of AA face such problems as explaining the facts that there are nonwhite minority groups, for example, Asians, who are not generally underrepresented in desirable positions even though they have been victimized in this country; that there are statistical disparities between non-Jewish and Jewish whites and between non-Jewish whites and Asians in representation in prestigious, high-level positions, such as places in elite
colleges and universities; and even that whites are greatly underrepresented among players selected in prominent, high-paying sports, such as basketball and football. Presumably, AA defenders would not maintain that reference to present discrimination best explains such racial and ethnic disparities.

A problematic assumption underlying the inference from statistical disparities to ongoing discrimination as the cause is that in the absence of present discrimination blacks and the other designated groups would be proportionally represented across society, that is, in the various types of desirable positions in society. The lack of proportional representation of the designated groups in these positions is adequate evidence of present discrimination, AA critics argue, only if it is reasonable to believe that the counterfactual assumption is true.56 However, as noted earlier in the critical examination of the backward-looking defense of AA and as critics of AA contend, the empirical evidence contradicts such an assumption. The sociological evidence indicates that, past and present discrimination aside, uneven representation among racial, ethnic, and cultural groups is the norm, not an aberration.57 Are AA defenders making the implausible claim that the counterfactual or proportionality assumption is true if it is restricted to the designated groups, especially the minorities?
Acknowledging that statistical disparities alone are insufficient to establish the existence of continuing discrimination, some proponents of AA agree that evidence must be adduced to show that the statistical disparities focused on are caused by present discrimination. Although the statistical disparities between the targeted or designated groups and the nontargeted or nondesignated groups provide one of the grounds for thinking that discrimination is ongoing, these defenders of AA argue, other evidence, such as that furnished by the existence of deeply felt and widely held racist and sexist attitudes, helps to account for or to explain the skewed statistics and therefore buttresses the statistical evidence. The attitudinal evidence provides discriminatory reasons for the statistics; this evidence points to continuing discrimination as the cause of the statistical disparities. Empirical evidence shows, these AA defenders claim, that racist, sexist, and discriminatory attitudes harbored against blacks, other minorities, and women have been widespread and deeply entrenched in this society and have distorted selection procedures. The "most straightforward" way that "scholars have devised" to search for racism, one writer says, "is to ask people what they think." Thus, AA advocates cite the findings of opinion surveys and questionnaires which purportedly show that whites still harbor prejudice against blacks and other minorities, for example, that minority underachievement is the result of a lack of ability and determination.
Information about formal and informal employment and other selection practices, for example, the practice of filling positions through word-of-mouth recruiting or preference for friends and relatives of current employees, supplies further evidence, AA advocates affirm, of continuing discrimination against the specified minorities and women.63

"There is much evidence that a strong determinant of whether one finds a job or advances in one's profession depends," a supporter of AA writes, "on 'who you know'—the informal relationships that lead to recommendations and personal endorsements."64 Filling positions through word-of-mouth recruitment and reliance on informal employee networking has been commonplace, studies show, in blue- and white-collar hiring, AA proponents claim.65 Thus, "about 86 percent of available jobs do not appear in classified advertisements, and 80 percent of executives find jobs through networking."66

Further evidence of ongoing discrimination in employment that buttresses the skewed statistics "has been presented in a number of formats,"67 a defender of AA writes. This evidence includes suits against major corporations and labor unions, such as AT&T and the United Steelworkers of America; suits and public hearings involving government departments and agencies, for example, the police departments in Los Angeles and New York City; and EEOC complaints concerning word-of-mouth recruitment and hiring and promotion decisions influenced by negative stereotypes.68
In an Urban Institute study, experiments that tracked "equally qualified" and "identically dressed" pairs of black and white job applicants are said to provide direct evidence of discrimination in employment. Although the blacks and whites were "equal in every arguably relevant dimension" (e.g., age, work experience, education, speech patterns, personal characteristics, and physical appearance), the study found, an AA proponent says, "repeated discrimination against African American male applicants. The white men received three times as many job offers as equally qualified African Americans who interviewed for the same positions." In its report the Urban Institute regarded these findings as "proof" that "discrimination against blacks in the American work force is 'widespread and entrenched.'" Another study revealed," an AA supporter writes, "that African and Hispanic American job applicants suffer blatant and easily identifiable discrimination once in every five times they apply for a job."

"Taken together," AA defenders claim, "the statistics, personal and institutional attitudes, assumptions, and practices provide powerful evidence of intractable discrimination against women and minorities in the American workplace."

Indeed, racism, as well as sexism, in employment, some AA defenders argue, can be assessed not only directly but also "indirectly, through extrapolation." If racist attitudes and racist or discriminatory behavior are widespread
in diverse areas or sectors of society generally, "it is reasonable to infer" that these attitudes and behavior "also exist" in hiring and promotions; and there is "abundant evidence" of widespread racism and discrimination. Cited are data said to show, for example, that "black men on average earn substantially less than white men"; black men with bachelor's degrees earn considerably less than their white counterparts; and college-educated women, black and white, earn a little more than white male high school graduates and substantially less than white male college graduates. Other data cited are claimed to reveal that there is "extensive housing discrimination against blacks" and other minorities, that "minorities in the United States are discriminated against 40 percent of the time when they attempt to rent apartments or buy homes." Further data are said to indicate that "minority applicants are 50 percent more likely to be denied a loan white applicants of equivalent economic status." 

Given the preceding and other similar data, "it is implausible" that racism and discrimination, "so widespread in contemporary society," these defenders of AA conclude, "should be significantly absent from the world of work where predominantly white employers, supervisors, and union officials decide whether blacks should be rewarded equally with whites." 

The present argument that AA is justified as a corrective to continuing discrimination, however, does not
establish that racist and sexist attitudes and discriminatory practices are widespread and pervasive and that reference to them accounts for or explains the statistical disparities between the designated and nondesignated groups in employment and admission to educational institutions. Thus, the findings of opinion surveys cited by AA proponents, if accurate, provide some evidence of derogatory or discriminatory attitudes toward blacks and other minorities; but critics of AA point to recent survey data which, they say, "consistently show" that "white attitudes have changed dramatically" from the negative attitudes held in earlier decades. For instance, "now more than 75 percent of whites assert that both whites and blacks are equal in intellectual capacity"; "at least 90 percent say that blacks and whites should have the same rights to public accommodations and to attend the same schools"; and "virtually 100 percent of whites say that blacks and whites should have an equal chance to compete for jobs."86 The opinion surveys cited by AA advocates show that significant percentages of whites have negative attitudes toward Asians as well, for example, that they are "more likely" than whites "to be lazy" and are "less intelligent."87 Such attitudes, however, do not result in pervasive discrimination against Asians and the underrepresentation of them in desirable positions.

The present justification of AA does not provide evidence sufficient to establish not only that racist, sexist, and discriminatory attitudes and negative stereotypes are
widely held and deeply embedded in contemporary society but also that prejudice and demeaning stereotypes corrupt employment and admissions officers' judgments about the qualifications and merit of minority and female applicants and distort selection decisions, that is, result in the best-qualified applicants being rejected. Further, this attempted justification of AA does not establish that pervasive discriminatory employment selection and admissions practices prevent minorities and women from attaining positions for which they are the most qualified or most competent candidates. Moreover, suits against major corporations, labor unions, and government departments and agencies and EEOC complaints do not provide the needed corroborative evidence of widespread continuing discrimination against the designated minorities and women. These suits and complaints show at most that some—or even many—people believe that there is widespread discrimination in employment selection and admissions, perhaps because they also believe that statistical disparities here must be caused by discrimination.

Contrary to the conclusion of the Urban Institute study cited by AA advocates, the study's findings concerning experiments involving carefully matched black and white job applicants do not yield proof of widespread and entrenched discrimination against blacks in employment. Thus, the study is not a survey of the job market as a whole, some researchers note, but only a small part of it. The study excluded all public sector jobs and a large number of jobs
in private sector firms. Furthermore, there are complications in ensuring that the black and white job applicants are, as AA advocates claim, equally qualified. Education, for example, is a multidimensional variable that varies not only quantitatively but also qualitatively, that is, according to such factors as the caliber of the institution in which an individual received his education, the performance of the individual receiving the education, and the individual's field of specialization. Hence, job applicants may have the same quantity of education but a very different quality of education. Moreover, the actual findings of the Urban Institute study do not reveal repeated discrimination against black applicants. Rather, they show that in 67 percent of cases neither applicant received a job offer, in 13 percent of cases both received a job offer, in 15 percent of cases only the white received an offer, and in 5 percent of cases only the black received an offer. "It would be hard to argue," a commentator remarks, "that this is evidence of large-scale, anti-black bias."

Proponents of the present justification of AA do not establish that there is abundant evidence of widespread racism and discrimination in diverse areas or sectors of society and hence do not convincingly argue that the inference that racism and discrimination also exist in employment is a reasonable one. These AA advocates' inferences from statistical discrepancies to the existence of racism and discrimination in diverse sectors of society, like the
inferences from statistical disparities in employment and admissions, ignore or neglect differentiating criteria and pertinent data. Thus, claims that income and pay differential are the result of racism, sexism, and ongoing discrimination ignore such differentiating criteria as level and quality of education and field of concentration (whites are more likely than blacks to attend top-rated colleges and to major in well-paying fields, for example, business and engineering), as well as "skills possessed, regional location, specific character of the labor market, time of entry into that market, amount of work experience, and so on." Data show, for instance, that "correcting for the whole range of criteria that influence earnings," black men earn 99.1 percent of the white wage; black college graduates earn more than whites with equivalent degrees from equivalent colleges, and black women with college degrees earn more than their white counterparts; and black faculty members with Ph.D.'s earn more than white faculty members with Ph.D.'s in the same field from a department of the same quality ranking. Further, "the best single measure of the male/female earnings differential," according to some researchers, "is to compare single, never married women in year-round, full-time employment with their male counterparts." Thus, when we remove part-time workers, the majority of whom are women, and remove marriage and parenthood, both of which have a negative effect on women's earnings, data reveal that single, never-married women who are
year-round, full-time workers have achieved income parity with their male counterparts. 101

An Urban Institute of housing discrimination tracking carefully matched black and white housing applicants found not that such discrimination is extensive or widespread but that 15 percent of blacks seeking to rent an apartment were told that an apartment was unavailable even though the same apartment was offered to a white and that 8 percent of blacks seeking to buy a house were falsely told that a house was no longer for sale. 102 Similarly, a study of apartment complexes found that black applicants received different treatment 9.8 percent of the time and hence that "whites and blacks are treated identically 90 percent of the time." 103 Concerning mortgage lending, data indicate that decisions on loans take into account not only levels of income but also such criteria as net worth, debt burden, credit history, value of the collateral, job stability, and size of the down payment. 104 A noteworthy fact is that data also show that Asians are more likely than whites to be granted mortgages 105; but "no one" has "argued," a commentator remarks, "that bankers are prejudiced in favor of Asians." 106

The claim that reference to continuing discrimination provides the best or most plausible explanation of the statistical disparities between the designated and nondesignated groups in employment and admission to educational institutions is confirmed or supported by the empirical evidence only if members of the designated groups are
available for the desirable positions being filled, are willing to accept these positions, and have the best qualifications or most competence for the positions they are denied.107 The present justification of AA, however, is unable to show that all these conditions are satisfied and hence does not establish the preceding claim.

Notwithstanding its stated rationale, AA is not a means of correcting continuing discrimination and achieving nondiscrimination and implementing equal opportunity in the present. AA does not simply set aside biased, discriminatory selection procedures or counter the prejudices, conscious or unconscious, that corrupt or distort judgments of competence. This policy does not remove or counteract the blockages and obstacles that, according to proponents of the present justification of AA, prevent minority-group members and women who are the best-qualified or most competent candidates from attaining the affected positions, such as by directly or indirectly distorting employment and admissions officers' judgments of their qualifications and competence through prejudice or negative stereotyping. AA is not simply a method of guaranteeing that "Blacks do not continue to be disadvantaged because of their race"108 in employment selection and admissions and making sure that minorities and women who are most qualified or most competent win out in the competition for desirable positions despite the prejudices and stereotypes that, defenders of AA insist, inescapably operate against them. Furthermore, AA is not a means of
allowing everyone to compete equally and ensuring that the
most qualified or most competent candidates prevail in the
competition; nor is it, therefore, a mechanism for imple­
menting equal opportunity in the present.

On the contrary, AA involves preferential treatment
and is discriminatory. In employment and admission to col­
leges, universities, and professional schools, AA programs
select minority-group members and women who are not more but
less qualified or less competent than white and Asian male
rivals according to the standard conception of qualifica­
tions and standard merit-based criteria of selection and who
would not be hired, promoted, or admitted under unbiased and
nondiscriminatory selection procedures. An instructive
illustration is that in one year at an elite university only
27 of the more than 800 black and Hispanic students admitted
would have been admitted if they had been evaluated accord­
ing to strictly academic criteria.\textsuperscript{109} Again, more than 90
percent of the black students actually enrolled in law
school in a recent year would not have been admitted to the
particular schools that granted them admission if academic
qualifications alone had been taken into account.\textsuperscript{110}

AA programs allocate positions on the basis of race,
sex, and ethnicity; these characteristics, not superior
qualifications, become the critical and decisive factors in
the selection process in these programs. Had the minority
and female applicants hired or admitted through AA been
white and male they would have been rejected straightaway.
In using these characteristics and discounting superior qualifications or superior competence in selecting members of the designated groups and bypassing nonmembers, AA programs discriminate in favor of members of the designated groups and against nonmembers in preventing them from attaining positions for which they are the most qualified or most competent candidates. Hence, these programs guarantee not that blacks and other minorities are not disadvantaged on account of race or ethnicity but that these minorities are advantaged and members of other groups are disadvantaged on account of race or ethnicity in employment selection and admissions.

Rather than correcting continuing discrimination and achieving nondiscrimination and equal opportunity in the present, AA programs are directed toward achieving parity for, or the proportional representation of, the designated groups in the various categories of desirable and valuable positions in society not by enforcing or implementing unbiased selection procedures but by selecting minorities and women according to group membership. AA programs use the device of goals not as a means to correct present discrimination but as a means to remedy statistical discrepancies in employment selection, as well as in admissions. Goals in AA programs do not function merely as indicators or measures of compliance by institutions with the requirement of nondiscrimination or as numerical projections specifying the percentages of members of the designated groups who would be
chosen under unbiased and nondiscriminatory selection procedures. Rather, the targets specified by AA programs are quotas; they are the numbers or percentages of desirable positions in various categories that these programs set aside for members of the designated groups. Thus, a university that decides to hire a certain percentage of black or Hispanic faculty members or to admit a certain percentage of black or Hispanic students or a company that decides to hire a certain percentage of black or Hispanic or female workers is adopting a quota system.

To achieve statistical parity for the designated groups in the various categories of desirable positions, AA programs are indeed necessary or indispensable because there are not enough minority-group members who have the qualifications to fill the affected positions without lowering selection standards and resorting to preferential treatment. "The number of minorities available to satisfy" the demand for statistical balance "using established intellectual standards," one writer observes, "falls far short" of "the number of minority members insisted upon as 'goal' or as a 'target.'" "There simply is no way" to achieve statistical parity or racial and ethnic proportionality in employment and admissions "if all candidates are evaluated on the same objective standards." Those academic institutions that abandoned programs of preferential treatment in admissions experienced a precipitous and dramatic decline in minority enrollment. This decline is a reflection not of the persistence of discrimination in the absence of AA
programs but of, one commentator remarks, "the magnitude" of programs of preferential treatment.

Selection practices and procedures that eliminate or reduce statistical disparities and so-called racist or sexist impact, then, may nevertheless be discriminatory and unjust. Moreover, formally neutral selection practices and procedures that result in statistical discrepancies and have a disparate and adverse impact on some racial, sexual, or ethnic groups may be in conformity with merit-based selection and the objective evaluation of competence and therefore not be discriminatory or unjust. Possible examples are an admissions procedure that yields the overrepresentation of Jewish or Asian students and an employment selection procedure for positions on an athletic team that has a disproportionally adverse impact on whites. Hence, the suggestion that "there is no real difference between eliminating discrimination and achieving proportionality" is mistaken. The pursuit of racial and ethnic proportionality, AA critics rightly maintain, "is certainly not to be identified with efforts to extirpate discriminatory practices." Achieving racial or ethnic proportionality is neither necessary nor sufficient for eliminating discrimination or achieving non-discrimination.

Defenders of AA cannot justifiably maintain, therefore, that discrimination against blacks, other minorities, and women in employment and admission to colleges, universities, and professional schools is ongoing because these
groups are underrepresented in desirable positions and that by eliminating statistical disparities AA programs are a corrective to continuing discrimination; that AA programs counter the prejudices that corrupt or distort officials' judgments of qualifications and competence; and that these programs are an effective method of making sure that minorities and women who are most qualified or most competent prevail in the competition despite the prejudices that inescapably operate against them.

When a college, university, or nonacademic institution, such as a company, advertising a position "describes itself as an 'Equal Opportunity/Affirmative Action employer'" and adds "that it 'welcomes and encourages application from women and minority candidates,'" such phrases supposedly "signify," a commentator notes, that the institution "does not engage in discrimination." However, "sometimes the same words are also intended to convey the important message that the institution strongly prefers, or will give serious consideration only to, members of specific groups." Concerning the phrase "'Affirmative Action/Equal Opportunity Employer,'" a university professor remarks that "everyone understands what that means," namely, that the employer engages in the preferential hiring of the specified minorities and women and therefore in discrimination against and the denial of equal opportunity to nonmembers of these groups.
Concern for members of the nontargeted or nondesignated groups who are denied positions in AA is not, as some AA advocates hold, "a matter of sympathy and not justice." If individuals have rights to equal opportunity and nondiscrimination and thus "a right to have credentials judged according to fair criteria for awarding positions," a commentator writes, this concern "certainly is a matter of justice." Indeed, those who defend AA as a corrective to present discrimination themselves assert that selection practices that treat individuals "differently on irrelevant grounds" are "discriminatory" and unjust.

The view that a policy of selecting minorities and women in proportion to their numbers or percentages in the pool of qualified applicants, not in the population as a whole, is justified does not avoid or undermine the foregoing objections to the present justification of AA. According to this view, since "talent is equally distributed" among the targeted and nontargeted groups and the members of these groups "are, on average, equally well qualified," these numbers or percentages are the ones "most likely to result in the best qualified individuals being hired." However, ignoring or neglecting relevant empirical evidence, this view simply assumes that the members of the targeted groups are, on average, as well qualified as the members of nontargeted groups. This view also fails to establish that selecting minorities and women in proportion to their numbers or percentages in the relevant applicant
pool serves the declared purpose of hiring the best-qualified individuals, regardless of race, gender, or ethnicity, for example, the best-qualified scholars for a university faculty. The minorities and women hired may not be the best-qualified individuals for the affected positions. A racial, sexual, or ethnic group's percentage in some employment category may not equal its percentage in the applicant pool even in the absence of present discrimination against it. For instance, the percentage of whites selected to fill positions on an athletic team often is lower than their percentage in the applicant pool. Similarly, in the absence of present injustice the percentage of a racial or ethnic group admitted to a college or university may not be proportionate to its percentage in the pool of applicants deemed at least minimally qualified. A group's percentage of those having the best qualifications for quality jobs or college or university places may be disproportionally lower than the percentages of other groups. Further, the present view is unable to show that the hiring programs it endorses are not merely ways of achieving racial, sexual, and ethnic quotas and engaging in preference and discrimination by selecting from the applicant pool minority-group members and women who are less qualified and less competent than the nonmembers displaced, who would not be selected under unbiased and non-discriminatory procedures, and who would not be victims of discrimination in selection in the absence of AA programs.
A reply objects that hiring programs which select minorities and "in proportion to their availability in the relevant labor pool," that is, in proportion to their numbers or percentages in the "pool of qualified persons in the relevant geographical area," such as sheet-metal workers in New York City, or their percentages of "the total number of people having the 'requisite' skills" or "relevant degrees," such as Ph.D.'s in psychology, are justified because these programs improve "the overall fairness of the competition." These hiring programs give preference to minority-group members and women "to a degree just sufficient to offset" the effects of present discrimination "and thus to meet minimum quotas" for these groups. These programs bypass white males "only as often as" minorities and women "continue to be passed over" because of discrimination in favor of white males. Hence, "it would no longer be predominantly" minorities and women who are "repeatedly disadvantaged" by "departures from the 'straight merit' principle." A "preferential hiring" program that "results in a situation where there is a balance of blacks, women, and white males," therefore, is not "unjust." The preceding argument relies not only on the unjustified claims that statistical disparities between the designated and nondesignated groups in employment are the effects of continuing discrimination and that in the absence of ongoing discrimination the employment percentages of the groups designated to receive preference would equal their
availability percentages but also on the unjustified claim that the preferential selection of members of the designated groups simply counterbalances the effects of ongoing discrimination. If the injustices of programs of preferential hiring significantly overbalance the injustices of ongoing discrimination, as critics of AA charge and the evidence confirms, these programs are morally objectionable on this argument's own premises. Even if it were true or reasonable to believe that programs of preferential hiring and ongoing discrimination "balance out in the statistics," as one writer says, these programs still would be morally objectionable, since statistically counterbalancing injustice with injustice results in "double injustice" rather than overall justice. Moreover, counterbalancing or eliminating statistical disparities that are purportedly the effects of ongoing discrimination is not a way of ending discrimination or creating the conditions for equal opportunity. This policy does not enforce or implement unbiased and nondiscriminatory procedures, which need not yield statistical balance; nor does this policy protect its beneficiaries from being victims of present discrimination.

To prevent employment selection procedures from continuing "to work against blacks and other minorities," one argument maintains, "preferential hiring is necessary" because these procedures and hiring decisions "cannot be objective" and unbiased and the "unavoidable non-neutrality of hiring decisions," this argument insists, "must be
recognized and countered by an opposing non-neutrality.\textsuperscript{138} Subjective elements or "vague subjective standards" in hiring and promotion decisions, such as "'fitting in'" and "'personality,'"\textsuperscript{139} along with how comfortable an interviewer feels with an applicant and how confident an applicant appears,\textsuperscript{140} AA advocates claim, "give play to prejudice and false stereotypes."\textsuperscript{141} Indeed, given the "element of subjectivity in the decision making process," there is "the likelihood of conscious or unconscious bias" affecting officials' judgments of qualifications "if the decision makers are white."\textsuperscript{142} Hence, selection procedures that "depend on subjective evaluation" are "a 'ready mechanism' for covert race discrimination."\textsuperscript{143}

In claiming that employment selection procedures and hiring and promotion decisions involve subjective elements and cannot be objective or unbiased, however, the preceding defense of preferential hiring can be viewed as an argument not for preference but for eliminating or minimizing subjective factors in the selection process, such as by downplaying the importance of interviews and letters of recommendation, and emphasizing objective measures of qualifications and competence.\textsuperscript{144} Even if it is granted that the more that subjective, intangible, and unmeasurable criteria are taken account of in the selection process the more that prejudice can affect and distort this process, critics can argue, selection decisions are not necessarily dependent on or determined by subjective criteria and hence are not
ineluctably distorted by the bias of decision-makers. Reliable, objective judgments and assessments of achievement, competence, and promise "have long been made," an academician notes, "and are commonly made,"\textsuperscript{145} for example, in assessing the proficiency of a surgeon or an accountant, in identifying those who have a solid grasp of the principles of logic or mathematics, and in distinguishing those who are well prepared for graduate study or jobs in mathematics or physics and those who are not.\textsuperscript{146} For employment selection, as well as admissions, reliable and objective measures of competence and the capacity to perform the requisite tasks are available. However, preferential hiring, on the present defense of this policy, ignores important differences between preferred and displaced applicants when they are evaluated by objective standards.

Assuming again that the statistical disparities between the designated and nondesignated groups in representation in desirable positions are a reflection of ongoing discrimination, some writers offer a compromise proposal to achieve the proportional representation of the targeted groups in faculty positions in colleges and universities, for example, without having the costs borne by members of nontargeted or nondesignated groups who would have obtained the affected positions in the absence of preferential policies.\textsuperscript{147} The proposal is that colleges and universities make available additional faculty positions for the benefit of a targeted group, such as blacks or women. These institutions
are to add positions to academic units or areas in which the targeted group is underrepresented. According to the proposed policy, whenever a new position opens in a department with underrepresentation of the targeted group and that position is not filled by a member of this group, another position is to be created that will be filled by a member of the targeted group. This additional position will then convert to an ordinary position and be considered filled by that group member when a second ordinary position opens. This process will continue until the proportional representation of the targeted group is achieved.

However, individuals who are not members of the targeted group will lose positions they would have acquired in the absence of the proposed policy and hence will bear the costs of this policy. Thus, better-qualified members of nontargeted groups will be discriminatorily denied the opportunity to compete for and to acquire the additional or created positions that are reserved for members of the targeted group. Further, when a second ordinary position opens that is considered filled by a member of the targeted group but would be filled by a member of a nontargeted group were the position to be advertised, that member of a nontargeted group will not be acquiring a position he would have acquired in the absence of the proposed policy. Under this policy, therefore, individuals who are not members of the targeted group will be prevented from acquiring positions they would have acquired under nonpreferential and
nondiscriminatory selection procedures.

Some defenders of AA insist that what may seem to be preferential treatment in AA programs is really not; AA programs are innocent of the charge that they involve preferential treatment and hence are not vulnerable to the foregoing objections. One view holds not that the standard set of qualifications are applied in a biased or unfair way in the selection process but that "the criteria for 'being qualified' are inherently biased in directions unfavorable to women or minorities" and therefore that "the specific claims of some white males to actually be the most qualified candidates" are "undermined." Proponents of this view emphasize that they are not saying that "we ought to appoint less competent" white male candidates. Rather, they are saying that "qualifications, as commonly understood, do not generally reflect competence, particularly where women and minorities are concerned, because of the inherent bias built into the very criteria of qualification." Thus, "'it is part of our idea of what would make a good lawyer, brain-surgeon, manager, etc. that they should have features typically possessed by white males.' "'Merit standards . . . reflect what the dominant group does well,'" a legal scholar writes, and "'conceal the operation of racial favoritism.'" "Since our conception of qualifications in many areas, including academia, is rigged by racial and sexual stereotypes," proponents of the present view argue, "the candidate who is most qualified need not also be the
most competent." The biased common conception of qualifications "illegitimately" rules out or excludes "women and minorities who are in fact the most competent candidates."154

According to a view endorsed by some defenders of AA, "the true potential of women and minority-group members cannot be accurately assessed in terms of standard or 'paper' credentials"155 or strictly academic indicators, such as grade point averages, test scores, and letters of recommendation, since these credentials or indicators conceal previous discriminatory practices, for example, the unfair denial of admission to a prestigious graduate school and the less favorable assessment of written work or recommendations,156 that prevented minorities and women from acquiring impressive standard credentials.157 "Present credentials" do "not measure the true potential"158 of such individuals. Therefore, minority and female applicants who appear to be less competent than white male applicants may be "more competent than rivals."159

The employment selection procedures in AA programs violate the principle of merit or hiring by competence "only if," it is argued, "the accepted evidence of competence is indeed an accurate indicator." However, since "the evidence of competence" for the jobs that AA typically involves "is normally in the form of written documents, certificates, letters of recommendation, and so on,"160 and since these paper credentials are "skewed by prejudice"161 or "infected
themselves by earlier racism or sexism," supporters of the present view maintain, these credentials "cannot be taken unquestioningly as trustworthy evidence of the competence of a black or a woman." Therefore, "the principle of hiring by competence presently requires that the paper credentials of black and female job applicants be assessed differently from those of white male applicants." The apparently preferential treatment of women and members of the specified minority groups is thus "necessary simply in order to identify the candidate with the most competence."\textsuperscript{163}

In response to the consistently lower performance of the specified minority groups on the SAT and other standardized tests, the claim is made that the tests are racially or culturally biased and hence are not an accurate indicator of the ability and competence of minority job and school applicants.\textsuperscript{164} One complaint is that standardized tests have a "prediction bias"\textsuperscript{165}; that is, they underpredict minority applicants' college and job performance. The claim is that the tests predict a lower college and job performance than the designated minorities in fact achieve. The tests are thus less accurate in predicting the college and job performance of blacks and the other minorities than that of whites.\textsuperscript{167} Another complaint is that racial and ethnic disparities in performance on standardized tests are "the product of the 'cultural bias'" with which the tests "are constructed."\textsuperscript{168} The tests have a "content bias"; that is, they contain "questions that favor one group over
Publicized examples include SAT analogy items require familiarity with "terms like 'regatta' and 'sonata'" and presume "middle-class and suburban experience." According to this complaint, "blacks and those who live in the inner city are less likely to be familiar with" such terms "than whites who grow up in the suburbs." Such test items thus measure not aptitude or logical reasoning ability but knowledge of upper-middle-class activities.

Group disparities in standard criteria of qualifications and such standard indicators of qualifications as test scores do not show, however, either that these criteria are rigged by racial and sexual stereotypes or that these indicators are biased, unpredictable, or inaccurate. The scientific evidence indicates, on the contrary, that standardized tests, such as the SAT, "do not suffer from" prediction or content bias. Thus, in an exhaustive review of studies of the predictive value of tests for different racial groups, the National Academy of Sciences concluded that "'ability have not been proved to be biased against blacks.'" Extensive scientific inquiry has repeatedly shown the falsity of the claim of racial bias in standardized tests, some writers insist. The overwhelming evidence is that the tests used to make admissions and employment decisions do not underpredict black or Hispanic college and job performance. Blacks do worse, not better, than their test scores predict. Thus, "almost all colleges have found that when they compare black and white undergraduates who
enter with the same SAT scores, blacks earn lower grades than whites, not only in their first year but throughout their college careers." Similarly, "when firms compare black and white workers with the same test scores, blacks usually get slightly lower ratings from their supervisors and also do a little worse on more objective measures of job performance."\textsuperscript{178} The study by the National Academy of Sciences, along with other studies,\textsuperscript{179} "found that, compared to their predictive value for whites, tests were slightly more likely to overpredict black success."\textsuperscript{180} According to the scientific evidence, standardized tests overpredict blacks' college and job performance; their undergraduate and law school grades, for example, are lower than their test scores predict.\textsuperscript{181} Furthermore, the scientific evidence contradicts the claim that the SAT and other standardized tests have a cultural or content bias. Thus, "the black-white gap on tests that measure familiarity with the content of American culture" is not "consistently larger than the gap on nonverbal tests that do not measure familiarity with any particular culture."\textsuperscript{182} In addition, "the same test items that show the greatest differences between blacks and whites also discriminate most between high-scoring and low-scoring candidates within each racial group."\textsuperscript{183} When there are differences between racial or ethnic groups in academic preparation, knowledge, skills, and competence, such criteria of qualifications as test scores can be reasonably expected to reflect these differences.
The empirical evidence, furthermore, undermines the suggestion that since high school grades are a better predictor of college success, that is, college grades, than is the SAT, high school grades should be assigned prominence and test scores downgraded in importance in the admissions process. 184 This evidence shows that generally test scores are a more accurate predictor of college performance than high school grades for blacks and Hispanics, though the opposite is true for whites whites and Asians, 185 and that the combination of SAT scores and high school grades is a significantly more accurate predictor of success in undergraduate study than are high school grades alone. 186 Moreover, a problem for such attempts to increase minority enrollment in colleges and universities is that "the GPAs of students in their previous schooling also exhibit marked racial disparities." 187

If the claim that standardized tests are racially or culturally biased were true, reasonable expectations are that a prominent nonwhite and culturally distinct group like the Asians would have difficulty with these tests and that the designated minority groups would perform better in those sections of the tests in which cultural bias is minimized, for instance, mathematical and reasoning, than in verbal sections. These expectations, however, turn out to be false. 188

AA defenders' contention that high school and undergraduate grades are standard credentials or strictly
academic criteria also skewed by prejudice or infected by racism or sexism is vulnerable to objections as well. Thus, defenders of AA do not provide empirical evidence to substantiate the claim that grades assigned to minority and female students do not in general accurately reflect their competence and previous performance. If lower standard credentials of minority and female applicants, like grades, indicate equal competence with white male applicants, equal standard credentials should indicate superior competence and predict superior performance for minority and female applicants; but the empirical evidence does "not indicate relative overachievement." Indeed, the lower subsequent performance of minorities hired or admitted through AA programs confirms the judgments that standard credentials and standard criteria are accurate indicators of these minorities' qualifications and competence, that these minorities are not as well prepared academically as competing whites and Asians, and that these minorities are less competent than the whites and Asians displaced by AA programs. Although the unfair grading of minorities and women by white male teachers may take place occasionally, a university professor concedes, "it is equally plausible," he says, that some white male teachers grade their minority or female students "less harshly than average." In fact, in the evaluation of student performance "faculty members often internalize the spirit of race preference," another professor writes, and "commonly favor minority students whose failure might prove
awkward."

The present defense of AA implausibly suggests that previous discriminatory practices have resulted not in a lack of knowledge, skills, and competence but simply in a lack of ability to demonstrate them, such as on tests, or the lack of opportunity to acquire impressive standard credentials. This argument for AA conveys the distorted, stereotypical image of minorities and women "as overly hard-working and overly qualified but held down at every step by unfair tests and biased grades."

Preceding attempts to defend AA by maintaining that the common conception of qualifications is rigged by racial and sexual stereotypes and is therefore biased do not substantiate or establish the claims that qualifications as commonly understood are inherently biased and identify or pick out, for example, features typically possessed by white males, not those qualities, such as the possession of knowledge and skills, which reflect competence and the capacity to perform essential tasks; that the common conception of qualifications excludes minorities and women who are in fact the most competent candidates; and that the minority and female recipients of positions in AA programs, not the white males bypassed, are the most competent candidates for the affected positions and merely appear to be displacing more competent candidates. These attempts to defend AA, furthermore, are unable to establish that AA is not in fact fundamentally a means of selecting less-qualified and
less-competent minority and female candidates on the basis of group membership. Simply judging more leniently or readjusting or reevaluating the credentials of minority and female candidates and selecting them for the affected positions in employment, as well as in admissions, is not a method of identifying and selecting the candidates who are most knowledgeable, skilled, and competent.

To achieve and to ensure nondiscrimination in employment and admission to educational institutions, critics of AA can acknowledge, simply asking academic and nonacademic institutions to avoid discriminating or to adopt a policy of passive nondiscrimination is not sufficient. In passive nondiscrimination, employment and admissions officers seek to evaluate job and school applicants "solely on the basis of their qualifications, with no attention to race or sex." This policy is criticized as "insufficient by itself for several reasons," for example, because "in some cases the criteria for a certain position may be irrelevant to the qualifications really necessary for performing the job and may simply have the effect of disqualifying minorities," and because "there may be cases in which prejudice is so ingrained that trying to apply criteria fairly and impartially simply will not work." Distinguished from the preceding policy is a policy of active nondiscrimination, in which institutions take positive steps to ensure that recruitment and selection practices are fair, unbiased, and nondiscriminatory. Not all
critics of AA hold that affirmative action by itself ought to be abandoned, since they believe that there are forms of affirmative action that do not involve racial, gender, or ethnic preference and that may be considered forms of active nondiscrimination. Thus, the procedural form of affirmative action advocates "positive procedural requirements that employers or admissions officers must use to ensure," according to procedural affirmative action, "that their pool of candidates is representative of some larger body, such as the pool of qualified candidates in the nation, region, or in some smaller group from which the institution normally recruits." These requirements "might include open advertising of positions" and "inclusion in such advertisements of a statement of employer interest in hiring minorities or women," along with "greater internal efforts to make sure that applications of minorities and women are not dismissed because of perhaps unconscious bias or stereotyping." Other procedural requirements are that positions not be filled through word-of-mouth and similar recruiting practices or through the preferential selection of friends and relatives of current employees.

One problem for the procedural form of affirmative action is to avoid focusing on group statistics in recruitment and selection and thereby forgetting that the procedural requirements should protect not only the specified minorities and women but also members of other groups and should make sure that the applications of not only the
specified minorities and women but also members of other groups are not dismissed because of bias; stereotyping; or racial, sexual, or other forms of preference. Thus, outreach programs and efforts intended to inform the minority groups directly benefiting from AA programs that certain jobs and positions are available and that employers have an interest in hiring members of these groups and to reassure members of the designated groups that companies and other institutions advertising positions do not tolerate discrimination on the basis of race, gender, or ethnicity may be morally objectionable. These programs and efforts may be discriminatory and unjust in adopting positive measures, such as recruitment visits to black and Hispanic schools and advertising targeted to minority readers that are aimed at encouraging minorities to apply for certain positions and generating "a pool of applicants that is racially representative," and that thus "exemplify a purely racial remedy" in benefiting "only minorities."

The regulative form of affirmative action "requires employers or admissions officers to make numerical projections of the percentage of women or minorities who would be hired or selected under a fair and unbiased selection procedure." If the numerical goal is not met, "the institution normally is expected to shoulder the burden of proof of explaining the failure." Unlike in AA, "the intent of this form of affirmative action is not to prefer anyone on the basis of such factors as race, ethnicity, or gender," its
advocates emphasize, "but to specify a target against which actual hiring procedures can be measured. The target is simply the result that a fair hiring procedure would produce." Thus, if women receive 30 percent of the Ph.D.'s granted by universities in a given field, such as psychology, "one would normally expect institutions that hire from such an applicant pool to select women for roughly 30 percent of their new positions." Problems for this form of affirmative action, however, are to avoid the reliance on numerical projections or expectations of a group's representation in the various types of desirable positions that are based on false, unsupported, or unrealistic assessments of how many group members can be selected without applying a double or preferential standard, and to prevent numerical goals or projections for the group from becoming quotas.

The strict, careful assessment of nonpreferential procedural requirements and safeguards and the emphasis on standard, objective, and measurable criteria of merit, qualifications, and competence should be sufficient, as critics of AA hold, to achieve nondiscrimination in employment and admission to educational institutions. In conforming to this approach to ensuring nondiscrimination, we are able to identify and to correct or to eliminate recruitment and selection practices that discriminate against and treat unjustly not only the specified minorities and women but also members of other groups, such as the practices of filling positions through word-of-mouth referrals and preference for current
employees' friends and relatives. The nonpreferential procedural requirements and safeguards include openly advertising positions that are to be filled; reexamining existing selection practices and procedures and altering or eliminating those that are discriminatory or apply facially neutral but irrelevant criteria in employment and admissions decisions; monitoring and overseeing the selection process at each stage to ensure that job and school applicants are "judged without any consideration of their race, religion, or national origin" and that the best-qualified applicants are not eliminated from selection on the basis of such irrelevant characteristics; and being able to justify selection decisions on the basis of merit, qualifications, and competence. The emphasis on standard, objective, and measurable criteria in employment and admissions decisions, furthermore, is a way to exclude judgments of qualifications and competence that are distorted by prejudice or that reflect racist and sexist attitudes. Standard criteria "should be emphasized," a university professor writes, "to ensure fair application" of the rule for selection according to competence. The more objective the selection process and the narrower the criteria for selection, as one commentator observes, "the more difficult it is to discriminate on the basis of irrelevant features."~

The nonpreferential approach to achieving and ensuring nondiscrimination in employment and admission to colleges, universities, and professional schools recognizes as
discriminatory and unjust the various forms of institutional racism or discrimination in the selection process identified by supporters of AA, such as relying on negative stereotypes one is unaware of and unconsciously following old customs; using such characteristics as race, sex, and ethnicity as statistical indicators of the lack of qualifications and competence; accommodating or conforming to others' prejudices; and filling positions through personal connections and informal contacts or relationships. These practices and procedures are judged to be discriminatory and unjust, on the present approach, however, not because they have a disparate, adverse impact on the specified minorities and women but because they deny positions to individuals on the basis of irrelevant criteria rather than on the basis of a lack of knowledge, skills, and competence.

According to the nonpreferential approach, selection, as well as recruitment, practices should have to meet strict conditions designed not to remedy group statistical disparities or imbalances or to bring about the significantly increased employment or college, university, and professional school enrollment of certain racial, sexual, or ethnic groups but to ensure that no persons are prevented from attaining positions because of their racial, sexual, or ethnic group membership. This approach recognizes that selection practices and procedures which eliminate or reduce group statistical disparities and so-called racist or sexist impact may nevertheless be discriminatory and unjust and
that racially or sexually neutral or bias-free selection practices and procedures which result in such discrepancies may not be discriminatory or unjust.

The attempted justification of AA as a corrective to present or ongoing discrimination in employment and admissions has several implications that some supporters of AA may find unpalatable or be unwilling to accept. Thus, a policy of selecting apparently less-qualified individual whites for types of positions in which whites are significantly underrepresented, such as positions on athletic teams, may be justified or defended as a means of correcting a selection process distorted by racial or ethnic stereotypes, for example, that the specified minorities have superior physical ability but inferior intellectual ability to whites. Another implication is that policies modelled on AA that seek to correct institutionally racist or discriminatory practices in contexts beyond hiring and admissions by eliminating statistical disparities between the designated and nondesignated groups would be justified as well. Based on the assumption that these statistical discrepancies are also the result of ongoing discrimination, these policies would give preferential treatment to members of the designated groups and thus apply less stringent and less demanding criteria to them in, for example, the assignment of grades and the awarding of academic honors and degrees; the awarding of professional licenses, such as to practice law or medicine; the evaluation of employees' conduct or performance on the
job; the granting of mortgage loans; the allocation of scarce medical resources; the allocation of elective political offices; and the arrest, indictment, trial, and sentencing procedures in the criminal justice system.

Another variant of the equal opportunity justification of AA views this policy as a mechanism for correcting discrimination against the specified minorities and women, such as the discrimination practiced by AT&T and, more recently, Shorey's restaurant chain and Texaco, and achieving nondiscrimination and equal opportunity in the future. AT&T, according to proponents of the present defense of AA, "virtually excluded women, along with minority men," from "the higher paying positions in the company." Shorey's restaurant chain restricted blacks to "kitchen jobs so that most employees in the dining area would be white"; and Texaco "systematically passed over black employees for promotions in favor of less experienced whites" and "fostered a racially hostile environment." Acknowledging that AA is a policy of explicit racial, sexual, and ethnic preferences and quota requirements, proponents of the present argument for AA maintain that "the aim" of this policy "is to achieve equality of opportunity, understood as selection without bias. The use of preferences is a tool to this aim." Going beyond merely "giving lip service to equality of opportunity," preferences that yield the approximately proportional representation of the designated groups in the various job classifications are needed "to effect lasting
changes in the work environment, creating a more hospitable climate" for minorities and women, "and making unbiased employment practices truly possible"; to change racist and sexist attitudes, for example, that minorities and women are "incompetent at" higher-level and better-paying jobs and that "women would not succeed 'men's' jobs and were out of place in them" "to change and to reform institutional habits; and "to create conditions for equal opportunity for all." AA is thus justified as a necessary means of creating "a more just world," a world in which selection is unbiased and "people are treated on their individual merits."

Alternative methods to AA, such as the publication of nondiscriminatory guidelines and the use of "facially unbiased" or "nominally unbiased" selection procedures, are ineffective and too weak to produce "a truly unbiased workplace," AA defenders insist, since these programs will not have the result that "enough minorities or women are lodged in place to create appropriate changes in attitudes and habits." Indeed, bias-free selection procedures reinforce future racism and are "linked to future overt discrimination," a supporter of AA writes, "by contributing to the disproportionate presence of blacks at the bottom of employment—a presence that helps perpetuate the racist attitude that blacks are inherently inferior." "A credible account of an institution and its habits," proponents of the present justification of AA claim, "reveals deep blockages
to achieving truly unbiased selections, blockages not dislodgeable without resort to the drastic measure of preferential treatment." The "only way" to change attitudes and to reform institutional habits "is to implement a policy that affords advantages to blacks in the form of preferential treatment." \(^{224}\)

The initial problem confronting the present equal opportunity defense of AA is to substantiate the empirical claims that there is widespread and entrenched discrimination against the specified minorities and women and that deeply felt and widely held racist and sexist attitudes and discriminatory institutional habits block the achievement of unbiased selection and prevent the most highly qualified minorities and women from attaining desirable positions. This argument has to show that it is not simply relying on or adopting the standard of statistical parity that if there are group statistical disparities in employment, discrimination can be presumed to be ongoing. Indeed, the pervasiveness of AA programs is disconfirming evidence regarding the claim that present discrimination is widespread and entrenched. AA programs do not protect the many recipients of preferential treatment from being excluded or prevented from attaining higher-level and better-paying positions on the basis of group membership; and critics of AA can reasonably ask who or where the victims of the supposed discrimination are. Furthermore, AA proponents' vigorous support for the continuation of AA programs and vehement opposition to
the termination or abandonment of these programs is evidence that they believe not only that ending AA programs will result in the reappearance or recurrence of statistical disparities in employment, as well as in admissions, but also that after more than thirty years in operation these programs have not changed attitudes, have not reformed institutional habits, have not achieved truly unbiased selection, and have not created conditions for equal opportunity for all. What a policy of AA has done over more than three decades is to establish an entrenched system of racial, sexual, and ethnic preferences and biased selection that discriminates against and denies equal opportunity to individuals belonging to nondesignated groups. Moreover, rather than creating appropriate changes in attitudes and habits or creating a more hospitable climate for minorities and women, a policy of preferential treatment is more likely to cause resentment and hostility, to reinforce negative attitudes or to cause them to arise, and to foster or to reinforce negative stereotypes. Thus, the proportional presence of the specified minorities in higher-level positions through preferential treatment fosters or reinforces the belief that blacks and the other minorities are inferior to whites in intelligence and ability, given the view that such treatment is "the only way" these minorities "can achieve parity with whites." Proponents of the present defense of AA reject alternatives to AA as weak and ineffective in achieving truly
unbiased selection because, in effect, these AA advocates falsely assume that achieving unbiased selection requires achieving statistical parity or proportional representation of the designated groups, and hence that the failure of alternative programs to achieve the latter goal is a failure to achieve truly unbiased selection. AA programs may achieve the proportional representation of the designated groups in the various job classifications, but achieving statistical parity is neither equivalent to nor the means of achieving truly unbiased selection and genuine equal opportunity.

Critics of AA, it should be emphasized, are not simply advocating the implementation of facially or nominally unbiased or race-neutral selection practices and procedures as alternatives to AA, since such practices and procedures may themselves be morally unacceptable, not because they result in statistical disparities, but because they apply morally irrelevant and discriminatory criteria in the selection process.

Lastly, the present equal opportunity justification of AA is vulnerable to the objection that it provides equal justification for morally problematic policies that extend preference for minorities and women to contexts other than employment and admission to educational institutions, including grading, the awarding of honors and degrees, and the awarding of professional licenses. These policies, it can be argued, are also a means of eliminating group
statistical disparities in the distribution of social goods, changing attitudes, and reforming institutional habits. Therefore, if these policies are morally unacceptable, preferential policies in employment and college, university, and professional school admissions are morally unacceptable as well.

According to another version of the equal opportunity defense of AA, this policy "is needed to implement equality of opportunity precisely because of the effects" of discrimination on the designated minorities, "particularly African Americans," and women. AA is needed "as a balance against competitive disadvantages that are the legacy of past injustice." Because of past and continuing discrimination, blacks and the other minorities suffer a variety of disadvantages that impede or "slow them up" in the competition for "high-quality education" and "good jobs." These unjust competitive disadvantages include poverty, serious family problems, low self-esteem, and poor education—from having attended substandard schools, with, for example, poorly qualified teachers, out-of-date books or books in short supply, and deteriorating buildings—and a lack of adequate diet and nutrition, decent housing, and adequate medical care. AA is a way of neutralizing such disadvantages and affording minorities equal access to goods distributed competitively and the chance to achieve success in society.
The present argument for AA appeals to the familiar analogy of a race with a chained or shackled runner, which is now deployed in a forward-looking rather than a backward-looking or compensatory justification of AA. Thus, simply stopping the race in the middle, cutting the chain, and letting the race resume is an inadequate and unfair remedy, since the previously chained runner is already far behind and the suggested remedy does not eliminate the effect of the unfair burden on the runner. Likewise, given the previous discriminatory practice and the denial to minorities and women of "a level playing field," proponents of AA argue, merely enforcing laws prohibiting discrimination and implementing formal equal opportunity, which prohibits allocating jobs and places in educational institutions on the basis of irrelevant criteria, such as race and ethnicity, are "simply not enough," since "the inequalities resulting from past discrimination would be perpetuated into the future." Formal equal opportunity neglects disadvantages and inequalities of condition or background that lead to "a poignant discrepancy between the occupational aspirations of many blacks and the educational qualifications that they are able to achieve." Like the previously shackled runner, minorities handicapped by discrimination cannot be reasonably expected to be competitive. Hence, justice requires more than a commitment to formal equal opportunity; it requires that the effects of unjustly imposed handicaps be negated. Negating or eliminating such effects and
implementing equal opportunity in a broader sense, the present defense of AA maintains, is precisely what AA does.\textsuperscript{241}

However, even if it is granted, as AA proponents and others contend, that formal equal opportunity (also called "weak equal opportunity")\textsuperscript{242} is inadequate because it "leaves the matter of initial starting points untouched"\textsuperscript{243} and there are obstacles or barriers to competitive success that it does not address, the conclusions that formal equal opportunity simply be dismissed or disregarded and that a policy of preferential treatment is justified do not follow. Formal equal opportunity, with the requirement that jobs and college and university places be awarded to the best-qualified applicants, is a necessary component of an adequate conception of equal opportunity, which supplements this principle with a principle of substantive equal opportunity (also called "strong equal opportunity")\textsuperscript{244} that seeks to correct for inequalities and disadvantages in family background and social circumstances. Substantive equal opportunity requires not that society provide complete or perfect equality of initial or background conditions but that it take measures—e.g., income redistribution, the enforcement of minimally adequate conditions in the home environment, a system of free public education, and the provision of extra educational resources—which may require the infusion of social services, to compensate for or to mitigate disadvantages, such as poverty and inadequate education, that prevent individuals from, or seriously impede
them in, acquiring and developing the skills for successful competition and achievement. Substantive equal opportunity requires that society equalize initial or background conditions or remove disadvantages to the extent that these efforts ensure that each individual has the opportunity to develop his talents, to acquire qualifications, and to attain desirable positions.

In any case, AA programs, including set-asides, in fact make race or ethnicity, not individual disadvantage, the ground of preference and thus are not targeted at those group members who suffer the disadvantages that the present argument for AA claims handicap minorities in competing for desirable positions. Just as AA programs in backward-looking justifications do not directly benefit those minority-group members to whom the compensatory rationale applies, so AA programs in the present forward-looking justification do not directly benefit those minority-group members to whom the rationale of overcoming disadvantage applies. In institutions having higher- or upper-level positions, such as colleges, universities, and professional schools, critics note, AA programs principally benefit individuals who are the offspring of middle- and upper-class minority families, who are "the products of fine schools" and were "reared in fine homes," and who "have received an upbringing and an education superior to that of the vast majority of whites and persons of all other colors." These individuals are "the minority applicants most likely to be in a
position to apply\textsuperscript{247} to such institutions. Further, AA pro-
grams ignore or leave out disadvantaged individuals who do
not belong to the designated minority groups and even permit
the bypassing of these individuals in giving positions to
members of these minority groups. "Blacks and Hispanics are
not the only ones," as critics of AA point out, "to have
been burdened by bad schools, or undermined by poverty or
neglect, or wounded by absent or malfunctioning fami-
lies.\textsuperscript{248}

An attempt to salvage preferential treatment holds
that a race-neutral, class-based approach can justify a
policy of preferential treatment.\textsuperscript{249} This argument claims
that preference for those actually from socioeconomically
disadvantaged backgrounds, irrespective of race or ethnic-
ity, avoids the objection to the mistargeting of benefits
levied at race-based preference. Furthermore, unlike race,
which is not the best indicator of disadvantage,\textsuperscript{250}, social
and economic class are relevant because a poor socioeconomic
background can hinder the development of potential.\textsuperscript{251} Pro-
ponents of class-based preference argue that this policy is
justified as a way or providing equal opportunity for those
who because of socioeconomic disadvantage "never really
would have had a chance to develop the skills and qualifica-
tions demanded by meritocratic competition" or "might other-
wise never have a realistic chance of attaining certain
positions because of unequal developmental opportuni-
ties."\textsuperscript{252} Chronic social and economic deprivation have the
effect of denying those so affected "an equal chance to develop qualifications and achieve positions," including children whose impoverished home environments "effectively inhibit the development of their talents and aspirations." "A policy of preference is justified," according to the present argument, "in order to create equal opportunity in the future for the chronically deprived," who cannot have equality of opportunity for themselves or their children without decent jobs to raise their standard of living and level of motivation." Preference in hiring and admissions for "the chronically poor" is a way of breaking "the seemingly endless cycle of social and economic deprivation," breaking "the circle of deprivation by beginning to improve" the "home conditions" of poor children, and breaking "the progression of generations of chronically poor and socially deprived."

Although preference in employment, as well as in admissions, for individuals on the basis of socioeconomic disadvantage stands in stark contrast to race-based preference in being designed to help those who have suffered developmental disadvantages and in avoiding the objection to the mistargeting of benefits leveled at race-based preference, there are problems facing class-based preference as a proposed alternative to AA. Thus, AA advocates reject preference based on class or socioeconomic disadvantage because, they say, it will not yield the desired racial and ethnic proportionality in the various categories of desirable
positions.\textsuperscript{261} Unless academic and nonacademic institutions dramatically reduce their reliance on such selection criteria as grades, standardized test scores, and class rank, commentators agree, substituting class-based preference for race-based preference will not be sufficient to maintain racial and ethnic diversity or proportionality.\textsuperscript{262} The problem here is that far more low-income whites apply for higher-level positions, such as places in professional school, than low-income members of the specified minority groups and poor, disadvantaged whites generally have better skills and qualifications than their minority counterparts.\textsuperscript{263} Large competitive differences separate disadvantaged white students from disadvantaged black and other minority students.\textsuperscript{264} Consequently, disadvantaged whites will benefit more from class-based preference than disadvantaged minority-group members. Another problem, in the view of AA advocates, is that the class-based approach will require preference for disadvantaged whites over nondisadvantaged minorities.

Problems for the attempt to use preference in employment to create equal opportunity for the socioeconomically deprived arise from the consideration that employment is a source of inequality when there is a scarcity of quality jobs and some jobs offer greater economic rewards than others. A policy of preferential treatment neither increases the number of quality jobs available nor alters the reward structure of existing jobs.\textsuperscript{265} Also, there remain menial
and unpleasant jobs with low salaries that some people must perform, and the proposed preferential policy clearly will not raise the standard of living and level of motivation of these workers and their children.

Further problems facing the present defense of preferential treatment relate to the task of providing empirical evidence to establish or to support such assumptions and claims as that the development of talents and aspirations in poor children to prepare for professional and other higher-level positions has certain prerequisites, for instance, books and magazines in the home, much verbal interaction between parents and children, and parental involvement in the school. and that there is an underclass of people trapped in a seemingly unbreakable or endless cycle of social and economic deprivation. Contrary evidence indicates that the supposed prerequisites are not necessary for the development of talents and aspirations in poor children. Thus, the children of Japanese immigrant farmers had none of the alleged prerequisites during the period of their high educational achievements. Indeed, a significant number of children from poor families have managed to aspire to higher-level positions and to achieve success in society without preference or even less drastic measures to improve the home environment. Moreover, the image of a perpetual underclass that the present defense of preferential treatment conveys is, according to research, the exception rather than the norm. Although children born into poverty have a
higher chance of ending up in poverty than those not so disadvantaged, there still is an enormous amount of economic mobility from one generation to the next.\textsuperscript{268}

Class-based preference does not resolve the problem of those who are socioeconomically deprived and have grown up in home environments that effectively inhibited the development of their talents and aspirations and have not really had the chance to develop the skills and qualifications required by meritocratic competition and to attain certain desirable positions. These individuals lack the skills, qualifications, and competence to be seriously considered for higher-level positions or to benefit directly from preference for these positions, including jobs that, according to the present defense of preferential treatment, provide the home environment and motivation necessary to encourage and to enable poor children to aspire to and to prepare for professional and other desirable positions. Indeed, preference in employment and admission to educational institutions is an ill-suited and inappropriate mechanism for overcoming disadvantage. Thus, preference in college or university admissions is not an appropriate remedy for a poor or an inadequate primary or secondary education, since the natural result of lacking or being deprived of an adequate primary or secondary education is to be incapable of benefiting from college or university admission and a tertiary education.\textsuperscript{269} Even some supporters of race-based preference concede that "those who really have been hurt by
disadvantaged individuals should have the opportunity, like other individuals, to develop their talents, acquire qualifications, and to attain desirable positions; but they should not simply be guaranteed the attainment of these positions. Proponents of AA cannot seriously or justifiably contend, critics maintain, that white males now applying for positions, for example, places in law or medical school, find themselves "on an 'equal opportunity playing field.'"272

The preceding arguments for race- and class-based preference in employment and admission to educational institutions imply that other morally objectionable policies that seek to overcome disadvantage and to create equal
opportunity or to make available quickly more quality jobs for minorities and women, disadvantaged individuals, or the parents of poor children would also be justified, such as policies that open up new positions by dismissing individuals from jobs they hold and that extend preference to contexts other than employment and admissions, including grading, the awarding of academic honors and degrees, and the awarding of professional licenses. The second sort of policies, it can be argued, are also a means of overcoming or neutralizing competitive disadvantages and achieving equal opportunity by applying lower or less stringent standards to the specified minorities and women or to individuals said not to have had an equal chance to acquire and to develop skills and qualifications and to attain desirable positions.

A variant of the present equal opportunity defense of AA seeks to justify group-based preference by explicitly linking the notion of equal opportunity to the goal of proportional representation of the designated racial, sexual, and ethnic groups in employment and admission to educational institutions. This argument construes equal opportunity in group terms (perhaps appropriately called "Super Strong Equal Opportunity"). That is, this sort of equal opportunity requires that social groups—i.e., racial, sexual, and ethnic groups—succeed "in obtaining coveted positions in proportion to their representation in the population." Equal opportunity here is thus "equivalent to
equal outcomes." On the present conception, equal opportunity exists only when groups that compose n percent of the population obtain n percent of the desirable positions in each category, for example, the professoriate or faculty positions in a university department. One form of group-oriented equal opportunity holds that "equal attainment" or equal success rates for groups express the requirement of equal opportunity, that is, that the number or percentage of group members obtaining desirable positions be proportionate to the number or percentage of group members applying for the positions. Blacks or women have an equal opportunity to enter law or medical school, for instance, "only if they are admitted in proportions appropriate to the number who apply." Hence, according to the group conception of equal opportunity, the lack of proportional representation of the designated racial, sexual, and ethnic groups in desirable positions, such as positions as faculty members or company supervisors, or these groups' unequal attainment or unequal success rates in obtaining such positions is a denial of equal opportunity.

Before the implementation of AA, usual hiring, promotions, and admissions practices did not generate the appropriate percentages of the designated groups in desirable positions. Thus, "minorities (notoriously blacks)," a supporter of AA writes, were "previously underrepresented in higher education," as well as in upper-level positions in other areas. Therefore, in yielding the proportional
representation of the specified minority groups and women in desirable positions in society or in equalizing these groups' success rates in obtaining these positions, defenders of AA argue, AA is a justified means of achieving equal opportunity. Without AA, there will be at best only a gradual increase and improvement in the representation of the designated groups in desirable positions; and such a delay in achieving equal opportunity is unacceptable. 285

However, even if it were granted that the proportional representation of or equal success rates for the specified minorities and women is a desirable aim, critics say, there would be difficulty in understanding why this goal should be called "equal opportunity." 286 Surely, this conception is "not a conception of individual equal opportunity." 287 It is concerned with equal outcomes for groups, not equal opportunities for individuals. This conception of equal opportunity is satisfied when groups have the appropriate percentages of desirable positions or appropriate success rates in obtaining them regardless of the disparities in opportunities between individuals within the same group or between individuals in different groups. 288 Two individuals may have have very different opportunities even though they belong to the same group or to different groups with equal proportions of desirable positions or equal success rates in obtaining them. Hence, the present argument for AA substitutes concern with group statistics for concern with opportunities for individuals, who may have equal
opportunities whether or not statistics regarding the percentages of minorities and women in desirable positions even out. Initial problems confronting the present defense of AA, therefore, are to justify understanding or interpreting equal opportunity in group terms and restricting the scope or application of this conception to certain groups.

Rather than supplementing individual equal opportunity, as some might suggest, group equal opportunity fundamentally conflicts with individual equal opportunity in justifying limiting and denying individual opportunities on the basis of group membership in order to eliminate or to reduce the underrepresentation or inequality in success rates of some groups.

Indeed, in appealing to the group conception of equal opportunity the present defense of AA has several moral implications that some proponents of AA may acknowledge are unacceptable. Thus, denying positions to individuals who belong to overrepresented groups, such as Jews in academia, and also to members of the designated racial, sexual, and ethnic groups when these groups have higher percentages of desirable positions in some category than equal opportunity requires or permits would be justified. On the group conception of equal opportunity, the overrepresentation of some groups entails the denial of equal opportunity to underrepresented groups. Furthermore, once the proportional representation of previously underrepresented racial or
ethnic groups is achieved through preferential treatment, institutions would be justified on grounds of equal opportunity in giving preference to nonmembers, including whites, in allocating new positions, such as teaching positions in a university academic department, in order to preserve racial or ethnic proportionality in the distribution of positions. Therefore, bypassing blacks or Hispanics who happen to be the best-qualified applicants in such cases would not be a denial of equal opportunity. Moreover, the present equal opportunity defense of AA implies that preference for members of the designated groups in contexts other than hiring, promotions, and admissions would also be justified, such as policies that equalize the proportions of blacks and Hispanics receiving high academic grades, academic honors and degrees, and professional licenses by applying lower and less demanding standards to members of these groups.

Equality or Social Justice

Eschewing equal opportunity as an aim, another egalitarian defense of AA substitutes instead the goal of equality of condition in some respect. This defense argues that AA is justified as a means of "eliminating caste from American life" (as a result of a history of discrimination and oppression in this society, black Americans "have become an undercaste"), ridding "our society of the great injustice of racial inequality"; ending "the inequality of groups in our society," which "has arisen because of past
discrimination against, and oppression of, racial minorities and women; and "promoting a more just and equal society." AA programs are justified, a proponent of AA writes, "because of what they do to help make the conditions of social life in our society today more racially just and less racially disadvantageous for blacks than would be the case in their absence," and "because of their substantial causal role in weakening the existing system of racial disadvantage"—in which "to be black rather than white is to be at a disadvantage in terms of the prospects for achieving and enjoying a satisfying life whether understood along economic, vocational, political, or social lines—and helping "to eliminate this system" by having "it occur that blacks do come to occupy more" of the "positions of power, authority, and the like within the system."

According to the present defense of AA, this policy eliminates group inequalities in the distribution of desirable positions, strengthens the socioeconomic position of the disadvantaged minority groups and women, brings about a more equal distribution of wealth and power among groups in this society, and produces a more equal and—some advocates of AA claim—more just society by altering the ways in which quality jobs and other desirable positions are distributed or "by having," a proponent of AA writes, "the selections for places turn in part on the race of the applicants." "The guiding thought motivating" the "redistribution" of desirable positions, for some advocates
of AA, "is that it is unjust that members of some groups should receive a greater share of scarce, prized, and competitive benefits," like quality jobs and places in educational institutions, "than members of some other groups."304

In arguing that AA is justified the present defense of AA appeals to an independently grounded principle of equality or a principle of social justice incorporating a requirement of equality as a component. These principles require that "racial, sexual, and ethnic groups be made roughly equally well off" and hence that the representation of these groups in "desirable jobs and positions" be "in rough proportion to their overall numbers." Racial, sexual, and ethnic diversity or proportionality is thus "a require-
"305 of equality or social justice. Such diversity or proportionality is taken as a standard or measure of equality or social justice.306 Thus, a university which has 1,000 places for incoming freshmen should as demanded by equality or social justice select not simply the best-qualified applicants regardless of race, sex, or ethnicity but proportional percentages of blacks, women, Hispanics, and so on.307 Equality or social justice demands the continuation of rectificatory programs until the goal of proportional representation of the designated minority groups and women, for example, in desirable jobs and positions is achieved.308
Programs of AA satisfy the relevant requirement of equality or social justice, the present justification of AA contends, in eliminating the underrepresentation of blacks, women, and Hispanics and equalizing their overall levels of representation in the professions and other positions of "power, authority, and status."³⁰⁹ By bringing about a more equal distribution of wealth, power, and status among racial, sexual, and ethnic groups in this society, AA programs help to eliminate a caste system or a system of racial disadvantage whose preservation is a violation of social justice and to rectify inequalities or disadvantages whose continued existence is a violation of equality or social justice.³¹⁰

The present attempted justification of AA, however, faces serious objections, theoretical and practical. Thus, there are practical difficulties in achieving the goal of proportional representation demanded by the relevant principle of equality or social justice which arise from such facts as that there is considerable variance in the average age of the members of different racial and ethnic groups;³¹¹ that groups' population percentages differ from one geographical area to another³¹²; and that there is a shortage of members of the designated minority groups having the requisite qualifications, such as Ph.D. degrees, for academic and other high-level positions.³¹³ Theoretical problems confronting the present defense of AA involve articulating and justifying the principle of equality or social
justice appealed to. Proponents of this defense have not only to specify and to clarify the relevant conception of equality or social justice but also to justify understanding equality or social justice in group terms, that is, "along lines of race, ethnicity, and gender,"^{314} rather than in terms of overcoming equalities or disadvantages affecting individuals. It is individuals and not groups as such, after all, who suffer inequalities or disadvantages in, for example, employment, education, nutrition, housing, and medical care. These proponents of AA have to justify the claim that equality or social justice requires that desirable jobs and positions be distributed among racial, sexual, and ethnic groups in proportion to their overall numbers or percentages. They could answer positively the question whether there is a reasonable, or even plausible, principle of equality or social justice that has this requirement and that supports AA if such goods as desirable jobs and positions should be distributed proportionally among racial, sexual, and ethnic groups; but the problem then is to justify this claim.^{315} Moreover, they have to justify on purely forward-looking grounds the actual restriction of AA to directly benefiting only the specified minorities and women.

Advocates of the general principle or requirement of equality that "everyone have the same, or be treated the same"^{316} have to answer questions concerning what sorts of inequalities, such as great differences in wealth, social
status, or political power, are morally unacceptable or indefensible and should be corrected; what it is that should be equally distributed; and to whom it should be equally distributed.\textsuperscript{317} Most egalitarians acknowledge that some inequalities are morally permissible," some writers note, for example, "differences in ethnicity, interests, aptitudes, intelligence, and conceptions of the good."\textsuperscript{318} They divide or disagree over what sorts of items should be equalized or equally distributed. The competing items to be equalized include "welfare, preference satisfaction, primary goods, economic resources, social status, political power, capacity for personal fulfillment, opportunity for welfare, and opportunity for scarce resources and social positions."\textsuperscript{319} Whatever is to be equally distributed, the beneficiaries of equal distribution, on traditional and contemporary egalitarian accounts, are persons or individuals. Thus, welfare egalitarianism holds that "the ideal is a 'condition of equal well-being for all persons'"; and resource egalitarianism "assigns to each individual a bundle of goods which is envied by no other individual."\textsuperscript{320} The group interpretation of equality or social justice advocated by the present defense of AA thus diverges sharply from traditional and contemporary interpretations, according to which equality and social justice are fundamentally concerned with the distribution of social benefits, as well as burdens, to individuals and not to groups as such—racial, sexual, ethnic, religious, and so on.\textsuperscript{321}
Proponents of the present attempted justification of AA offer several reasons in defense of their concentration on racial, sexual, and ethnic inequalities; their refusal to accept these inequalities; and their willingness to accept or to tolerate other inequalities. One reason calls attention to "the most salient feature" of the designated minorities and women, according to these proponents of AA, namely, that these groups were so often discriminated against in the past and continue to suffer the effects of past discrimination, such as the disproportional exclusion of these groups from positions of power, authority, and status. Blacks historically have been "very badly off," an advocate of AA writes, and "in a sense are America's perpetual underclass." However, these defenders of AA here resort to backward-looking or compensatory considerations, that is, redressing or making amends for the ongoing effects of past discrimination, and therefore abandon the purely forward-looking justification of AA they were purportedly seeking. They reintroduce precisely the sorts of reference to the past that they have explicitly sought to avoid in adopting the forward-looking approach to the justification of AA. Recall that the forward-looking justification of AA makes no essential reference to past discrimination and its devastating impact but defends AA as a means to a desirable future goal. What is crucial about the inequalities or disadvantages AA seeks to eliminate is not that they were caused by past injustice but that they
"violate some purely non-historical principle or ideal."\textsuperscript{326}

Furthermore, the specified minority groups can be coherently said to be disadvantaged or to have a low socioeconomic position or level of well-being relative to other groups in the sense that a disproportionally large percentage of members of these groups are poor or disadvantaged and belong to the lower socioeconomic class in society. Hence, simply describing the specified minority groups as disadvantaged is misleading, since it obscures the fact that most members of these groups are not poor or disadvantaged and do not belong to society's underclass.\textsuperscript{327} Defenders of AA have to justify defining such expressions as "most disadvantaged group" and "Worst-off group" in racial and ethnic terms rather than in socioeconomic terms, that is, as applying to poor and disadvantaged individuals irrespective of race or ethnicity.

Another reason offered by AA defenders for concentrating on racial, sexual, and ethnic inequalities is that these inequalities are especially objectionable because they, unlike other inequalities, are apt to lead to further inequalities, for example, of self-respect.\textsuperscript{328} Thus, "a white who is poor and uneducated is not likely to despise himself for belonging to an inferior group"; but "even an affluent and well-educated black may think badly of himself because so many other blacks have occupied inferior positions."\textsuperscript{329} However, although "it must be acknowledged," a commentator maintains, "that any distributional inequality
which leads to a further inequality in self-respect is \textit{ceteris paribus} worse than one which does not," critics can reasonably ask whether the empirical evidence supports such claims as that even blacks and Hispanics who are affluent and well-educated are likely to suffer a loss of self-respect. Moreover, not only is an affluent and well-educated black or Hispanic socially and economically better off than a poor and uneducated white, but also this white is more likely to suffer low self-respect, not for belonging to an inferior racial group but for belonging to an inferior socioeconomic class.

Although AA may indeed equalize overall levels of representation of the designated groups in desirable positions and improve the socioeconomic position of these groups relative to other groups, as its proponents claim, AA leaves a framework of inequality between subgroups of the designated groups, as well as the non-designated groups, that is, between the subgroups composed of well-off or advantaged group members and the subgroups composed of worse-off or disadvantaged group members. AA is purportedly an egalitarian policy, but it does not eliminate or reduce the inequalities between the advantaged and disadvantaged subgroups of the designated racial, sexual, and ethnic groups. AA is not even directed toward eliminating or reducing the socioeconomic gaps separating these subgroups. This policy does not promote equality or social justice by channeling resources to disadvantaged racial, sexual, and ethnic
subgroups or to a substantial segment of society's poor. In making race and ethnicity conditions of eligibility and not individual disadvantage, AA not only excludes poor and disadvantaged individuals, including many whites, who are not members of the designated minority groups but also directly benefits middle- and upper-class blacks and Hispanics. These minority group members are not the "persons" who "bear" the "continuing injustices" of "an unjust racial system" and are not those who are disadvantaged economically, vocationally, educationally, politically, or socially.

Despite more than three decades of implementation, AA has not changed important facts and figures about poverty and inequality in the United States affecting members and nonmembers of the designated minority groups. Thus, in 2004, according to the Census Bureau, there still was a significant gap between the annual household incomes of non-Hispanic whites and those of blacks and Hispanics. A much larger percentage of black and Hispanic households than non-Hispanic white households had annual incomes placing them in the lower class; and the percentages of blacks and Hispanics below the official poverty line and without health insurance were much higher than the corresponding percentages of non-Hispanic whites. Further, the median annual household income of non-Hispanic whites was $14,000 to $18,000 higher than the corresponding household incomes of blacks and Hispanics; and the percentage of white households with high incomes, though small, was significantly higher than the
corresponding percentages of black and Hispanic households. 332

In 2004, moreover, no households in the bottom 20 percent of the population had an annual income exceeding $18,500, whereas no households in the richest 5 percent had an annual income below $157,000. The poorest 20 percent received only about 3 percent of total U.S. income, but the richest 20 percent received about 50 percent of total U.S. income. In 1970, the poorest 20 percent received about 4 percent of total U.S. income, while the richest 20 percent received about 43 percent of total U.S. income. 333 Further recent data reveal that one in every seven people lives in poverty and an additional 12 or more million live on incomes only slightly above the poverty line; that the poverty rate is higher than it was in the 1970s; and that one in every four Americans lives in substandard housing. 334

Since the 1970s, there has been a general trend toward greater inequality in the distribution of income in the United States. 335 This trend "is even more striking," a commentator notes, "when set against the background of an extremely unequal distribution of wealth in the U.S." Thus, "not only does the top 10 percent receive a disproportionate share of the total national income, they already have 68 percent of the nation's wealth in their hands." Further, "the top 1 percent owns nearly 40 percent of the nation's total net worth—more than is owned by the entire bottom
90 percent of U.S. households.\textsuperscript{336}

The present justification of AA implies that other morally problematic policies which seek to eliminate inequalities in the distribution of desirable positions among racial, sexual, and ethnic groups and to bring about a more equal or more just society would be justified. Thus, this argument for AA implies that policies which place quotas or limits on high-performing and high-achieving groups, who have more than proportional representation in desirable positions, such as Jews and Asians, and which reduce the number of members of these groups in these positions or prevent a certain number of group members from attaining these positions in order to eliminate the inequalities in representation of underrepresented groups, including non-Jewish white ethnic groups, would also be justified. In activities to which Jews and Asians are singularly devoted and in which they are especially talented—e.g., law, medicine, academia, mathematics, and science—many members of these groups can be properly and justly excluded from certain positions to open these positions for blacks and Hispanics and members of other underrepresented groups. Not only is the proportional representation of blacks and Hispanics among law and medical students or lawyers and doctors, for example, dictated by a group principle of equality or social justice, but also the disproportionately high percentages of Jewish lawyers and doctors and Jewish and Asian students in elite colleges and
universities violate this principle. Moreover, the present defense of AA provides justification for policies that place quotas or limits on the groups designated to receive preference in AA and that afford preference to members of nondesignated groups, including whites, in areas and activities in which blacks and Hispanics, for example, are overrepresented, such as amateur and prestigious and highly lucrative professional sports, or already proportionally represented, perhaps as a result of AA, in order to eliminate group inequalities in representation in desirable positions and thus to produce a more equal or more just society. When equality or social justice is interpreted in group terms and as requiring proportional representation among racial, sexual, and ethnic groups, it becomes a demand for quotas or limits. Since some groups have more than proportional representation in desirable jobs and positions, a group principle of equality or social justice requires taking away positions from overrepresented groups and giving them to underrepresented groups.\(^{337}\)

Would not proposals to limit, for example, the numbers or percentages of blacks and Hispanics in sports, Jews in law and medicine and professional school, and Asians in mathematics and science and the student bodies of elite colleges and universities, critics of AA might reasonably ask, be generally condemned as morally unacceptable because of the realization that social groups can properly and justly have more than proportional shares of goods like
desirable positions? The attempt to evade the present objection by restricting the application of a group principle of equality or social justice to the groups receiving preference in AA and claiming that these groups alone can properly and justly be overrepresented but not underrepresented in desirable positions faces serious difficulties, such as those of viewing quotas on Jews and Asians as morally acceptable and defending an apparent moral double standard.

The present egalitarian justification of AA implies, furthermore, that still other morally problematic measures to equalize the distribution of desirable positions would be justified, for example, policies that make available new positions for the designated minorities and women by dismissing some members of nondesignated groups from desirable jobs they hold.

The present defense of AA also has the overlooked or unnoticed implication that it provides equally good justification for morally objectionable policies favoring the specified minorities in contexts other than hiring and admissions that, it can be argued, would eliminate group inequalities and help to make groups equally well off, would help to eliminate the existing system of racial disadvantage, and would contribute to making society more equal or more just by altering the ways in which social benefits and burdens are distributed through the preferential treatment of the groups favored in AA. These policies would eliminate inequalities or disadvantages for blacks
and Hispanics in the distribution of, for example, high grades and academic honors and degrees, such as by awarding them to blacks and Hispanics whose work is inferior to that of members of the nondesignated groups; professional licenses, such as by setting lower passing scores for blacks and Hispanics in licensure examinations; average income, such as by giving blacks and Hispanics higher pay for the same or lower-level jobs and by taxing them less than members of the nondesignated groups with the same or even lower incomes. These policies would also eliminate inequalities in the distribution of scarce medical resources, such as kidney transplants, by making race or ethnicity, not medical need, the decisive criterion of distribution; political power and influence, such as by awarding elective political offices to blacks and Hispanics who have not received the most votes and by permitting blacks and Hispanics to vote at a lower age than whites and members of the other nondesignated groups; and places in the prison population, such as making it more difficult to convict blacks and Hispanics of crimes and by imposing more lenient punishments on blacks and Hispanics convicted of the same or even more serious crimes than whites and members of the other nondesignated groups.

Proponents of AA who attempt to undermine or to disarm the preceding objection by maintaining that there are morally relevant differences or dissimilarities between AA and the nonstandard cases and that preferential
policies in the nonstandard contexts are not morally acceptable ways of eliminating group inequalities and making groups equally well off have the problems of identifying differences between AA and the nonstandard cases that are indeed morally relevant and explaining why preferential policies in the nonstandard contexts are not morally acceptable. According to the preceding objection, essentially the same principles of justice and individual moral rights apply to a variety of contexts of distribution, including hiring and admissions.

The present egalitarian argument for AA offers a defense of policies, not only AA but also morally similar policies, that violate principles of justice and moral rights which govern the treatment of individuals in various contexts. These preferential policies seek to produce a more equal or more just society by denying social benefits to or imposing social burdens on nonmembers of the designated groups and thus by disadvantaging them on the basis of race, sex, or ethnicity.

The inference that if a policy contributes to making society more equal, such as by eliminating or reducing a racial group's underrepresentation in desirable positions, it contributes to making society more just is incorrect, therefore, since there are unjust ways of making society more equal, for instance, allocating academic grades and degrees, scarce medical resources, and places in prisons on the basis of race or ethnicity. A more equal society is not
a more just society when its policies ignore morally relevant differences in the distribution of social benefits and burdens.

The appeal to principles of justice, along with fundamental individual moral rights, in the moral assessment of AA is not undermined by the reply that, as one current line of critique maintains, this appeal's application of ideal, abstract principles of justice—which "tend to specify conceptual conditions of what a society (generically described) would look like were it completely just" but do not say "how to make a non-ideal (unjust) society live up to or adopt those conditions"—to "non-ideal circumstances will imply, for the most part, simply ignoring those injustices and their effects"\(^{338}\) and "will predictably serve merely to protect the status quo."\(^{339}\) The appeal to principles of justice and rights in the moral evaluation of AA simply insists that measures to rectify inequalities or disadvantages whose continued existence is claimed to violate a principle of equality or social justice focus on morally unacceptable inequalities affecting individuals whether or not these inequalities "have resulted from past discrimination"\(^{340}\) and whether or not these individuals are members of the designated minorities, and that rectificatory measures be compatible with principles of justice and moral rights governing the treatment of individuals in the distribution of social benefits and burdens.
In contrast to egalitarian attempts to defend AA, the libertarian view maintains that although AA is morally permissible and not unjust it is not mandated or required.\textsuperscript{341} According to the libertarian view, the refusal of employers to hire the most qualified job applicants in AA programs is not unjust because "no one has a right to," or "an equal chance" at, "some benefit which is wholly another's to dispose of."\textsuperscript{342} "If I own something, I can do what I like with it, so long as I do not thereby harm nonconsenting others in certain ways, e.g., by assaulting them."\textsuperscript{343} Hence, just as individuals have a right to select as mates or friends whomever they choose, so organizations and institutions with jobs and other positions to fill have the right to give or to distribute them to whomever they choose.\textsuperscript{344} A business owner or an employer is free to hire friends or fellow members of his religious congregation, for example, "or to hire on some whimsical basis."\textsuperscript{345} In the allocation of positions, the libertarian view insists, not merit or qualifications but ownership is involved.\textsuperscript{346}

The principle of formal equal opportunity or careers open to talents "conflicts with the prerogatives of private ownership as usually understood,"\textsuperscript{347} some commentators note. Therefore, recognizing this principle limits the right of property owners to do whatever they please and thus to distribute their assets, such as desirable positions, to whomever they please.\textsuperscript{348} Government-mandated AA is difficult to justify on the libertarian view, however, since such
government policies infringe on the owners' property rights to hire, fire, or promote whomever they wish for whatever reason they wish. 349 Hence, the government should neither require nor prohibit AA policies.

Although, "in modern, secular Western moral culture we commonly think," a commentator notes, "that members of the same ethnic group, race, or religion can, if they choose, select mates only from the same ethnic group, race, or religion," 350 or that individuals may send invitations to dinner in their homes or give an item they own (e.g., a bottle of wine, a watch, or a sum of money) to whomever they choose, the distribution of jobs and such goods as saleable items in stores, hotel rooms, apartments, and restaurant and theater seats are morally very different. Regarding jobs, employers may not do whatever they please in hiring, firing, and promoting workers and distribute jobs to whomever they please; nor may property owners do whatever they please in distributing goods of the second kind and distribute these goods to whomever they please. If employers hire only, or give preference to, members of their own racial, ethnic, or religious group and if owners of stores, hotels, and so on, behave similarly, "We commonly view" such actions and practices as cases not of the "exercise of liberty" but of "blatant discrimination." 351 Jobs and such goods as saleable store items, hotel rooms, and so on, are not purely personal goods but are products of cooperation among members of the community in social enterprises. These
goods and services are produced by and distributed to members of the community. The distribution of these goods and services is constrained by moral, as well as legal, requirements and obligations. Thus, although an individual's selection of X over Y as a spouse or friend is decisive regardless of the individual's reason and does not provide grounds for complaint of injustice to Y, a company's selection of W, who is white, over B, who is black and is better qualified, is not similarly decisive and does provide grounds for complaint that the company unjustly discounts B's superior qualifications. Therefore, since the distribution of jobs, as well as places in educational institutions, is not morally analogous to an individual's decision to choose a mate or friend, to invite someone to dinner in his home, or to give an item he owns to someone, the libertarian argument does not establish that AA is morally permissible and not unjust. Moreover, the libertarian argument makes AA morally permissible at the price of making discrimination—racial, ethnic, religious, and so on—morally permissible. The libertarian view, a writer remarks, "eliminates any basis for complaint against discrimination and sheer arbitrariness." The objection here is not saying that the libertarian view leads inevitably to the widespread return of racial discrimination in society, but that it permits actions and practices rightly condemned as discriminatory and unjust.
Notes

5. Sher, "Diversity," 86.
7. Sher, "Diversity," 86.
10. Ibid., 86.
15. Ibid., 364.
16. Ibid., 363.
17. Ibid., 364.


27. Wasserman, "Discrimination."


29. Wasserman, "Discrimination."

30. Nickel, "Discrimination."

31. Wasserman, "Discrimination."


33. Rowan, *Conflicts of Rights*, 120.

34. Ibid.

35. Ezorsky, "Discrimination"; Wasserman, "Discrimination"; and Nickel, "Discrimination."

36. Nickel, "Discrimination"; and Wasserman, "Discrimination."


38. Wasserman, "Discrimination."

39. Ezorsky, "Discrimination."

40. Rowan, *Conflicts of Rights*, 120.


42. Ibid., 160.


44. Ibid., 216.
45. Ibid.
46. Ibid., 227.
49. Ibid., 215-16.
52. Mosley and Capaldi, Affirmative Action, 45.
53. Rowan, Conflicts of Rights, 123.
54. Ibid., 104.
57. Rowan, Conflicts of Rights, 124.
60. Ezorsky, Racism and Justice, 78-79, cited in Rowan, Conflicts of Rights, 127; and Beauchamp, "Reverse Discrimination," 380-84.
61. Taylor, Good Intentions, 31.
63. Barry, ed., Applying Ethics, 287; Cohen and Sterba, Affirmative Action 204; and Barcalow, Moral Philosophy, 282.
64. Christman, Social and Political Philosophy, 161.
68. Ibid.


71. Wasserman, "Discrimination."


73. Ibid.


78. Ibid.


81. Ibid., 227.


84. Ibid.


87. See, for example, Eisaguirre, *Affirmative Action*, 119.


95. Ibid.
96. Ibid., citing the conclusion of the head of the General Accounting Office.


98. D'Souza, End of Racism, 301.


100. Tomasson et al., Affirmative Action, 224.

101. Ibid.

102. Taylor, Good Intentions, 55-56.

103. Ibid., 55.

104. D'Souza, End of Racism, 280.

105. Taylor, Good Intentions, 57.

106. Ibid.


108. Mosley and Capaldi, Affirmative Action, 42.


111. Sher, "Preferential Hiring," 34.

112. Ibid.


114. Ibid., 142.


116. Ibid.


118. Ibid.


120. Cohen and Sterba, Affirmative Action, 53.
122. Ibid.
125. Ibid., 364.
126. Ibid., 362.
127. Ibid.
129.
131. Ezorsky, "Hiring Women Faculty," 83.
134. Ibid.
137. Ibid., 218.
138. See Fullinwider, Reverse Discrimination, 155.
139. Ezorsky, Racism and Justice, 23.
140. Christman, Social and Political Philosophy, 161.
141. Fullinwider, Reverse Discrimination, 155.
142. Barcalow, Moral Philosophy, 284.
143. Ezorsky, Racism and Justice, 23, citing the court statement in Rowe v. General Motors Co.
144. See Goldman, "Compromise and Affirmative Action," 297.
146. Ibid., 125.


151. Ibid.


158. Ibid., 54.

159. Ibid.


163. Ibid., 229.

164. Cohen and Sterba, Affirmative Action, 140.


166. Ibid.; D'Souza, End of Racism, 312-13; and Herrnstein and Murray, Bell Curve, 280-81.

167. Sowell, Preferential Policies, 109; and Herrnstein and Murray, Bell Curve, 280-81.


171. Ibid., 312-13.


180. Ibid.


188. Williams, "Campus Racism," 37; and D'Souza, *End of Racism*, 313.
190. Ibid., 60.
193. Ibid., 61.
195. Ibid., 407.
197. Ibid., 202.
205. Ibid., 221.
210. Ibid., 207.

214. Ibid.

215. Ibid., 180.

216. Ibid., 183.

217. Ibid., 184.

218. Wolff, Political Philosophy, 209.


220. Ibid.

221. Ibid., 185.

222. Ezorsky, Racism and Justice, 26.


224. Rowan, Conflicts of Rights, 120.

225. Ibid., 122.

226. Ibid.

227. Bowie and Simon, Political Order, 269.


229. Ibid., 215.


232. Sher, "Preferential Hiring," 49; and Barcalow, Moral Philosophy, 28-81.


235. Ibid., 215.


243. Ibid.

244. Ibid.


246. Ibid., 299.

247. Ibid., 31.

248. Ibid., 30.


256. Ibid., 10.

257. Ibid., 230.

258. Ibid.
259. Ibid., 174.

260. Ibid., 184.


265. Sher, "Preferential Hiring," 42.


267. Ibid.


275. See Sher, "Diversity," 94.


279. O'Neill, "When Opportunities Are Equal," 182.


283. Fullinwider, Reverse Discrimination, 111.

284. Ibid.


287. Fullinwider, Reverse Discrimination, 111.


290. Ibid.

291. Ibid., referring to the argument in Dworkin, Taking Rights Seriously, 226, 228.


293. Ibid., 156.

294. Ibid., 154.

295. Ibid., 156.

296. Ibid., 155.


298. Bowie and Simon, Political Order, 270.


300. Wasserstrom, "Preferential Treatment," 156.


309. Ibid.


316. Ibid., 1-2.


319. Sher, "Diversity," 100.


323. Ibid., 86.

325. Sher, "Reverse Discrimination, the Future, and the Past," 86.

326. Ibid.

327. Ibid.

328. Wasserstrom, "Preferential Treatment," 158.


332. Ibid., 210.

333. Ibid.


336. Ibid., 153.

337. Ibid., 156.


345. Ibid., 88-89.
348. Ibid.
349. Ibid.
Chapter 11
The Utilitarian Justification of AA

As an attempted forward-looking and utilitarian justification of AA, the present defense of AA appeals to the good future consequences of this policy. The essential claim of the argument is that AA is justified by its beneficial consequences.\(^1\) By increasing the number of members of the designated groups in the universities, professions, and other desirable jobs and positions, the present argument claims, AA is conducive to the general welfare or promotes overall well-being.\(^2\) This justification of AA appeals to utilitarian moral theory, which holds that the consequences or results of actions, practices, and policies are "the key to their moral evaluation."\(^3\) The rightness or wrongness of these objects of assessment is a function of or determined by their consequences.\(^4\) and the sorts of consequences utilitarianism is interested in have to do with people's welfare or well-being.\(^5\) Utilitarianism assesses actions, policies, and so on, based on their effects on people's well-being, that is, based on whether they benefit or harm people.\(^6\)

The claim that AA is conducive to the general welfare or promotes overall well-being is developed and elaborated in various ways. Described more specifically, the anticipated or predicted good or beneficial consequences of AA are, for example, that AA economically benefits the designated groups and society as a whole; leads to a racially and sexually integrated and harmonious society; provides role
models for the specified minorities and women; undermines harmful stereotypes; enhances the self-esteem of minorities and women; promotes intellectual diversity and advances intellectual inquiry and discourse in colleges and universities and also promotes group interaction, understanding, and harmony; improves professional services in underserved minority communities; and enhances efficiency and productivity in a variety of jobs and occupations.

Thus, one utilitarian argument for AA is that it reduces unemployment, removes inequities in income distribution, reduces group economic inequality, and improves the economic position of the designated groups by significantly increasing the entry of blacks, other minorities, and women into and their representation in more prestigious, better-paying jobs in industry, government, and education and by raising the average incomes of black and other minority families and increasing the number of minority families with high incomes. These consequences have important economic benefits for society as a whole by, for example, reducing the economic burden on society that derives from the seemingly self-perpetuating poverty in which large numbers of blacks and other minorities find themselves.

There also are important noneconomic benefits, it is argued, that AA expectedly yields. Thus, in achieving racial, sexual, and ethnic diversity AA helps to eliminate racial and sexual prejudice, eases racial tensions, and produces a racially and sexually integrated and harmonious
society. The preferential selection of minorities and women in employment and admissions "is often said to yield important psychological benefits that would otherwise be absent," for example, providing role models for minorities and women, overcoming or undermining harmful racial and sexual stereotypes, and enhancing the self-esteem of minorities and women. AA creates minority and female role models "in the professions, the university, and the corporation as inspirations for" other minorities and women "to aspire to careers they otherwise would have feared to enter." For blacks, Hispanics, and women "rationally to attain to" prestigious positions, such as those of doctor, lawyer, and professor, "they must be able to see that people like them can succeed." "Plainly," an advocate of AA writes, "you won't try to become what you don't believe you can become." Minorities and women "need to see members of their race or sex who are accepted, successful professionals. They need concrete evidence that those of their race or sex can become accepted, successful professionals." Further, the presence of blacks, Hispanics, and women in "visible and prestigious positions" promotes social utility by undermining demeaning and harmful stereotypes, such as the beliefs that blacks and Hispanics are more suited to menial work and that women lack the talent and ability for such demanding fields as science, mathematics, and engineering. Working closely with and having extensive contact with minority and female
professionals break down barriers and disrupt stereotypes, utilitarian defenders of AA claim; and therefore AA will help to change the perception of members of nondesignated groups who are prone to believe that members of the designated groups lack the ability and competence to perform effectively in high-level positions. Moreover, AA enhances the self-esteem and reinstates the self-confidence of the designated minorities and women by overcoming the effects of lower self-esteem and self-confidence from diminished opportunities, it is argued, that disincline minorities and women to pursue opportunities in education and employment that will enable them to compete for desirable jobs and other positions currently held by white males.

In addition to the previous economic and noneconomic benefits, AA produces benefits for members of specific institutions, academic and nonacademic, utilitarian defenders of AA claim. Thus, AA is "needed to increase diversity in educational institutions and the workplace." "Increasing racial, sexual, and ethnic diversity" in colleges and universities "will advance the academic enterprise." According to utilitarian defenders of AA, racial, sexual, and ethnic diversity in the student body and among faculty members promotes intellectual diversity, which has an important role "in promoting intellectual inquiry and discourse." Racial, sexual, and ethnic diversity enriches the educational environment by bringing new and different perspectives and points of view to discussion of issues.
and by promoting scholarly work in nontraditional areas, such as women's studies and other studies dealing with race and gender, which will open up "illuminating discussion" and challenge "received views in ways that contribute to our knowledge."

''A diverse educational environment,'' an academic and advocate of AA writes, "challenges (students) to explore ideas and arguments at a deeper level," that is, "to see issues from various sides, to rethink their own premises, to achieve the kind of understanding that comes only from testing their own hypotheses against people with other views." Furthermore, racial, sexual, and ethnic diversity has educational value other than in contributing to intellectual diversity and advancing intellectual inquiry and discourse, utilitarian defenders of AA claim. This kind of diversity promotes group interaction, communication, understanding, and harmony.

It is "important because part of education in an increasingly multicultural society such as our own is for different groups to learn to understand each other and get along." The "main goal" of colleges is "education, the scope of which reaches beyond the classroom, and exposure to a diverse student body," in the view of administrators, is "an integral part of 'training young people for a multicultural habitat.'"

Moreover, racial, sexual, and ethnic diversity in the workplace, it is claimed, helps to create a more stimulating, more cooperative, and more efficient and productive workplace environment.
A frequent defense of the preferential admission of blacks, other minorities, and women to colleges, universities, and professional schools is that this policy is advantageous to society and produces a better society in serving important social goals and meeting urgent social needs, such as the training of future black leaders and the improvement of legal, medical, and other professional services in black and other minority communities. Minority graduates of law and medical schools are more likely than white graduates to work in to serve minority communities. Thus, a number of studies have shown, some AA advocates assert, that "underrepresented minority physicians are more likely than their majority counterparts to care for poor patients and patients of similar ethnicity."

Preferring minority-group members and women in admissions is relevantly similar, utilitarian supporters of AA argue, to other sorts of preference in admission to educational institutions, such as the selection of individuals who are the children of alumni, who have wealthy parents, or who are skilled at playing basketball or football. These other sorts of preferences can also be justified on utilitarian grounds. Thus, universities greatly benefit financially by holding out the promise that children of alumni will receive preference in admissions and by fielding competitive basketball and football teams. Furthermore, society will benefit from preference in admissions for individuals from wealthy families who are "likely to exert a lot of
influence on the world."

According to another utilitarian argument for AA, there will be benefits and advantages to the designated groups, institutions, and society as a whole in having minority-groups numbers and women more significantly represented in a variety of jobs and occupations. For instance, members of minority groups and women are able to teach certain courses or subject matters, such as black history and female psychology and ethics, better than members of other groups can and are more effective in teaching, counseling, and advising minority and female students, who relate better to and "learn better from" teachers of their own race, sex, or ethnicity. Further, black and other minority lawyers and doctors can more adequately serve their own minority groups, who are "likely to feel more comfortable" with lawyers and doctors "who share their race and cultural heritage" and "who are sensitive to their attitudes and circumstances, who can truly understand them." Moreover, for jobs in which the helpful, cooperative responses of community members are important, such as jobs as police officers, minority-group members "may be able to relate especially well to the population of minority communities and to elicit more cooperation from people in these communities than whites can."

Utilitarian defenders of AA face the initial challenge of providing empirical evidence to substantiate the factual claims in the argument for AA about the predicted good or
beneficial consequences of this policy. Further, since social policies like AA may produce harmful as well as beneficial consequences and therefore since utilitarian defenders of AA have to consider the harmful consequences of AA, they have the difficult task of showing that the positive effects or good consequences of AA are greater than or outweigh the negative effects or harmful consequences of this policy and hence that AA "produces an overall benefit after all the consequences are counted." The utilitarian argument for AA then has to show that alternative policies are "unlikely to achieve equivalent benefits at even less cost." The utilitarian defense of AA, I shall argue, fails to show that utilitarian considerations offered in support of AA are greater than or outweigh countervailing utilitarian considerations and therefore that the overall consequences of AA are beneficial, not harmful. Notwithstanding the utilitarian defense of AA, moreover, AA is vulnerable to nonutilitarian objections based on an appeal to principles of justice and individual moral rights.

First of all, the empirical evidence contradicts, disconfirms, or fails to support the factual claims of the utilitarian argument about the predicted economic benefits AA. Concerning the economic effects on blacks, along with the other designated minorities, the historical record suggests, according to researchers, that "affirmative action had economic costs as well as benefits for blacks," and for the other minorities. It "created both winners and losers
Thus, black wages rose relative to the white average, and as a result those blacks able to find employment "were better off than ever before." Moreover, although black wages rose relative to the white norm, a growing number of blacks were unable to find employment; and they "were worse off than before." Contrary to what some critics of AA imply, one researcher says, it is not true "that black college graduates were necessarily winners or that less-educated blacks were necessarily losers." Research data indicate that there were "both winners and losers at every educational level. Joblessness increased among young black college graduates, so some black college graduates were among the losers." Weekly earnings increased among black dropouts; consequently, "those who found steady work were among the winners." Additional data show, however, that during the decades following the institution of AA and according to mean annual earnings, black men "made almost no progress relative to whites with the same amount of schooling"—a "fact," one researcher remarks, that "seems to support" critics' claim that "affirmative action had little net effect."

A rise in black incomes and a significant increase in the number of blacks, together with other minorities, in professional and other high-level positions were taking place when AA was in operation; but these developments, according to some researchers, were a continuation of pre-existing trends. In fact, the overall economic advances of
blacks as a group seemed to slow considerably after the implementation of AA.47 Thus, the number of blacks in professional and other high-level positions increased more rapidly in the years preceding the implementation of AA, and the largest gains in black wages relative to those of whites took place in areas of employment less affected by government policies.48

The claim that AA has produced economic benefits for society as a whole by removing or easing the great economic burden on society that derives from the poverty afflicting large numbers of blacks and other minorities is contradicted by the empirical evidence, which indicates that AA is not targeted at or directed toward poor or lower-class minority-group members. Thus, the economic status of the most disadvantaged blacks and other minorities did not improve and even began to retrogress following the implementation of AA.49 Recall that even as recently as 2004, according to the Census Bureau, the percentages of blacks and Hispanics below the official poverty line still were much higher than the corresponding percentage of non-Hispanic whites.50 "What happened in black America in the era of affirmative action," one black scholar writes, is that "middle-class black people are better off and lower-class black people are worse off."51 Again, "the black underclass is in a hopeless state of economic stagnation," another black scholar writes, falling further and further behind the rest of society."52
Perhaps the most often cited cost of AA is the loss of efficiency and productivity. AA, utilitarian critics claim, decreases overall societal efficiency and productivity because the selection of minorities and women who are less qualified results in lower subsequent performance on the job and in school. Those who are less qualified—i.e., less knowledgeable, less skilled, and less competent—can be reasonably expected, as the empirical evidence confirms, not to perform as well as those bypassed or rejected in AA. Those preferentially selected are less likely to learn, to graduate, and to do the job well. Hence, the purposes of increasing efficiency and productivity are best accomplished, utilitarian critics of AA insist, if the best-qualified job and school applicants and those best able to do the job well and to learn are selected.

The gap between the best-qualified and preferentially selected applicants in credentials is wide, not narrow. There are large differences in qualifications and competence between these groups of applicants, particularly when employment and admissions officers have to go far down the scale of qualifications to get the desired percentages of minorities. One reply cites data showing that three-quarters of the black students applying to very selective schools scored higher on the SAT than the national average for all white test takers. However, the typical white applicant to these schools had scores far above the national average; and those actually accepted ranked in the top 3-4
percent of all test takers. In AA, black students with SAT scores in the 75th percentile get into schools in which the average white or Asian score is in the 96th percentile or higher.

The present objection to the utilitarian defense of AA does not maintain or assume that AA mandates or sanctions hiring unqualified minority applicants and that only the hiring or admission of unqualified individuals results in decreased efficiency or productivity. There are significant differences in performance between individuals highly qualified and those merely basically or minimally qualified. Consider, for instance, the difference in performance between an A student and a C student.

In maintaining that AA results in lower job and school performance by the recipients of preference, critics of AA point to such measures of performance as grades, dropout and failure rates, professional examination failure rates, and job-performance evaluations. Thus, data show that blacks attending selective colleges earn lower grades than their white and Asian classmates. Indeed, the cumulative grade point averages of black students at very selective schools place them in the bottom one-quarter of their classes. Further, minorities admitted to professional school under AA tend to cluster at the bottom of their law and medical school classes. Some AA defenders cite data showing that black graduates of elite colleges obtained professional or doctoral degrees at a rate slightly higher than that for
whites from the same schools and at a dramatically higher rate than that for all black college graduates and that "blacks from elite colleges were far more likely than their white classmates to attend the most prestigious law, medical, and business schools." However, critics respond that these results are "still further evidence of the extent to which race-conscious admissions policies at the undergraduate level are carried over in race-conscious policies at the graduate level."

The dropout and failure rates of blacks and Hispanics are high, particularly at selective colleges and universities with ambitious AA programs. These minorities are much less likely than white and Asian students to remain in school and to graduate. Remedial efforts to reduce minority dropout and failure rates have not succeeded. Some AA defenders reply that at elite institutions almost eight out of ten minority beneficiaries of preference graduated, a rate double the national average for blacks, and that at very elite institutions nearly nine out of ten received diplomas. However, the black dropout rate at elite institutions was 3.3 times the white rate, a differential that is much larger than the national gap between all black and white dropouts. The black-white dropout ratio increases with the selectivity of the school. In law school, the dropout rate for blacks given preference was more than double the white rate.
Concerning bar examination and medical certification failure rates, data reveal that the failure rate for blacks admitted to law school on the basis of preference was almost three times higher than the rate for blacks admitted on the basis of academic performance and more than six times higher than the white failure rate. Moreover, only 32 percent of minority medical school graduates with the weakest academic records managed to achieve certification in their specialty; but more than 80 percent of minority physicians who gained admission to medical school without preference and white and Asian physicians achieved board certification.

In subordinating strictly academic and standard merit-based criteria to such nonacademic and nonintellectual criteria as race and ethnicity in the admissions process, utilitarian critics of AA argue, AA rejects white and Asian applicants in favor of black and Hispanic applicants with a significantly lower probability of performing well in school, graduating, passing the bar, or achieving medical certification. AA also corrupts the selection process itself, damages the integrity of academic institutions, and lowers the academic and intellectual quality of the student population.

There are other negative or harmful consequences of AA programs, critics of AA on utilitarian grounds insist. One of these consequences is the creation of resentment and hostility among groups. In denying individual whites desirable jobs, educational opportunities, or even careers, AA
causes whites who have been bypassed, who think they have or would have been bypassed, or who believe they will be or may be bypassed to feel resentment toward blacks and the other preferred minorities. These feelings of resentment and bitterness have erupted into expressions of hostility on campus, for example, in the form of demonstrations and racial epithets and slogans. Rather than eliminating racial and ethnic prejudice, utilitarian critics maintain, AA reinforces prejudice in those already harboring such tendencies and causes prejudice to arise in those who do not have it. Hence, AA exacerbates rather than reduces racial tensions and thus has not produced a racially harmonious society. Among the costs of a social policy that have to be taken into account in a utilitarian assessment of the policy are such effects as the alienation of people and the potential for increased racism.

A problematic assumption of the utilitarian defense of AA is that greater contact between groups leads to greater understanding and to the elimination of prejudices and stereotypes. This assumption, one researcher writes, "turns out to illusory." Studies confirm that greater exposure often has the effect of reinforcing negative perceptions of groups. Thus, one study "showed that 'teachers, nurses and physicians working in Alaska had much more negative stereotypes of Eskimos than those having little contact' and concluded, 'Contact does generate prejudice.'" Another study "found that whites who live in areas with high
concentrations of blacks exhibit greater hostility to them and oppose government race-based programs more strongly than whites who live in areas with few if any blacks.

Although AA was introduced and commonly defended as a temporary measure to be used until the percentages of the designated groups in desirable positions reflect the groups' percentages in the population as a whole, this policy has become entrenched in the political system. History has demonstrated, as some commentators observe, that once a social policy benefiting certain people is created these people come to depend on the continued benefit and to feel a sense of entitlement to it; and the revocation of the policy takes place very rarely. Further, contrary to the belief that once achieved the desired racial, sexual, and ethnic diversity "would be self-sustaining," critics of AA maintain, the "supposed transience of preference has been a delusion." The objective of diversity or proportionality "is in fact not attainable for the foreseeable future"; and preference will have to be used, "covertly if not overtly, so long as proportionality is the measure of success."

AA also has significant negative or harmful psychological consequences affecting the designated minorities, along with women. Thus, concerning the utilitarian argument that AA provides role models in the professions, universities, and corporations as inspirations for other minorities and women, the empirical evidence shows that although AA has been in place for more than thirty-five years there is a
shortage of blacks, as well as other minorities, acquiring qualifications and degrees, such as Ph.D.'s, for professional and other high-level occupations and positions. The number of blacks entering the professoriate, for instance, "has been disappointing." The percentage of Ph.D.'s awarded to American blacks has been below 3 percent. In some academic fields—e.g., astronomy, mathematics, computer science, European history, and even American history—the percentage of recent black Ph.D.'s is zero or far below 3 percent. Further, the perception created by AA that minority-group members in professional and other high-level positions have attained these positions only because they have been evaluated by lower standards and hence would not have attained these positions without preference based on their group membership undermines their ability to demonstrate that other group members can succeed and to serve as good, effective role models. To serve as such role models, exemplifying to other group members "the possibility of their success," minority-group members in high-level, high-status positions have to be perceived as having been appointed or selected by the same criteria as all others and on the basis of qualifications and competence, not race or ethnicity.

The assumption that success is not possible without role models is false, since the first successful individual had none; nor did "the first successful African Americans and many current successful African Americans," one writer
notes, have "role models of the same race." Members of other racial and ethnic groups have also succeeded without members of their own race or ethnicity serving as role models. For example, as some researchers point out, Japanese-American schoolchildren have performed well without Asian teachers; and Jewish immigrants to New York did excellent work under Irish Catholic teachers.

Even if it is true that an individual will not try to become what he does not believe he can become and that to rationally aspire to prestigious and high-level positions members of the designated groups must be able to see that people of their own race, sex, or ethnicity can succeed, it does not follow that the proportional distribution of desirable jobs and other positions among the designated minorities and women is necessary. So long as a significant or visible number of minorities and women succeed, some critics remark, other group members will know that they too can succeed. Indeed, some critics comment that one really good minority or female professional, for example, a university professor, is a more effective or more inspiring role model than ten mediocre ones.

Furthermore, rather than destroying or undermining negative, demeaning, and harmful stereotypes, utilitarian critics of AA maintain, AA actually reinforces these stereotypes, such as the belief that the designated minorities have less academic and intellectual ability than whites. A frequently cited bad or harmful consequence of AA is that it
stigmatizes these minorities as inferior or results in the "'permanent conferral of inferior status'"\(^{100}\) on blacks and the other minorities by creating or inspiring the perceptions that the minorities lack the ability to compete equally with or to succeed in competition with whites, that they need preference to attain high-level and high-status positions, and hence that preference is the only way they can achieve parity with whites.\(^{101}\) A difficult conclusion to avoid is that the adoption and continuing implementation of AA is an implicit acceptance of the view that the significant underrepresentation of these minorities in high-level and high-status positions in the absence of AA is an accurate reflection of their lower abilities.

When AA leads to conspicuous differences between the preferred minorities and other groups in subsequent performance, "its social cost becomes substantial,"\(^{102}\) one commentator says. Thus, both black and white students notice such facts, according to researchers, as that on average blacks earn lower grades than whites' that few blacks achieve high grades; that although blacks are a relatively small portion of the student population they are a large portion of students performing poorly; and that relatively few blacks choose difficult majors, such as chemistry and engineering.\(^{103}\) "These experiences," a commentator writes, "inevitably reinforce traditional prejudices about blacks' academic abilities."\(^{104}\)
compete equally with members of nondesignated groups suffer a loss of self-esteem and self-confidence.

Rather than losing self-esteem and self-confidence or feeling "stigmatized," some utilitarian defenders of AA reply, most blacks at elite colleges reported in a survey "feeling 'satisfied' or 'very satisfied.'" Critics may question, however, whether those surveyed gave honest answers or whether they think that being stigmatized is a tolerable price for desirable jobs and other positions. A real consequence of individuals' knowledge or belief that they would not have attained their positions without preference and that others have a negative perception of their abilities does seem to be a lowering of self-esteem and self-confidence. "It seems likely," a critic writes, that "the attitude of reasonable and decent individuals" in these circumstances "would be a mixture" including "shame, guilt, embarrassment," and "self-doubt." Proponents of the present utilitarian argument for AA claim not only that AA enhances the self-esteem of the designated minorities, as well as women, but also that the enhanced self-esteem improves academic performance. However, the empirical evidence does not show that self-esteem promotes achievement. "There is a causal relationship between self-esteem and academic performance, but it proceeds in the opposite direction. It is not self-esteem that boosts performance; it is performance that boosts self-esteem." Some researchers conclude that "educators
should be cautious about assuming 'that enhancing a person's feelings about himself will lead to academic achievement.'\textsuperscript{114}

AA creates self-doubt affecting all blacks and the other designated minorities, even those who have attained desirable positions without preference in AA. This policy damages the self-esteem of these minority-group members since their legitimate achievements are called into question and considered suspect and they are uncertain about whether or not they have benefited from preference.\textsuperscript{115} Even some supporters of AA agree that "some highly qualified blacks and women object that affirmative action is damaging to their reputations and self-esteem."\textsuperscript{116}

The utilitarian argument for AA that defends the importance of racial, sexual, and ethnic diversity in the appointment of faculty members and the admission of students by relating it to the promotion of intellectual diversity "has been highly influential on many campuses," a commentator remarks; but "it also has been the subject of significant criticism."\textsuperscript{117} Thus, critics of this argument agree that intellectual diversity is important "because intellectual discourse functions best when different perspectives and different points of view are represented"\textsuperscript{118} and intellectual diversity provokes the challenging of common assumptions and the exposing of weaknesses in points of view that are not apparent to those within the prevailing consensus.\textsuperscript{119} However, these critics deny that racial,
sexual, and ethnic diversity has an important role in promoting intellectual diversity and intellectual inquiry and discourse. First of all, as some critics point out, universities like Brandeis, Notre Dame, and Mount Holyoke have managed to provide an excellent education even though they "were founded on principles of religious or gender homogeneity" and that foreign institutions like Oxford, Cambridge, and Paris are regarded as among the best in the world even though they "display considerable cultural singularity." Racial, sexual, and ethnic diversity is not essential for the kind of educational environment that, for example, challenges students to explore ideas and arguments at a deeper level, to see issues from different sides, and to rethink their own premises.

Furthermore, it is not clear, commentators observe, that members of the groups covered by AA share perspectives on most issues or that their perspectives differ from those of others in many areas. Thus, many women are pro-life rather than pro-choice and disapprove of abortion; and many men are pro-choice and approve of abortion. There are white males who hold views on social issues similar to those of many minorities and women. On the other hand, on some issues there seem to be significant differences between these groups, but even in such cases "there is considerable overlap between groups." The central point is that people of different racial, sexual, and ethnic groups hold similar views; and people with different views are often of the same
race, sex, or ethnicity. The claim that members of each of the designated racial, sexual, and ethnic groups "share a distinctive intellectual perspective" is "aptly described," one writer comments, "as a form of 'stereotyping' that is 'demeaning.'" The assumption that members of these groups "will advocate positions based on their ethnicity, race, or gender" is said to be "insulting, or at least unjustified stereotyping." Since diversity of perspective or opinion within groups can be substantial, in many cases it is doubtful. Critics maintain, that diversity in group membership enhances or contributes significantly to intellectual diversity. Hence, proponents of AA cannot reasonably simply assume that the desired group diversity enhances intellectual diversity, yet AA makes no attempt to determine whether the individuals selected in AA will contribute to intellectual diversity.

The diversity argument, it should be noted, does not support and is not relevant to all forms of preference, such as nonacademic hiring and contractual set-asides. This argument is most apt to apply to and to be relevant to certain disciplines in higher education, for example, the humanities and social sciences rather than the formal and natural sciences, such as mathematics, physics, and chemistry. Thus, a black or female mathematician or physicist is not likely to hold views different from those of white males in the field that are traceable to racial or sexual group membership.
Further, critics reject the use of racial, sexual, or ethnic group membership as a stand-in for intellectual diversity. There is no need to assume or to infer that a member of a designated group who is an applicant for a faculty position, for example, will contribute to intellectual diversity when the applicant's work can be directly checked to determine whether the assumption or inference is warranted and whether the applicant shows a potential for unusual and significant intellectual contribution. The professional views of applicants for academic positions normally are well known and are often expressed in publications. Even if it is a reasonable expectation that the designated minorities and women will be disproportionally represented in certain fields, such as black history and feminist philosophy, because they are more likely to be interested in the issues these fields address and are more apt to acquire the requisite qualifications for these fields, judgments about likely contribution to intellectual diversity need not be based on fallible group generalizations because more reliable judgments are available. Black scholars may indeed be more inclined to study black history or black literature, for instance, than are non-black scholars; but some nonblack scholars may be more interested in and more knowledgeable about black history or black literature than some black scholars are. Also, although the utilitarian argument claims that members of the designated groups are "particularly insightful researchers
due to their experiencing the world from distinctive stand-
points" and hence that membership in these groups is a
reliable indicator of special research ability, "to be an
effective researcher," an academic writes, "calls for dis-
cernment, imagination and perseverance" and "these attri-
butes are not tied to one's race, sex, ethnicity, age, or
religion."132

Even if intellectual diversity is the goal and we were
to grant the premise of the diversity argument that members
of the designated groups will add different perspectives and
different points of view to the academic community, critics
of AA would reject focusing solely on the designated racial,
sexual, and ethnic groups in seeking diversity rather than
focusing in addition on other groups, for example, Americans
of East European, Arabic, and Asian Indian background.133
Indeed, AA critics would reject understanding group diver-
sity only in terms of race, ethnicity, gender, and national
origin. Perspectives and points of view tied to these group
characteristics are not the only educationally or intellec-
tually valuable or important ones. Other groups have differ-
ent concerns, types of experience, perspectives, and points
of view, critics could plausibly argue, that can contribute
to intellectual diversity, for example, gays, religious
fundamentalists, Mormons, the young, the old, the handi-
capped, the married, the unmarried, people in the lower
socioeconomic class, blue-collar workers, ex-military
personnel, political conservatives, Marxists, and
anarchists. 134

The term "diversity" in the utilitarian defense of AA "does not actually mean," some critics say, "variety of viewpoint and opinion. In practice, it means variety among the races in their proper proportions." 135 In fact, the real goal of AA is racial, sexual, and ethnic diversity in the student body and among faculty members, not intellectual diversity. However, a problem in achieving the desired diversity is, as some commentators point out, the shortage or small number of black, as well as Hispanic, academics, especially in such fields as mathematics, physics, and philosophy. 136 Given the limited number of blacks and other minorities in the professoriate, AA cannot achieve representation here proportionate to the groups' percentages of the general population. The most that AA can do is to redistribute the small number of minority scholars among different schools. More racial or ethnic diversity at one school means less diversity at another. 137

The utilitarian argument that racial sexual, and ethnic diversity is also an instrument for promoting interaction, communication, understanding, and harmony among groups and for training students for life in an increasingly multicultural society by mirroring or approximating the broader social environment in which they well later have to function is applicable or relevant at the undergraduate level rather than at the graduate or professional school level, where such education or training is not the goal. 138
However, in admitting and bringing together minorities and whites from middle- and upper-class, well-educated, and privileged backgrounds, elite and selective schools clearly do not mirror or approximate the broader social environment in which students will later have to function. Further, the factual premise on which this argument for racial, sexual, and ethnic diversity relies is the claim that such diversity produces enormous educational benefits, that there is a correlation between such diversity and "positive educational outcomes." Data presented by proponents of the diversity argument as supporting this claim have been subjected to meticulous examination by social scientists and statisticians. One group of critics concluded, after careful review of all the pertinent data, that this empirical claim is not supported by any data, including the data presented by proponents of the diversity argument. Examination of the pertinent data, the National Association of Scholars concluded, "actually disconfirmed the claim that campus racial diversity is correlated with educational excellence." For evidence that the desired diversity serves important educational ends, such as making students "think in deeper, more complex ways!" and "learn to harness [their] differences," supporters of the diversity argument "relied not on independent assessments but, for the most part, on students' self-evaluations."

A more recent and deeper examination of the empirical claim that there is a correlation between campus diversity
and positive educational outcomes "by three impartial statisticians and social scientists of highest repute," a commentator writes, "investigated the actual effects of diversity rather than what some people say about diversity." Thus, if, as proponents of the diversity argument claim, racial, sexual, and ethnic diversity is beneficial to the entire campus community, it will produce a better educational environment, greater satisfaction with the quality of education, and better relations between students of different racial and ethnic groups. However, "in every case," according to this study, "the significant correlations were in the direction opposite those predicted by the diversity model." As the proportion of black students enrolled at an institution increased, "student satisfaction with their university experience dropped, as did assessment of the quality of their education, and the work efforts of their peers." Further, documents show that diversity policies on campus "led, during the 1990s, to sharply increasing perceptions of interracial tension, by both black and white students, and plummeting numbers of interracial friendships." The longer students were enrolled "the more likely they were to perceive racial conflict on the campus." Diversity on campus "produced among the races not greater harmony but greater antagonism." It has resulted in the self-segregation and separation of the designated minority groups. The evidence shows, for instance, that students in colleges and universities
"now regularly sort themselves by color. In lunchrooms and libraries and lounges and classrooms, blacks cluster with blacks, and whites with whites, all keenly aware of their color." 148

Against the claim that increasing racial, sexual, and ethnic diversity in the workplace creates a more stimulating, cooperative, efficient, and productive work environment, some writers argue that the central assumption of this extension of the diversity argument that a variety of groups and cultures automatically contributes to such an improvement in the work environment is problematic. The desired diversity may actually generate conflicts and tensions that retard institutional performance.149 According to some management experts, homogeneous groups "can relate to each other better" and minimize conflicts and tensions; as a result, they "organize more efficiently."150 Hence, "the potential tensions generated by diversity lead to a surprising conclusion," namely, that "companies may realize important gains by maintaining an ethnically homogeneous work force."151 Even some strong advocates of diversity in the workplace admit that "highly cohesive groups have higher member morale and better communication than less cohesive groups."152

The claim that there are utilitarian benefits and advantages, such as enhanced efficiency, in having the designated minorities and women in a variety of jobs and occupations, for instance, teacher, doctor, lawyer, and police
officer, is vulnerable to serious criticism. Thus, regarding the presumed effectiveness of these minorities and women in teaching certain courses or subjects and in teaching students of their own race, sex, or ethnicity, critics maintain, "no empirical study supports the claim."\textsuperscript{153} Although black scholars, for example, may be more inclined to study black history or black literature than nonblack scholars are, some nonblack scholars are more knowledgeable about and better able to teach black history or black literature than black scholars are.\textsuperscript{154} The claim that minority and female students learn better from teachers who share their race, sex, or ethnicity is "not," some advocates of AA concede, "borne out in experience."\textsuperscript{155} However, if it is true that minorities and women teach certain courses better than white males do and that minority and female students learn better from teachers of their own race, sex, or ethnicity, is it not then also true that white males teach certain courses or subjects better than minorities and women do, such as European and Russian history, mathematics, physics, and engineering, and that white male students learn better from white male teachers? Even if it is granted that the designated minorities and women are more effective in some respects in teaching students who share their race, sex, or ethnicity, more qualified and more competent white males may be more effective overall in teaching minority and female students, who thus may benefit more from having these teachers than less qualified
and less competent teachers of their own race, sex, or ethnicity.

Concerning the presumed effectiveness of minority lawyers and doctors in meeting the perceived need for professionals to serve minority communities, the problem, critics maintain, is not that there is a shortage of black and Hispanic lawyers and doctors and that without a significant increase in the number of minority professionals the need for improved health care and legal services in minority communities will not be met. "Minority communities are indeed often underserved," some critics agree. However, the accompaniments of poverty, such as unsanitary living conditions and inadequate diet and nutrition, have contributed more to ill health in poor minority communities than a shortage of minority physicians; and "the needed improvement in professional service is far more dependent upon economic considerations than upon the color of practitioners." Further, is it true, some critics ask, that the members of the designated minority groups feel more comfortable dealing with and have preferences for professionals of their own race or ethnicity and hence that minority lawyers and doctors will more adequately serve their own minority communities than whites will? If so, is it not then also true that members of other groups, including whites and Asians, feel more comfortable dealing with and have preferences for professionals of their own race or ethnicity? Even if minority professionals relate especially well to the
population of minority communities, more knowledgeable and
more skilled white lawyers and doctors usually will serve
members of minority communities more adequately. As one
writer points out, "the record of professional service
completely transcending difference of race or religion or
nationality is long and honorable." Regarding the claim that minority professionals are
more likely than whites to serve minority communities, some
writers say that a review of data on law school graduates,
for example, shows that minorities are "no more likely"
than whites "to go into 'public interest law'"; that only a
small percentage of minorities entered such categories as
"'public defender'" and "'legal services'"; and that, in
fact, "minorities were more likely to opt for the relative
lucre of private practice" and they "also tend to work for
bigger firms" than whites. Other writers agree that
"black professionals may be more likely than whites to build
their practices in black communities." An important ques-
tion then, however, is whether sufficient numbers of minor-
itv law and medical school graduates are likely to practice
in those minority communities in need of improved health
care and legal services. The empirical evidence does not
show that preference in professional school admissions has
a significant effect on the problem. Indeed, the "expecta-
tion that minority lawyers (and doctors) will, as a matter
of course, practice mainly in minority communities," a
critic writes, "is worse than parochial—it exerts heavy
and unfair pressure on minority professionals to limit the sphere of their practice.\textsuperscript{163}

In response to the claim that the preferential selection of blacks and other minorities to work as police officers, social workers, and so on, in minority communities enhances efficiency, critics may ask whether it is true that minority police officers, for example, relate especially well to the population of minority communities and that minority citizens relate better to minority police officers than to white police officers. Even if this claim is true and black and other minority police officers are more effective in some respects than white police officers in policing minority neighborhoods, they may be less effective overall than white police officers who are more qualified; who are more knowledgeable about the law and proper police procedures; and who are more competent in performing some tasks deemed essential for police work, for instance, writing arrest reports and giving court testimony.\textsuperscript{164} If so, race-conscious selection here is not justified on efficiency-related grounds.

Concerning alternatives to AA, recall that even if AA were to have generally beneficial consequences, the utilitarian case for AA still would not be made, since there may be alternatives that are likely to have equally beneficial consequences and less harmful consequences. These policies may be likely to achieve equivalent or even greater benefits at less cost.\textsuperscript{165} Some utilitarian opponents of AA maintain
not only that the benefits of AA are "very much smaller" than its proponents claim but also that the costs of AA are "far greater than its proponents concede" and that "its benefit-cost ratio is unfavorable compared to other alternatives" that do not involve preferential treatment. These alternative policies are nonpreferential ways of yielding such economic benefits as improving the economic condition of the designated minorities and such noneconomic benefits as promoting intellectual diversity on campus, providing role models for the designated minorities, and improving health care and other professional services in underserved communities.

Thus, if intellectual diversity and the representation of different perspectives and different points of view is the goal, we can more effectively pursue this goal directly rather than indirectly, as in AA, by, for example, "appointing those individual scholars whose work indicates a potential for unusual contribution of the greatest significance." In addition, educational institutions can ask students in applications for admission to state their views on a wide range of questions and then admit students with the aim of promoting intellectual diversity in the classroom; or these institutions can simply provide understanding of a far wider range of issues than race-related issues through class lectures, assigned readings, and class discussions. If providing role models for the designated minority groups is the goal, publicizing and giving
attention to group members who have succeeded without preference and whose ability to demonstrate that other group members can succeed has not been undermined is a more effective method of achieving the goal. "At the present time," a commentator remarks, "models abound in the news media and elsewhere." If the goal is to improve health care and legal services in underserved communities, the way to achieve the goal and to solve the problem is not through the indirect, unpredictable, and inefficient method of setting aside a certain number of places for minority applicants to law or medical school but through more direct ways, such as making large money payments available to people in underserved communities. Other more direct methods include making government subsidies available to all qualified lawyers and doctors who are willing to work where there is a special need for them and making government scholarships available to all needy and well-qualified students, regardless of race or ethnicity, who are willing to pledge to work a certain number of years in government service programs that assign lawyers and doctors to those areas, including white areas, where their services are especially needed. These suggested alternatives to AA have the additional advantage of not sacrificing legal and medical knowledge, skill, and competence.

The utilitarian argument for AA implies that various kinds of morally objectionable or morally problematic policies and practices would be justified. Thus, if this
argument justifies policies that advantage members of the designated groups and disadvantage nonmembers of these groups on the basis of race, sex or ethnicity when doing so promotes social utility, it provides a rationale for and would justify policies that advantage members of other racial, sexual, and ethnic groups, including white males, and disadvantage nonmembers, including the designated minorities and women, on the basis of race, sex, or ethnicity when doing so promotes social utility. For example, if giving preference to members of the designated minority groups and women for teaching positions may be justified on the grounds that they teach certain courses or subjects better than white males do and that minority and female students relate better to and learn better from teachers of their own race, sex, or ethnicity, the preferential selection of white males for teaching positions may be justified on the grounds that they teach certain course or subjects better than the designated minorities and women do and that white male students relate better to and learn better from white male teachers than from minority and female teachers. Further, if the preferential selection of minority lawyers and doctors for certain positions may be justified on the grounds that minorities relate better to, feel more comfortable dealing with, and have preferences for professionals of their own race or ethnicity, the preferential selection of white lawyers and doctors for positions in which they will serve a predominantly white clientele or
population may be justified on the grounds that whites relate better to, feel more comfortable dealing with, and have preferences for white professionals. The same point applies to the preferential selection of whites as police officers to serve white communities when white police officers relate especially well to the population of these communities and white citizens relate better to white police officers than to minority police officers.

Characteristics that are relevant to selection for positions often are statistically correlated positively or negatively to some degree with such characteristics as race, sex, and ethnicity, which may then serve as statistical indicators of the presence or absence of qualifications and criteria that are relevant to selection for desirable positions. Policies that are based on such statistical correlations or generalizations—e.g., that the members of a particular racial or ethnic group are more likely to be absent from work or school, to perform poorly on the job, to leave the job after a short time, and to drop out from or to fail in school—and that disadvantage individuals on the basis of group membership may be justified on grounds of administrative convenience and efficiency. Also, employers may be justified on such grounds in giving preference to men over women for certain jobs, for example, jobs as warehouse workers, because they believe correctly that most women are unable to lift the heavy boxes stored in the warehouse or lack the stamina and endurance to lift these
boxes over an extended time. 173

The utilitarian argument for AA implies, furthermore, that policies that sharply reduce or severely restrict or limit the number if members of high-performing and over-represented groups, such as Jews and Asians and the designated minorities in certain activities, in various categories of desirable positions may be justified as ways of promoting social utility. Thus, policies that sharply reduce and severely limit the percentages of black and other minority athletes on amateur or professional sports teams on which they are greatly overrepresented and that thus give substantial preference to white athletes seeking places on the teams may be justified on grounds of social utility. These policies, for example, it can be argued, will achieve racial and ethnic diversity on the teams and make the racial and ethnic composition of the teams reflect that of the community, will foster community spirit and support, will counteract such negative stereotypes as that blacks and other minorities have greater physical ability but lesser intellectual ability than whites, and will help to persuade other minorities to pursue more intellectual jobs and other desirable positions. Further, gains in social utility would justify preferential policies that sharply reduce the numbers of Jewish and Asian students enrolled in elite colleges and universities and severely restrict the numbers of Jews and Asians in the professoriate, law, medicine, mathematics, and science to achieve racial and ethnic diversity in
high-level and high-status positions and to reduce anti-Semitism and racial, ethnic, and religious tensions exacerbated by these groups' percentages in these positions, which far exceed their percentages of the population. Utilitarian arguments would also justify policies of preference for men at the expense of women in making faculty appointments in academic departments in which most of the faculty members are women, such as elementary education and nursing, and in filling jobs in elementary education and nursing, in which women predominate—e.g., six of seven elementary school teachers today are women—to achieve valued sexual diversity and to provide more male role models in the classroom.

Gains in social utility would justify other policies, it might be argued, that advantage some individuals and disadvantage others on the basis of such characteristics as race, ethnicity, religion, and socioeconomic class. These policies involve, for example, dismissing whites or members of other overrepresented groups from jobs they hold to achieve racial and ethnic diversity more quickly; maintaining a racially, ethnically, or religiously homogeneous work force to derive the benefits of greater harmony and efficiency among workers due to, for instance, their religious unity; giving preference in admissions to individuals from wealthy families, who are likely to give money to the college and to exert a lot of influence on the world; and benefiting society by giving preference in
admissions to "whites from disadvantaged backgrounds" to vindicate "the American dream for poor whites" and to add representatives of "disadvantaged white America"\textsuperscript{179} to the ranks of successful professionals.

Preferential policies based on race, ethnicity, and so on, in contexts other than hiring, promotions, and admissions would also be justified on grounds of social utility. These policies, for example, will by lowering standards of evaluation increase racial and ethnic diversity, that is, proportionality, among recipients of high grades, academic honors, and academic degrees and reduce college dropout and failure rates for the designated minority groups; will dramatically increase the numbers of minority lawyers and doctors to serve minority communities and to serve as role models for other minorities by setting lower passing scores for the designated minorities in bar and medical certification examinations; and will achieve racial and ethnic proportionality in integrating housing by advantaging and disadvantaging white and minority housing applicants on the basis of race or ethnicity. Another preferential policy will enhance minority political power and influence and benefit society by setting lower voting eligibility requirements for the designated minorities, such as allowing them to vote at a lower age than whites may, and by awarding a certain percentage of elective political offices to minority candidates who have not received the most votes. A further preferential policy will eliminate racial and ethnic
disparities in arrest, trial, conviction, and imprisonment in the criminal justice system that are a source of prejudice, stereotyping, and hostility.

If utilitarian defenders of AA hold that policies that advantage members of the designated groups and disadvantage nonmembers of the designated groups on the basis of race, sex, or ethnicity are justified when doing so promotes social utility, they have to explain why they deny that policies that advantage members of nondesignated groups and disadvantage members of the designated groups on the basis of these characteristics are justified when doing so promotes social utility. If AA defenders accept that there are moral constraints on policies that have generally beneficial consequences or promote social utility and hence that such policies may be morally impermissible or morally unacceptable, they have the problem of explaining why AA is not morally impermissible or unacceptable.

The principal nonutilitarian objection to AA is that this policy, like past discrimination against minorities and women and other policies of preferential treatment, is discriminatory and unjust in denying positions to individuals on the basis of the morally irrelevant characteristics of race, sex, or ethnicity. The present objection does not maintain that AA is morally unacceptable because it changes the rules after white male job and school applicants have invested their efforts in acquiring qualifications for desirable positions and hence frustrates their legitimate
expectations; nor does this objection falsely assume, as some AA proponents claim, that the distribution of desirable positions is a reward for past achievement. Furthermore, the present objection is not undermined by the replies that "'hiring the most competent candidate is not the currently accepted rule in employment,'" that "'merit criteria are either ignored or undermined in several ways'"; that "merit is not usually used as a criterion in hiring" or admissions; and that AA is no worse than ongoing selection practices. That there are other practices which ignore the principle principal of selection according to merit, qualifications, or competence, such as traditional admissions practices that subordinate merit to nonacademic and non-intellectual considerations—e.g., personal connections, family wealth, athletic ability, pecuniary benefit or financial expediency, and alumni loyalty and approval—does not show that AA is morally permissible or morally acceptable. The correct conclusion to be drawn from the claim, even if true, that selection according to competence is not the usual rule in employment and admissions is that not only AA but also other selection practices are discriminatory and unjust.

Proponents of the present justification of AA reject the argument that AA is "a form of invidious discrimination in reverse" because it does "not differ in any morally relevant way from past discrimination against minorities and women." They maintain that there is a moral asymmetry
or "a morally relevant distinction"\textsuperscript{185} between AA and past invidious discrimination.

Thus, AA, unlike past invidious discrimination, does "not express hatred or prejudice"\textsuperscript{186} toward or "contempt for the victims"\textsuperscript{187} and is "not based on inaccurate and demeaning stereotyping of the people disadvantaged"\textsuperscript{188} by it or on the idea that "one group of people" is "inherently inferior" or is "less worthy or has less moral standing than another because of race, sex, or ethnicity." Hence, AA "lacks the crucial element of prejudice toward a group that characterizes past invidious discrimination and so is morally in a different category."\textsuperscript{189} "Racial and sexual discrimination," AA defenders argue, "are based on contempt or even loathing for the excluded group, a feeling that certain contacts with them are degrading to members of the dominant group, that they are fit only for subordinate positions or menial work."\textsuperscript{190} This discrimination "attaches a sense of reduced worth to a feature with which people are born."\textsuperscript{191} In AA, white males "are 'being excluded not by prejudice but because of a rational calculation about the socially most beneficial use of limited resources'"\textsuperscript{192} or because of "impartial calculations about the social good."\textsuperscript{193} Therefore, since AA is in a morally different category from past invidious discrimination, it is not a form of invidious discrimination in reverse and cannot be ruled out as morally impermissible.
promote social utility by disadvantaging individuals on the basis of race, sex, ethnicity, religion, or socioeconomic class or policies of favoritism for members of an individual's own racial, ethnic, or religious group that arise out of loyalty to the group, such as a black (Jewish, Italian, Asian, and so on) employer strongly preferring blacks (Jews, Italians, Asians, and so on) in hiring. The AA defenders' reply fails to rule out as discriminatory and unjust not only AA but also these and other morally objectionable policies and practices which, like AA, do not express hatred or prejudice toward or contempt for those disadvantaged.

To circumvent the objection to race-based preference in AA, plans have been devised to achieve racial and ethnic diversity in state undergraduate colleges without giving preference explicitly. These plans guarantee admission to the top x percent of each high school graduating class in the state, for example, 10 percent in Texas, 20 percent in Florida, and 4 percent in California. Although these plans are race neutral on the surface, they are a species of indirect racial preference since they seek to do indirectly what AA does directly. They are a means to produce the desired degree of racial and ethnic diversity in the state colleges and universities. "In this regard," some proponents of AA concede, these plans "are no different from the poll taxes that were used in the segregated South, which were purportedly race-neutral means, but were clearly
designed to produce, in that case, an objectionable racial result," namely, "to keep blacks from voting." Such plans achieve racial and ethnic proportionality only because many high schools in the state are predominantly black or Hispanic. By automatically admitting a fixed and significant percentage from each of the predominantly black or Hispanic secondary schools, colleges and universities are able to admit blacks and Hispanics in roughly the same percentage as in AA programs. In these plans, blacks and Hispanics in the top x percent of each predominantly black or Hispanic secondary school gain admission over better-qualified whites.

Another alternative to explicit race-based preference in admissions "would require schools to establish a minimum test score as acceptable and then hold a lottery for admission among those who meet the minimum standard." AA advocates reject this alternative on the grounds that the "lottery system will not function as an acceptable proxy for race-based affirmative action," since, "at least at selective schools, where the minimum test score is relatively high, there will be disproportionately more whites than minorities in the lottery pool." Further, the lottery system ignores morally relevant differences between applicants for admission according to principles of justice governing the distribution of goods like places in educational institutions. Like AA, this system would distribute desirable positions on the basis of morally irrelevant
criteria, namely outcomes of a lottery. Consider the morally unacceptable consequences of extending the lottery approach to other contexts of distribution to eliminate racial and ethnic disparities, such as assigning grades and awarding degrees, awarding professional licenses, awarding elective political offices, and determining guilt or innocence and punishments in the criminal justice system.

Some AA advocates deny that AA programs harm whites. They "scoff at the alleged burden of race preferences, contending that their impact upon the majority is insignificant."\(^{201}\) Again, "racial preferences have only the slightest negative effect on any individual white." That is, the costs of preferences "are paid by a group so large as to render the pain trivial for any one of its members."\(^{202}\) The group of white job and school applicants is large, while the number of minority applicants given preference is small.\(^{203}\) Hence, if racial preferences "impose a burden," these AA advocates contend, "it is at worst a trivial burden because of the great number over whom the burden is distributed." The burden of preferences given to minority applicants is "so greatly diluted by the size of the majority" that the consequences of these preferences "are barely detectable."\(^{204}\) However, the costs of programs of racial preference are not paid by a group so large that the pain for any one of its members is rendered trivial. The costs are not widely dispersed among a large group, like a financial burden that is spread over the members of a group, and
are not diluted by the size of the group. On the contrary, relatively few members of the group bear the burden of racial preferences. They are the ones denied or prevented from attaining positions. For them the burden of racial preferences is not trivial or diluted by the size of the group of white applicants. This group may be large, but the number of whites displaced by racial preferences is the same as the number of minority applicants given preference.

AA does not violate the rights of white males disadvantaged by this policy, some defenders of AA maintain, since they are excluded because of a rational calculation about the socially most beneficial use of limited resources or impartial calculations about the social good and not because of prejudice. The disadvantages imposed on white males are "counted equally in the process of social cost accounting." However, the claim that AA conforms to the "utilitarian requirement that everyone's welfare be counted the same in computing the costs and benefits of social policy" does not answer or disarm the objection that AA violates the moral rights of those disadvantaged by it. These rights are "more than mere entitlements to be counted fairly in the utilitarian calculus of consequences" or "without prejudice in the computation of the effects of social policy." These rights are constraints on the pursuit of institutional and societal goals and on utilitarian calculations of consequences.
Arguing that AA is justified on grounds of social utility, one defense of AA maintains that AA is not seriously unjust because the system of differential reward, the distribution of social and economic benefits accompanying the distribution of desirable positions, is already unjust, and that AA has social advantages. Problems confronting this defense of AA, however, are to provide a convincing argument that the distribution of desirable positions on morally irrelevant grounds, such as race and ethnicity, is not seriously unjust and to show that the social advantages of AA outweigh the countervailing utilitarian considerations or the harmful consequences of AA and that alternative policies are unlikely to produce equivalent benefits at less cost.

Reflecting on the "message of affirmative action," another defense of AA goes beyond entirely forward-looking or utilitarian arguments, which give the wrong message in defending AA and the preferential treatment of minorities and women and the rejection of white males solely as a means to produce socially beneficial results and thus in ignoring past discrimination and injustice against these minorities and women and their current disadvantages. "The proper alternative," according to the present argument, is a defense of AA that gives the right message in taking into account the future benefits of AA and acknowledging past injustice against the designated minorities and women and recognizing their current disadvantages. Countering
"the deep insult inherent in racism and sexism," AA affirms and expresses the values and ideals of "fair opportunity, mutual trust, and respect for all" in acknowledging that the minorities and women given preference in admissions have been wronged and that most of them have had their opportunities in life diminished by injustice; in deploring and denouncing racist and sexist attitudes and wrongs; in recognizing these minorities' and women's "understandable grounds for suspicion and mistrust" of the expression of "high-minded sentiments"; in recognizing the disadvantages they have probably suffered; and in welcoming them into the university community.

However, in including a compensatory element and relying on the unjustified claims that the recipients of preference in admissions are victims of injustice and that the rejected white male applicants are likely beneficiaries of injustice against minorities and women, the present defense of AA is subject to the criticisms of the backward-looking arguments. Given that there are unjust ways of distributing social benefits and burdens as well, furthermore, this defense of AA has the problems of answering the objection that AA treats the rejected white male applicants unjustly in violating principles of justice and fundamental individual moral rights governing the distribution of such social goods or benefits as desirable positions, and the objection that AA contravenes the values and ideals of fair opportunity and respect for all that purportedly underlie
The preceding reply by defenders of AA however, does not undermine or disarm the present objection when carefully formulated. This objection does not contend that AA is morally permissible because it does not differ in any morally relevant way from past discrimination against minorities and women. Rather, the present objection maintains that AA and past invidious discrimination are morally similar in a crucial respect, that is, that they deny positions to individuals on the basis of the morally irrelevant characteristics of race, sex, or ethnicity with the classes of beneficiaries and victims reversed. Even if AA does not express hatred or prejudice toward whites or stigmatize them as members of an inferior racial group, it does treat the white applicants displaced with disrespect in discounting their qualifications, dismissing their achievement, and denying them desirable positions on the basis of group membership.

The AA defenders' reply to the present objection to AA does not apply to or rule out all forms of discrimination or injustice. Not every form of discrimination or injustice expresses prejudice toward or contempt for the victims or stigmatizes them as members of an inferior group. This reply identifies salient features of a well-known and prominent historical example of discrimination, but these features are not essential characteristics of the conception or phenomenon of discrimination. Consider, for instance, the previously discussed policies that
this policy in discounting the qualifications of the rejected white male applicants; dismissing their achievement; and denying them positions on the basis of race, sex, or ethnicity. AA actually conveys the message that minorities and women will be evaluated by lower standards and will be admitted even though competing white male applicants are better qualified and that white male applicants competing for the affected positions are not welcome and will be excluded in favor of less-qualified minority and female applicants on the basis of race, sex, or ethnicity.

Moreover, not only are there moral constraints, such as principles of justice and individual moral rights, on policies that seek to achieve legitimate or unobjectionable goals, but also there are ways of conveying the right message and responding to past injustice that, unlike AA, do not imitate the structure of this injustice.215
Notes

2. Ibid., 90, 97-98.
3. Shaw, Contemporary Ethics, 2.
4. Ibid., 12.
6. Shaw, Contemporary Ethics, 11.
14. Ibid., 47.
18. Rowan, Conflicts of Rights, 121.
20. Ibid., 98.


22. Ibid.

23. Ibid.


25. Bowie and Simon, Political Order, 3d ed., 218-20; Rowan, Conflicts of Rights, 118; and Sher, "Diversity," 97-98.


27. Rowan, Conflicts of Rights, 118.

28. Fullinwider, Reverse Discrimination, 70; D'Souza, End of Racism, 219; and Paul, "Affirmative Action."


30. Mosley and Capaldi, Affirmative Action, 52; Rowan, Conflicts of Rights, 121; and Cohen and Sterba, Affirmative Action, 97.

31. Mosley and Capaldi, Affirmative Action, 52.

32. Bowie and Simon, Political Order, 266.


36. Gross, Discrimination in Reverse, 67; and Fishkin, Justice, 25.


39. Fullinwider, Reverse Discrimination, 87-88; and Bowie and Simon, Political Order, 3d ed., 221.
43. Ibid.
44. Ibid., 58.
45. Ibid., 56-57.
47. Rowan, *Conflicts of Rights*, 125.
54. Sher, *Desert*, 121.
57. Ibid.
58. Ibid.
61. Thernstrom and Thernstrom, "Racial Preferences," 47.


64. Ibid.

65. Ibid.

66. D'Souza, Illiberal Education, 42.

67. Thernstrom and Thernstrom, "Racial Preferences," 47.

68. D'Souza, Illiberal Education, 43; and Cohen and Sterba, Affirmative Action, 112.


70. Ibid., 47.

71. Ibid.


73. Ibid., 30.

74. Ibid., 31.

75. Cohen and Sterba, Affirmative Action, 139, 143; and Sher, "Preferential Hiring," 40.


78. Sowell, Preferential Policies, 110; D'Souza, Illiberal Education, 46; Rowan, Conflicts of Rights, 122; and Cohen and Sterba, Affirmative Action, 168.

79. Rowan, Conflicts of Rights, 122.

80. Cahn, "Two Concepts of Affirmative Action," 358; Rowan, Conflicts of Rights, 122; and Bowie and Simon,

82. Ibid.
83. Ibid.
86. Sher, "Preferential Hiring," 40.
87. Rowan, Conflicts of Rights, 127.
89. Ibid., 159-60; and Simon, "Affirmative Action," 50.
93. Ibid.
94. Ibid.
95. Mosley and Capaldi, Affirmative Action, 83.
96. Taylor, Good Intentions, 209.
97. See, for example, Posner, "Preferential Treatment," 17.
100. Rowan, Conflicts of Rights, 122.
103. Ibid.
104. Ibid.
110. Thernstrom and Thernstrom, "Racial Preferences," 47.
113. Ibid., 343.
114. Ibid.
118. Ibid.
119. Ibid.
122. Ibid.
126. Ibid.
129. Ibid., 77-78.
131. Ibid.
132. Ibid.
140. Ibid.
141. Ibid.
142. Ibid., 92.
145. Ibid.
148. Ibid., 166.
150. Ibid.

151. Ibid.


154. Ibid.


157. Ibid.


163. Ibid., 98.


172. Nickel, "Discrimination."

173. Ibid.

175. Thernstrom and Thernstrom, "Racial Preferences," 50.


179. Herrnstein and Murray, Bell Curve, 465.


182. Ezorsky, Racism and Justice, 90, cited in Mosley and Capaldi, Affirmative Action, 94.

183. Gross, Discrimination in Reverse, 70.


185. Ibid., 204. See also Wasserstrom, "Preferential Treatment," 159-68.

186. Ibid.

187. Ibid., 205.

188. Ibid., 204.


195. Ibid., 41-42, 346.
196. Ibid., 345.
197. Ibid., 42, 272.
198. Ibid., 41.
199. Ibid., 271.
200. Ibid.
201. Ibid., 34.
204. Ibid.
206. Ibid.
210. Ibid., 179.
211. Ibid., 186.
212. Ibid., 189.
213. Ibid.
214. Ibid.
Chapter 12
Conclusion

In this paper I have critically examined and rejected the two principal types of moral justification, the compensatory and noncompensatory, of affirmative action involving preferential treatment (AA) for blacks, Hispanics, American Indians, and women in hiring, promotions, and admissions. Neither of these approaches to the justification of AA, I have argued, is able to defend AA successfully. AA is not morally justified.

Thus, succeeding compensatory arguments for AA, individual and group oriented, are unable to evade, undermine, or disarm the objections that AA violates the principles of compensatory justice governing who is owed compensation, what compensation is owed, and who owes compensation, and that AA violates the principles of justice and fundamental individual moral rights governing the distribution of such social goods or benefits as desirable and valuable positions. The principles of justice and moral rights violated by AA govern the distribution of social benefits, including desirable positions, and burdens and systematize, unify, and explain correct moral judgments about the injustice of actions, policies, and practices in a variety of contexts of distribution. Moreover, backward-looking or compensatory arguments for AA have the implication that unjust and morally unacceptable compensatory policies that are morally similar to AA would be justified in contexts other than
hiring, promotions, and admissions. Furthermore, the noncompenatory justifications of AA, including meritocratic and utilitarian forward-looking arguments, are unable to evade or to undermine the objection that AA violates principles of justice and fundamental individual moral rights and the objection that these attempted justifications of AA have the implication that unjust and morally unacceptable noncompensatory, forward-looking policies that are morally similar to AA would also be justified in contexts other than the standard ones.
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