DEFENDING THE USE OF QUOTAS IN AFFIRMATIVE ACTION: ATTACKING RACISM IN THE NINETIES

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I. INTRODUCTION

In this article I take the controversial position that the implementation of mandatory quotas or strict numerical goals in the admission process for colleges and professional schools is a necessary remedial tool given the invidious nature of discrimination and the manipulation of the concept of "merit" in our society to maintain the favored position of the dominant group (white males) in our society. In other words, building upon other philosophical work in this area, including my own, I make certain key assumptions that ultimately justify the use of quotas in the admission process. I assume that certain first-order principles such as antidiscrimination and the presumption of individual equality irrespective of race and gender are beyond cavil. More specifically, I reject the concept that certain groups are biologically inferior or superior based on race or other ethnic classifications in favor of the postulate of equality irrespective of race.

Working from the first-order principle that all people are inherently,

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2. See Alex M. Johnson, Jr., Affirmative Action in the Nineties: A Philosophical Defense: A Time for Reflection and Reexamination (work in progress, on file with author).

3. This perspective expressly rejects the view taken by William Shockley in Dystenics, Geneticity, Racology: A Challenge to the Intellectual Responsibility of Educators, 53 PHI DELTA KAPPAN 297 (1972), and others who have proposed anthropological and psychological theories of
randomly equal when it comes to the distribution of intelligence across racial and ethnic lines, the logical question is why blacks\(^4\) and others historically discriminated against are underrepresented in certain prestigious positions but overrepresented in negative categories or positions.\(^5\) In the absence of racism and its effects, both past and present, our society presumably would produce a percentage of minority students matriculating at American colleges and professional schools (the focus here will be on law schools although the analysis applies with equal force to medical schools and other graduate professional schools) proportional to the percentage of minorities in American society.

The problem that results in the underrepresentation of minorities in prestigious positions involves slavish devotion to numerical "meritocratic standards" for the allocation of scarce resources in our society. The problem is exacerbated when the meritocratic dogma is coupled with institutionalized racism, creating a permanent underclass in our society from which few, if any, can escape.

As long as there are enough qualified applicants to diversify the student body so that its composition mirrors that of society—of which more later\(^6\)—the student body, if fairly selected, should approximate the racial and cultural composition of society. Consequently, once one rejects the position that blacks and other people of color lack the ability to compete with whites, a serious question is raised as a result of the underrepresentation of blacks and others historically discriminated against in certain positions.

Mandating quotas to eliminate the underrepresentation of subordinated groups is not wrongful as long as there are qualified individuals who meet the minimum standards required for the subject position. On the other hand, having or mandating quotas when no individuals meet the minimum standards is quite harmful. The problem


4. The term black is used throughout this article instead of African-American. The debate over correct terminology is largely semantic and of no substantive import; moreover, the issues that are addressed herein have largely been thought of as black/white issues. It is more convenient to invoke the terminological differentiation between black and white than say, between African-American and Northern European-American, which would be necessary to maintain semantic symmetry between the two typologies.

5. Almost any statistical study or examination that compares the plight of blacks and other minorities vis-a-vis whites demonstrates with respect to any important index that blacks and other minorities are underrepresented in prestigious positions but overrepresented in negative categories. One excellent source of statistical and other material that proves this point appears in Richard Delgado, Rodrigo's Chronicle, 101 Yale L.J. 1357, 1382 (1992) (appendix lists essays and books that bring statistical data to bear on problems of the cities and underclass). See also Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 223-36 (1992) (includes statistical tables drawn from 1990 census data and the Current Population Survey that compare the positions of whites and blacks in various categories ranging from infant mortality to life expectancy and everything in between).

6. See infra notes 106-10 and accompanying text (discussing relevant pool from which qualified minority applicants to law school would be selected); see also infra notes 129-37 and accompanying text (discussing how use of quotas implicates the issue of standards).
is really about standards, their appropriateness, and their use for the allocation of scarce resources in American society.

To address these issues, this article first examines the historical legacy which created the need for race-conscious remedies in American society. More particularly, this article focuses on the plight and treatment of blacks and other minorities\(^7\) (hereinafter sometimes collectively referred to as *people of color*) in our society, and how that treatment led to the necessity for and development of race-conscious remedies such as affirmative action. Thus, this article demonstrates that from an evolutive perspective, not much has changed with respect to the condition of minorities in our society and their position vis-a-vis whites as it pertains to the quality and calibre of educational opportunity they have received. In other words, de facto school segregation continues to exist on a massive scale, and minorities continue to receive an inferior education as a result.\(^8\)

Moreover, although this article is not intended as a legal brief defending the constitutional use of affirmative action, in order to place the discussion in the appropriate historical and legal context, some minimal reference will be made to recent Supreme Court opinions that have heightened the debate over the efficacious use of affirmative action. Only by placing the debate over the use of affirmative action in its appropriate historical context can informed decisions be made concerning whether the position of blacks and other minorities in this society, and the state of race relations, have evolved to the point at which race-conscious remedies are no longer needed to correct inequities caused by past and present racism in our society.

Focusing on the current condition of people of color in our society, and comparing it to the historical conditions that led to the development and large-scale implementation of affirmative action programs, reveals that racial discrimination\(^9\) has not been eliminated in our society. If any-

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7. Minorities are defined to include Latinos, Asians, and Native Americans, as well as blacks, by reference to the discriminated positions they have occupied in American society.

8. See *infra* notes 12-73 and accompanying text.

9. Discrimination should, I suggest, be understood to include any decision that treats an otherwise similarly qualified black, woman, or handicapped person less favorably than a white, male or able-bodied person, whether the reason for the decision lies in malice, taste, selective empathy and indifference, economic self-interest or rational stereotyping. This understanding of discrimination picks up not merely covert unequal treatment, but also requirements that are neutral "on their face" but that would not have been adopted if the burdened and benefitted groups had been reversed. . . .

It follows that the claim of discrimination, best understood, is not for prevention of certain irrational acts, or of "prejudice," but instead for the elimination, in places large and small, of something in the nature of a caste system. . . .

. . . .

In the areas of race and sex discrimination, and of disability as well, the problem is precisely this sort of systemic disadvantage. A social or biological difference has the effect of systematically subordinating the relevant group and of doing so in multiple spheres and along multiple indices of social welfare: poverty, education, political power, employment, susceptibility to violence and crime, and so forth. That is the caste system to which the legal system is attempting to respond.
thing, the condition of people of color, when viewed as a whole, has worsened in the last decade.\textsuperscript{10} Upon examining the objective, statistical indices regarding the education and distribution of wealth among individuals in our society,\textsuperscript{11} it appears that de facto segregation is still endemic in American society and that remedial steps must be taken for its elimination. In other words, the need for affirmative action programs truly never has been greater.

II. BLACKS IN AMERICAN SOCIETY: AN ANALYSIS OF REGRESSION

“White prejudice and discrimination keep the Negro low in standards of living, health, education, manners and morals. This, in its turn, gives support to white prejudice.”

—— Gunnar Myrdal, \textit{An American Dilemma}, 1944\textsuperscript{12}

“This is our basic conclusion: Our nation is moving toward two societies, one black, one white—separate and unequal.”

—— \textit{Report of the National Advisory Commission on Civil Disorders}, 1968\textsuperscript{13}

“[T]here are strong signs that the 1990s will be the decade in which America resurrects a network of separate schools—one set for whites, another for minorities—similar to the system the high court began tearing down in 1954.”

—— Larry Tye, \textit{Boston Globe}, 1992\textsuperscript{14}

Gunnar Myrdal was prophetic. In his monumental study of black-white relations, \textit{An American Dilemma}, he correctly predicted slow, tenuous improvement in the educational, political, and social status of blacks; a worsening economic situation; rising self-confidence and assertiveness among blacks; and an impending breakdown among whites of formerly accepted beliefs and attitudes about white race dominance.

Myrdal’s prophyse, however, contained one major flaw. He had too much faith in the idea that changes in the discourse about race dominance would eliminate racial separation and discrimination. He thus failed to predict the strong resistance to full equality for blacks that

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\textsuperscript{10} My point here is that although the plight of people of color has improved at the top, the plight of those at the bottom has persisted or worsened. Even at the top, blacks are limited by glass ceilings, raising the issue of how much further blacks would have gone in the absence of racism. Perhaps incremental progress is not enough given the results of incrementalism as measured by current statistics.

\textsuperscript{11} For example, it was reported that a recent Urban League study found that the average net worth of black households is only 23\% of whites or $26,130 versus $111,950. Other objective indices show that blacks have failed to achieve anything resembling economic parity with whites. \textit{See} Robert Davis, \textit{Urban League: Recession Hits Blacks Harder}, USA TODAY, Jan. 22, 1992, at 8A.

\textsuperscript{12} \textit{Gunnar Myrdal, An American Dilemma} (1944).

\textsuperscript{13} \textit{National Advisory Comm’n on Civil Disorders, Report} 1 (1968).

\end{footnotes}
would remain after the old system of legalized, or de jure, segregation had been eliminated.

Almost forty years ago, and ten years after publication of Myrdal's influential study, the Supreme Court declared segregation unconstitutional.15 The decision was a response to the outcry against the deplorable conditions in which blacks were forced to live—conditions that were the result of legally sanctioned segregation.16 Segregation was the rule in public accommodations, health care, housing, schooling, work, and the legal system.17 As is well known and accepted today, this segregation was not "separate but equal"; indeed, "virtually all facilities and services for blacks were fewer in number, much lower in quality, or more inaccessible than those for whites."18

The effects of segregation and the separate but unequal status of blacks were most apparent in housing and education. In housing, most blacks lived in the cities, but were confined to a very limited area devoted almost entirely to their own race. Overvaluation, rent exploitation, poor housing, and poor health conditions were the result.19 The black neighborhoods stood in varying states of disrepair, with thirty-five percent in need of major repairs, while only sixteen percent of whites' homes needed such repairs.20 Many neighborhoods had unpaved, undrained, and unlighted streets, no sewer connections, and inadequate water and fire protection.21

In education, the inequality of conditions was especially apparent. As in housing, black schools and learning conditions were grossly inferior to those at the white schools, resulting in a vastly unequal educational experience for blacks and whites. Approximately four-fifths of black youth attended segregated schools that were generally "extremely impoverished, small, short-term schools, lacking in transportation service, void of practically every kind of instructional equipment, and staffed by relatively unprepared, overloaded teachers whose compensation does not ap-

16. In Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court held that segregation of races was constitutional provided the facilities and conditions for blacks were equal in quality to those provided for whites. This became known as the doctrine of "separate but equal."
17. The picture was well illustrated by Maurice R. Davie:
The most conspicuous forms of racial segregation, ... are in residential areas; in educational, recreational, and other public institutions; in quasi-public or privately operated institutions under public control, such as railroads, steamship lines, streetcar and bus systems, and hospitals; in private business establishments, such as hotels and restaurants; and in other private commercial and professional services, such as department stores, mortuary establishments, and doctors' offices. These are the more common and visible forms of separation; actually it pervades, in some degree or other, practically the whole range of social behavior.
20. Id. at 219.
21. Id. at 220.
proximate a subsistence wage."  

In public education, southern states spent far more on the education of white pupils than on that of black pupils. Average expenditures per pupil in the southern states was $58.69 for whites and $18.82 for blacks. In Mississippi, those figures were $52.01 for whites and $7.36 for blacks, a difference of over 600%. The value of school-plant equipment averaged $162 for each white pupil and $34 for each black. Many black teachers had little more than an elementary school education, and they earned substantially less than their white counterparts. As a result of this segregation, over sixty percent of black youth were not able to obtain more than six years of education, whereas only sixteen percent of whites suffered the same plight.

After the Supreme Court declared in Brown that desegregation should proceed "with all deliberate speed," for a time it seemed as if the inequalities between blacks and whites could be eliminated. In the spirit of the civil rights movement, blacks initially made great gains, comparatively, in many areas. A combination of desegregation and other economic and legal events gave blacks opportunities that could be used to improve economic and social status. Those blacks best prepared to respond to these new opportunities could do so with initiative and success. The result was a new black middle class.

The dismantling of de jure segregation and the increased support of whites for the principles of racial equality represented big gains for blacks. After Brown, blacks made improvements in life expectancy, education, occupation, income, and political participation—including the election of many blacks to public office.

The promise of Brown and the subsequent growth spurt were, however, short-lived. Economic decline, combined with a shift in white attitudes in the mid-1970s, closed many of the doors which had previously been opened for blacks. The situation is perhaps most succinctly summed up by Jaynes and Williams: "The greatest economic gains for

22. Id. at 150.
23. A COMMON DESTINY, supra note 18, at 59.
24. Id.
25. DAVIE, supra note 17, at 150.
26. Id. at 153.
27. Id. at 152-53.
29. These events have been identified in A COMMON DESTINY, supra note 18, at 7, as: (1) the urbanization and northern movement of the black population from 1940 to 1970; (2) the civil rights movement; and (3) the high and sustained rate of national economic growth during 1940-1970. Perhaps the gains made by blacks were significant, even startling, because blacks were oppressed for so long and had no where to go but up once the systemic oppression was removed as an obstacle.
30. Many people now point to the black middle class as proof that discrimination and segregation are no longer problems in our society and that affirmative action programs are no longer necessary. Black entry into the middle class after 1970, however, has increased merely 4%, from 18% to 22%. Walter Shapiro, Unfinished Business, TIME, Aug. 7, 1989, at 12, 14.
blacks occurred in the 1940s and 1960s. Since the early 1970s, the economic status of blacks relative to whites has, on average, stagnated or deteriorated.\footnote{32}

This change in attitudes and subsequent halt of black progress is well illustrated by two Supreme Court decisions which addressed affirmative action. \textit{Bakke}\footnote{33} and \textit{DeFunis}\footnote{34} caused a fear of litigation among law school admission boards that resulted in defensive admission practices which were detrimental to aggressive affirmative action.\footnote{35}

More importantly, the temporary and permanent gains made by blacks during the civil rights era have led many currently to believe that affirmative action programs are no longer necessary. As ridiculous as it might seem, some even think that blacks have an advantage in our society.\footnote{36} Many feel that racism and segregation are relics of the past. Reality, however, paints a completely different picture.\footnote{37} Blacks and other minorities are no better off, and in some ways are worse off, than they were before \textit{Brown}.\footnote{38}

Opinion polls show that large majorities of blacks and whites adopt the principles of equal access to public institutions and equal treatment in race relations in their rhetoric. In practice, however, many whites refuse or are reluctant to endorse these principles if they would result in close, frequent, or prolonged social contact with minorities, or equal treatment in important social institutions.\footnote{39} In short, "the prevalent white attitude is 'Yeah, I'm for integration, but not in my neighborhood.'"\footnote{40} As a result, "[a]t all levels of education, income and occupational status, blacks

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\item 32. \textit{A Common Destiny}, supra note 18, at 6.
\item 34. DeFunis v. Odegaard, 416 U.S. 312 (1974).
\item 36. Shapiro, supra note 30, at 13. Alan Freeman observed:
\begin{quote}
Additionally, many believe that blacks and other minorities luxuriate in preferential treatment at the expense of victimized and innocent whites. They believe that if minorities have not benefitted from antidiscrimination laws and remain poor and powerless, it is their own fault for not mustering the skill or will to make it. \\
\textit{Alan Freeman, Antidiscrimination Law: The View From 1989}, 64 TUL. L. REV. 1407, 1408 (1990); \textit{see also Richard P. Thornell, The Future of Affirmative Action in Higher Education}, 29 HOW. L.J. 259, 269 (1986) ("I take issue with those in high places who now insist that civil rights laws have virtually eliminated the problems of race and sex discrimination and who attack affirmative action as reverse discrimination.")
\end{quote}
\item 37. Shapiro, supra note 30, at 13 ("How self-satisfying to conclude that the U.S. has already done enough to tear down the barriers of segregation."). Such delusions are an inevitable consequence—and a cause—of a decade of willful denial of the realities of white-black relations.
\item 38. Author Jonathan Kozol summed this up succinctly in a recent interview, in which he said, "America is 'at a juncture comparable to what the Supreme Court faced in 1954, although I think the situation we're facing today is even grimmer.'" Larry Tye, \textit{Vision, Hard Choices Needed to Make Integration Work}, \textit{Boston Globe}, Jan. 8, 1992, at 12.
\item 39. \textit{A Common Destiny}, supra note 18, at 11.
\item 40. Shapiro, supra note 30, at 15. This is best characterized as the current equivalent of the oft-expressed sentiment of the seventies and eighties, "some of my best friends are blacks, but I certainly would not want one of my [sons] daughters to marry one," that was actually articulated to prove how liberal the speaker was when it came to race relations.
\end{itemize}
Economically, blacks have made little gain as compared to whites. By 1984, per capita income for blacks was about six times its 1939 level, which sounds quite impressive; however, black income still was only fifty-seven percent of white income,\footnote{42} all of which demonstrates not only how much further blacks have to go to achieve true economic equality, but also the abysmal, inhumane plight of blacks in American society in the pre-\textit{Brown} era. For black male college graduates, the most likely beneficiaries of affirmative action, income in 1984 was only seventy-four percent of their white counterparts.\footnote{43} Employment rates of blacks have fallen relative to whites since 1954, and unemployment rates for blacks remain about twice as high as for whites.\footnote{44} Jobless rates of young black high school dropouts in 1985 were above forty percent, an increase of almost thirty percent since 1973.\footnote{45}

An examination of housing reveals that segregation is still near pre-\textit{Brown} levels, and little progress toward integration has been made.\footnote{46} In almost every major northern metropolitan area, whites live in neighborhoods that are almost exclusively white, and blacks live in predominantly black neighborhoods.\footnote{47} In some cities, the segregation is as complete as it was when it was legislated and enforced judicially; the parks, schools,
city services, and churches for black neighborhoods attract few, if any, white patrons. Further, the poverty in these neighborhoods creates the conditions of inner-city life with which we are all familiar—crime, violence, early pregnancy, and drug use. "Inner-city residents can go weeks without encountering anyone, black or white, who is a middle-class achiever." Discrimination and prejudice also keep middle-class blacks from leaving the inner-city, an escape which would allow these families the opportunity to break the cycle of oppression generated by poverty conditions. Middle-class families experience difficulties moving out "because property values have declined and there are few buyers for their homes." If buyers are found, blacks must then face discriminatory realtors, lenders, and the prospect that there are few middle-class neighborhoods that will welcome them.

Turning to education, differences in socioeconomic status, when combined with residential separation, produce large disparities between blacks and whites in educational status. Large gaps, which are in no way primarily attributable to the distribution of individual entitlements, exist in the schooling quality and achievement outcomes of education for the two groups:

Black high school dropout rates remain higher than those for whites, black performance on tests of achievement lags behind that of whites, and blacks remain less likely to attend college and to complete a college degree. After the mid-1970s, the college-going

48. A COMMON DESTINY, supra note 18, at 91; see also Massey & Denton, supra note 41, at 389. 
49. "Our results suggest that the extremity of black residential segregation and its unique multidimensional character may help explain the growing social and economic gap between the black underclass and the rest of American society." Massey & Denton, supra note 41, at 389. 
50. Shapiro, supra note 45, at 18. Indeed, these residents can go miles without finding a decent grocer in which to shop for food and sundries. Many inner-city grocers have relocated their stores to the suburbs to attract the business of whites fleeing the inner-city to maintain their racially pure neighborhoods. Bill Turque et al., Where the Food Isn't, NEWSWEEK, Feb. 24, 1992, at 36, 36.

51. For most ethnic groups, socioeconomic mobility is a cumulative process whereby economic advancement . . . is translated into residential progress (a higher-status neighborhood with better schools, peer influences and social contacts), which in turn leads to additional socioeconomic gains (children receive better educations and get better jobs). This avenue for cumulative socioeconomic advancement is largely closed to blacks because of racial barriers to residential mobility. Massey, supra note 41, at V5. 
52. Stein, supra note 46, at 21 (quoting Douglas Massey). 
53. In tests conducted by undercover agents employed by the U.S. Department of Housing and Urban Development and the Federal Reserve Board, "(m)ortgage applications of minorities were rejected up to three times more frequently than applications of whites, even if they had similar incomes." Further, minority couples were given less information about financing, were steered into different neighborhoods than whites, and were told houses had been rented or sold when they really had not. Margaret L. Udansky, Housing Act Fails to Eliminate Bias Against Minorities, USA TODAY, Nov. 11, 1991, at 2A; see also H. Jane Lehman, Study: Race Factor in Loan Rejections, WASH. POST, Oct. 24, 1992, at F1 ("[D]ata collected under the Home Mortgage Disclosure Act . . . showed a loan rejection rate 170 percent greater for blacks and other minorities compared with that for whites.").
chances of black high school graduates have declined, and the proportion of advanced degrees awarded to blacks has decreased. 54

Significantly, since 1977 the number of black high school graduates attending college has declined markedly. 55 The rate of black high school graduates attending college in 1973 was about 39%; that rate rose steadily until it peaked at 48% in 1977, when it was virtually equal to the attendance rates of white high school graduates. 56 Since 1977 the college attendance rates of blacks has fallen continuously, and in 1986, only 36.5% of black high school graduates attended college. 57 In comparison, for 1977 to 1984, the college entry rates for whites rose continuously from 48% in 1977 to 57% in 1984. 58

Blacks also lag far behind whites in terms of college completion. In 1960, approximately 5% of black men and women had completed college. 59 While that figure rose to 11% of black men and 12% of black women in 1980, it still is dismal when compared with completion rates of white men and women in 1980, which were 25.5% and 22%, respectively. 60

The decline in college attendance cannot be attributed to changes in economic status, geographic location, or sex composition. 61 Neither can the decline be explained by a decline in black academic achievement relative to whites, as black achievement levels are on the increase. 62 Rather, the decline could be due in large part to a decrease in the amount of financial aid which is available to all students:

Over the 10-year period from 1975-1976 to 1985-1986, outright grants as a percentage of all financial aid declined from 80 percent to 46 percent, while loans increased from 17 percent to 50 percent as a percentage of financial aid. This change has probably reduced blacks’ college-going chances more than those of whites. 63

Black college hopefuls are less likely than their white counterparts to rely significantly on loans to finance their college career. First, from a purely economic perspective, given the history of economic discrimination against blacks and the perception of fewer opportunities to enter good jobs, blacks will anticipate a lower rate of return on their investment in an education than whites will. If the expected rewards are less, then the amount of money that a student will be willing to borrow will be lower. 64 Moreover, black students are overwhelmingly from low income

54. A COMMON DESTINY, supra note 18, at 378.
55. Bakke was decided in 1976...hmm.
56. A COMMON DESTINY, supra note 18, at 338-39.
57. Id.
58. Id.
59. Id. at 339-40.
60. Id.
61. A COMMON DESTINY, supra note 18, at 341.
62. Id. at 342.
63. Id. at 343.
64. Id.
families.\textsuperscript{65} For a family that makes less than $10,000 a year, a typical $10,000 to $12,000 college debt is virtually overwhelming.\textsuperscript{66}

Another factor in the declining college attendance could be the increasing amount of resegregation which is occurring at an alarming rate in our nation's schools. Segregation among primary and secondary schools is more prominent now than it was in 1980.\textsuperscript{67} School segregation is a contributing factor to the lower results in black attainment and achievement levels as compared to whites.\textsuperscript{68} Further, segregation increases racial isolation and helps to perpetuate high school dropouts, crime, teenage childbearing, and other ills popularly associated with the inner-city.\textsuperscript{69}

Segregation further harms blacks because the quality of education received at schools with a majority of black students is markedly inferior to that received at white majority schools. Schools attended by mostly black students are located in the black communities where property values are lower. Low property values make it more difficult for predominantly black schools to raise tax dollars than for the predominantly white schools in the suburbs. Hence, the funding for the two school systems is unequal.\textsuperscript{70} Although most states contribute funds to make up the deficit

\textsuperscript{65} In 1985, 35\% of black high school graduates had family incomes of less than $10,000 per year. \textit{Id.} at 344.


\textsuperscript{67} Tye, \textit{supra} note 14, at 14. In the same article, Tye quipped: “America is quietly abandoning the battle against segregated schools that the Supreme Court launched 38 years ago with its landmark ruling in \textit{Brown v. Board of Education}.” \textit{Id.} at 1.

\textsuperscript{68} A COMMON DESTINY, \textit{supra} note 18, at 378.

\textsuperscript{69} Tye, \textit{supra} note 14, at 15. Massey and Denton reported:

Indicators of the accompanying social isolation are not hard to find. Over the past decade, black ghetto speech has grown progressively more distant from the standard English spoken by most . . . whites, and black marriage, fertility, and family patterns have diverged more sharply from the mainstream. Over the same period, poverty, labor force withdrawal, and unemployment have come to be increasingly concentrated in inner-city black neighborhoods, particularly for young men.

Massey & Denton, \textit{supra} note 41, at 389 (citations omitted).

\textsuperscript{70} \textit{See} JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS 54-57 (1991). In Long Island, segregation causes blacks to pay a disproportionately high tax rate for inferior schools; further, state aid formulas, designed to give more aid to property-poor districts, are thwarted by local assessment practices that overvalue property in most black communities. \textit{See} Robert Fresco & Michael D’Antonio, \textit{Equal Funding, but Unequal}, Newsday, Sept. 19, 1990, at 7, 40.

In Mississippi, a group of black citizens sued the state, claiming that “unequal funding of the state’s three historically black schools and discriminatory admissions practices at the mostly white schools has continued.” Lacresha Butler, \textit{Tennessee Carefully Watching Mississippi College Case}, Gannett News Service, Nov. 15, 1991, available in LEXIS, Nexis Library, GNS File. In that case, United States v. Fordice, 112 S. Ct. 2727 (1992), the Supreme Court held that implementing race neutral policies in the operation of separate black and white university systems did not fulfill Mississippi’s obligation to eradicate its formerly de jure segregated system of public universities. \textit{Id.} at
property taxes do not cover, these funds are simply not adequate to properly educate young, poverty-stricken, black youth. In the inner-city, schools have become social service centers for the deprived and troubled youth, and these schools must pay more in student health care, counseling, social services, and maintenance than do the schools located in the suburbs.\textsuperscript{71} As a result, inner-city schools have less funds to spend on items such as books, computers, extracurricular activities, and teacher salaries.\textsuperscript{72} Finally, the decline in college enrollment could be attributed in part to the perception that, due to discrimination and continued oppression by whites, job opportunities and career choices after college will be extremely limited.\textsuperscript{73} The dearth of role models in prominent positions reinforces this perception.

III. MINORITY REPRESENTATION IN THE LEGAL PROFESSION

This section focuses specifically on the common misperception that there is no further need for affirmative action in law schools because there are enough black lawyers out there practicing that have been produced by past affirmative action programs. This sentiment is representative of one of the major fallacies perpetuated by affirmative action opponents—that affirmative action has already succeeded, i.e., it is no longer necessary in our society because minorities are adequately represented in the professions in which affirmative action is promoted as a remedy. On the contrary, an examination of the data, beginning with admission statistics and data, and concluding with the bar passage rates, demonstrates that people of color are still woefully underrepresented in the legal profession notwithstanding the perception—based on the high degree of visibility of some successful minorities—that minorities are adequately represented in the legal profession.

In reality, the percentage of minorities in the legal profession is extremely low. Although the black population in the United States comprises about 13% of the population, black lawyers represent only about 3.5% of the legal profession.\textsuperscript{74} Further, out of the 23,195 partners in the

\textsuperscript{71} Fresco & D'Antonio, supra note 70, at 40.

\textsuperscript{72} See, e.g., A World Apart: Segregation on Long Island, NEWSDAY, Sept. 16-20, 1990. The series portrays the extreme segregation on Long Island, which is typical of many areas across the nation.

\textsuperscript{73} One prominent researcher has studied this hypothesis extensively and has found that such perceptions do have an effect on school achievement. Specifically, he found that:

Among black students themselves, the negative messages conveyed by the textures of their parents' lives and the community responses were reinforced by their own observations of the employment and unemployment status of older people around them. . . . Under these circumstances, black students did not try to maximize their schoolwork because they did not think that they would have equal opportunity to get good jobs when they finished school.

\textsuperscript{74} This is an optimistic guess, as no precise figures were available. In 1988, approximately
250 largest firms in the nation, only 210, less than 1%, are black.\textsuperscript{75}

One article from the popular press demonstrates the conundrum created by the issue of affirmative action in which many white males feel that affirmative action has "gone too far":

In a college classroom, a young white man . . . wants to know [what the future can] possibly hold for him when . . . most of the spots in professional schools are being given to women and, most especially, to blacks . . . .

. . . .

. . . The worried young white men I've met on college campuses in the last year have internalized the newest myth of American race relations, and it has made them bitter. It is called affirmative action, a.k.a. the systematic oppression of white men. . . .

Never mind that you can walk through the offices of almost any big company and see a sea of white faces. Never mind that with all that has been written about preferential treatment for minority law students, only about 7,500 of the 127,000 students enrolled in law school last year were African-American. Never mind that only 3 percent of the doctors in this country are black.\textsuperscript{76}

The current segregated state of our nation is being tacitly, and in some instances actively, supported by the policy-making branches of government. All but one of the administrations since 1968 have been openly hostile to urban desegregation orders.\textsuperscript{77} Moreover, there have been no important policy proposals supporting desegregation from any branch of government since the passage of the Emergency School Aid Act desegregation assistance program in 1972.\textsuperscript{78} The regulations currently emanating from the executive branch are particularly harmful and distinctly antiminority rights oriented.\textsuperscript{79}

The Supreme Court, once a protector of minority rights, held recently that federal courts supervising desegregation orders have the authority to relinquish supervision and control in incremental stages of school districts, even where those school districts have not fully complied

\textsuperscript{75} Jensen, supra note 74, at 28.


\textsuperscript{77} GARY ORFIELD, ET AL., \textit{STATUS OF SCHOOL DESSEGREGATION, A REPORT OF THE COUNCIL OF URBAN BOARDS OF EDUCATION AND THE NATIONAL SCHOOL DESSEGREGATION RESEARCH PROJECT, UNIVERSITY OF CHICAGO 1968-1986}, at 2 (1989) ("Four of the five Administrations since 1968 have been openly hostile to urban desegregation orders, and the Carter Administration (the single exception) took few initiatives."). This article does not evaluate the Clinton administration's position on desegregation.


\textsuperscript{79} See supra note 66.
with the desegregation orders. Two years ago, the Court held that school districts could be released from court oversight once they root out past intentional segregation—even if, as was the case, a new student assignment plan produces eleven elementary schools with 90% or more black students and twenty-two that have 90% or more whites.

In 1954 the Supreme Court declared that segregation was unconstitutional. Almost forty years later, our nation remains segregated and minorities are still suffering. Affirmative action languishes in the courts, and a new white backlash threatens to overturn the gains toward equality which have been achieved. Improving the conditions of segregation and poverty for the whole class of African-Americans seems impossible, but the class is composed of individuals. Walter Shapiro provides a solution in an article addressing the aftermath of the Detroit riots of the summer of 1967:

What successes there have been come not through cosmetically improving the ghettos but by providing residents with opportunities through jobs and education to rise out of them. Saving people, not inner-city neighborhoods, may be the only way America can redeem the promises that were made against the charred urban landscape of that terrible summer of 1967.

IV. QUOTAS V. GOALS: A SPECIOUS DISTINCTION

The goals/quota distinction has been overblown. No sensible business person would fail to set goals with respect to his business—be it for profitability, inventory, cash flow, etc. Why is it so different when the goals relate to the racial composition of a student body, and penalties are employed or rewards given for meeting or failing to meet certain standards? The best measure of progress toward integration is the result, and quotas are best suited for producing the optimal result.

Quotas should not be viewed in a pejorative sense when compared to "goals" or "guidelines." The failure to fully integrate our educational system in this society since the elimination of de jure discrimination after Brown calls for something more than the "soft" objectives of goals and guidelines that are inherently malleable. Goals and guidelines are not enough given the subjective nature of what is being measured—merit. The only way to achieve true or complete integration of our educational system is through the use of numerical standards or quotas.

80. Freeman v. Pitts, 112 S. Ct. 1430, 1445-46 (1992). The decision gives guidelines on when federal judges should extricate themselves from integration cases and return schools to local control. See id. "It could 'close the books on Brown' warned William Taylor, the former staff chief at the U.S Commission on Civil Rights." Tye, supra note 14, at 15.
82. The popularity and presidential campaigns of "conservative" politicians such as David Duke and Pat Buchanan threaten the small gains minorities have made. See generally Howard Feneman et al., The New Politics of Race, NEWSWEEK, May 6, 1991, at 22.
83. Shapiro, supra note 45, at 19.
84. Cf: David A. Strauss, The Law and Economics of Racial Discrimination in Employment:
The appropriate use of quotas depends on a definition of goals and quotas that differentiates the two. A goal is something one aims for, whereas quotas relate to a particular allocation of goods or resources made on some basis other than, in this context, educational qualifications. Notwithstanding this distinction, nothing is inherently good about goals or bad about quotas. There can be inflexible goals and flexible quotas.

In the last analysis, quotas in themselves, like goals and preferential treatment, would seem to be neither good nor bad, neither desirable nor undesirable. Whether any given quota is to be deemed just or unjust, good or bad, would seem to depend on the nature of the quota and on the (conceptual and historical) context in which it is sought to be inserted. Thus, for example, a flexible quota involving no preferential treatment and implemented for purposes of establishing a loose balance in the proportion of men to women at a coeducational college might well seem unobjectionable to a vast majority of the people. At the other extreme, a rigid quota setting a very low ceiling in order to drastically limit the number of members of a persecuted minority holding desirable jobs would undoubtedly be repugnant to anyone firmly committed to the postulate of equality.

V. QUOTAS AND MOTIVES

A question raised by the quota issue is what motivates those who support affirmative action in principle (benign programs) but object to affirmative action programs based on quotas. My thesis is this: those who support benign programs and deplore the use of quotas are practicing a form of unconscious "covert" racial discrimination. Without an effective remedy, support for the principle of affirmative action amounts to support of a platitude that is costless to the individual supporter. The individual who supports benign affirmative action programs that do not contain quotas takes a position that is very similar to the individual who opposes affirmative action and states that the opposition is based on the proposition that all should now be treated equally. In other words, the individual who supports only benign programs ignores the context within which the debate over affirmative action is raging.

In the abstract we all support peace and love. Today, only racial extremists, both black and white, promote discriminatory or racist actions or ideals. All reasonable, intelligent persons involved in the public debate over affirmative action agree that racism and discrimination are wrong. Moreover, there is substantial agreement that this society's history of racism and discriminatory acts is deplorable and without justifica-


85. See ROSENFELD, supra note 1, at 45.
86. Id. (citing FULWINWINDER, supra note 1).
87. Id. at 46.
tion. The debate is over what, if anything, can be done to rectify the situation created by the wrongs of our ancestors.

Yet framing the issue in this fashion ignores a very important point that needs to be addressed in the debate over affirmative action—the role that racism plays in the opposition to affirmative action programs generally, and the opposition to quota programs in particular. I do not believe an honest debate can occur over the efficacy of affirmative action and quotas unless the assertion that the quota issue is the last refuge of racists and other scoundrels is also addressed.88

It is beyond peradventure that the use of quotas has become a political football.89 As this is not a legal brief or a political document, however, an attempt will be made to obtain the moral high ground by rejecting the politicization of "quotas" by those opposed to affirmative action programs.90 In sum, the posture here is quite aggressive on the affirmative action issue based on the premise that those who believe in affirmative action recognize that quotas are a "red herring" and, furthermore, that quotas can serve as a valuable, remedial tool if properly employed. Through such an aggressive posture, one directly confronts the possibility that those so adamantly opposed to quotas in affirmative action are motivated by racism91 and not legitimate objections to such programs.92

88. Until Justice Marshall was appointed to the Supreme Court, there was a quota requirement for the Court—the Justices had to be white and male. See Benjamin L. Hooks, Race Always Factors in High Court Appointments, NAT'L L.J., Nov. 2, 1987, at 12. That same quota applies currently to the Presidency. Moreover, there is apparently a quota on the Supreme Court now: there is a black seat and a woman's seat.

89. The broad and largely inaccurate charge that the Civil Rights Act of 1990 would foster quotas led President Bush to veto that legislation, a veto that narrowly was upheld by the Senate. The same charge also complicated efforts to enact the Civil Rights Act of 1991. Supporters of both bills, like supporters of the original Civil Rights Act of 1964, felt compelled to disclaim any intent to require or encourage quotas.


90. See supra note 89. Recall also Jesse Helms's use of the quota issue in campaign advertisements to appeal to racial fears during the 1990 North Carolina Senate Race in which he defeated a black democratic challenger, Harvey Gantt. See Eleanor Clift, 'Going for the Gut': How Ads Play on Race, NEWSWEEK, May 6, 1991, at 24, 24-25.

91. Professor Kennedy has firmly addressed this issue by pointing out that the lacuna in the debate over the efficacy of affirmative action is whether racism is partly responsible for the opposition to affirmative action programs. Randall Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 HARV. L. REV. 1327, 1337 (1986). Without repeating the arguments that Professor Kennedy forcefully makes (and with appropriate emendation to place it in the context of the debate over the efficacy of quotas), the motivation for opposition to affirmative action programs and quotas is an appropriate subject of inquiry in the debate over the efficacy of affirmative action and quotas—one that has to be confronted directly.

92. To suggest that a policy is completely distinct from the motive from which it arises simply distorts reality. The animating motive is an integral aspect of the context in which a policy emerges, and there is no such thing as a policy without a context. A policy is "not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." In other words, no unchanging essence exists within any policy, including a policy rejecting affirmative action. Such a policy could have a wide variety of meanings, depending upon, among other things, the motive behind the policy. Rejecting affirmative action for nonracist reasons is sim-
The motivation for the vehement opposition to the use of quotas in affirmative action must particularly be called into question because a very strange thing has happened in race-relations and in the debate over affirmative action in the last, say, ten years. Basically, all affirmative action programs, irrespective of whether quotas were or were not used, were initially mischaracterized as quota programs designed to usurp white males' rights and jobs. Thus, notwithstanding the evidence to the contrary, the effects of affirmative action programs were distorted to raise the specter that significant white jobs and opportunities would be lost unless "quota-type or based affirmative action programs" were reigned in. Somewhere in the struggle for votes and public opinion, affirmative action programs became synonymous with quotas although very few, if any of the programs, employed actual quotas.

What happened next was a tactical error on the part of those in favor of affirmative action programs. Essentially, advocates of affirmative action programs conceded the issue of quotas by failing to: (1) address the benefits to be gained by these types of programs; (2) attack the allegations that all affirmative action programs were quota driven; and (3) challenge the motivations of those making the attacks. By refusing to differentiate between affirmative action programs that are quota driven and those that are not, and, more importantly, failing to provide a justification for those that are quota driven, supporters of affirmative action provided the opponents of all affirmative action with an important weapon: the vilification of quotas as the source of all evils in race-relations generally, and in the affirmative action context, in particular.

By conceding the issue on quotas, and attempting to justify what are characterized herein as benign programs, those supporting affirmative action allowed the next logical attack on such programs to occur. Against a background of charges that no principled distinction exists between programs that use quotas and those that do not, and a consensus that quotas are an unnecessary wrong, those attacking affirmative action began to characterize any affirmative action program as a quota program and therefore wrong. All affirmative action programs were treated as...
quota programs—making the defense of any affirmative action program appear untenable.

The conflation of quota and nonquota programs leads to the conclusion that before one can justify any type of affirmative action—because all affirmative action is regarded as premised on quotas—one must justify quotas. Only a defense of quotas will prevent the obfuscation of the issues that occurs when the quota issue is conceded. Affirmative action must be addressed or debated on its merits and not behind the rhetorical smoke screen of quotas.

VI. QUOTAS AS THE PERFECT REMEDIAL TOOL

There is an approach to the quota issue that justifies the use of quotas in legal education. Indeed, focusing on the remedial aspects of affirmative action,97 one can argue that quotas present the most efficacious method of remedying the past effects of discrimination, in view of the difficulties one has in precisely and accurately identifying those that have been harmed by past racially discriminatory acts. One of the common objections to affirmative action is that it is impossible to identify either those in current society who have benefitted as a result of past discriminatory acts or those that have been harmed as a result of the same discriminatory acts. Frequently, the "reparations-based" justification of affirmative action is challenged because not all white persons who believe themselves harmed by affirmative action are guilty of racial oppression, nor is every beneficiary of affirmative action necessarily a direct victim of identifiable past racist action.98

At bottom, the argument appears to be founded on a misperception that one must prove with a degree of certainty that one is a victim of specific past racial oppression before being entitled to any benefit provided by affirmative action. That is only half the problem, the other half is just as insoluble: the individual who meets the burden of proof by showing specific causal harm must also identify the individuals or entities that created the harm that resulted in the injury. Identifying the injury is not enough, one must identify the injurer as well. For various reasons, of course, either task is impossible. Indeed, the inquiry is altogether too simplistic. To assess blame for harm, for example, one must have a clear

97. Taking a backwards-looking reparations-based approach to defend the use of affirmative action is simply one facet of some arguments in favor of affirmative action. See R.M. O'Neil, The Case for Preferential Admissions, in REVERSE DISCRIMINATION, supra note 1, at 66.
98. See Thomas E. Hill, Jr., The Message of Affirmative Action, SOC. PHIL. & POL'Y, Spring 1991, at 108, 117-18. Compare CARTER, supra note 3, at 18-21, 71-80 (arguing that affirmative action is misguided because it fails to benefit those blacks who need it the most while benefiting those who need it the least—perversely, those who perhaps were least harmed by past discriminatory acts) with ROSENFIELD, supra note 1, at 89-90 (rejecting the claim as first made in GOLDMAN, supra note 1, that affirmative action is objectionable because it benefits those who need it least, and instead arguing that it is perfectly legitimate and logical and in step with the principle of "equality of opportunity" that those benefited by affirmative action would be the most qualified members of the discriminated group).
definition of right and wrong. There must be a consensus on exactly which acts are wrongful. That consensus, however, requires a contextual approach in which those doing the judging and those being judged inhabit, for want of a better phrase, the same contextual environment.\footnote{99}{Here I am drawing on Professor William Eskridge's theory of statutory interpretation which requires the evaluator of statutes to employ an interpretative approach that is based on the textual, the evolutive, and the historical context of the statute being interpreted. See, e.g., William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987); Alex M. Johnson, Jr. & Ross D. Taylor, Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation, 74 Iowa L. Rev. 545, 579 (1989); Alex M. Johnson, Jr., The New Voice of Color, 100 Yale L.J. 2007, 2040-52 (1991) (arguing that a contextual approach must be used to determine who is the victim and who is the injurer in the context of affirmative action).}

In other words, one can from our contextual framework interpret history and make relative moral judgments that the actions of those in prior generations were wrongful as judged by the relative moral standards of this generation. Yet that judgment begs the question of whether those actions were wrongful in the context within which those actions took place. For example, most people today would agree that enslaveing human beings and discriminating between individuals to determine who will and who will not be enslaved is morally reprehensible and indefensible.\footnote{100}{I would like to be able to say that all would agree with this statement but unfortunately such a broad prediction cannot be made concerning American society today. The rise in racist behavior and the thinly veiled racist comments of Neo-Nazis and members of the Ku Klux Klan lead me to conclude that not all would condemn slavery as an evil institution.}

In the days of slavery, however, the notion that such activities were morally reprehensible and unjustifiable might have raised strenuous objections from, for example, such noted slaveholders and signers of the Constitution as Thomas Jefferson and George Washington. That should not imply that what either individual did was justifiable or defensible. My point is simply this: to attribute blame based on value judgments developed and embraced in this milieu for actions that took place within a different historical milieu seems as wrongful as holding an incompetent responsible for his behavior.\footnote{101}{In fact I expect that when future generations look back and examine our society, they will be shocked at the vitriolic debate over the legality of abortion. Although I do not possess a crystal ball and am therefore unable to predict which view will prevail, i.e., anti-abortion or pro-choice, I am able to predict that once a consensus is reached on the myriad of issues surrounding abortion, future generations will judge our treatment of the issue from the vantage of their consensus. To say, however, that the activities of the individuals involved in the debate who fervidly believe that their position is the only legitimate one are wrongful is improper when judged in the context within which the debate and these activities take place.}

The animus or mens rea may be lacking.

There are many other reasons, practical and theoretical, why those injured by discriminatory acts and those occasioning the injuries will never be identified.\footnote{102}{For example, one can make the perfectly legitimate argument that those who created the injury, the dominators, were in the perfect position—that is, in control—to suborn and mask the acts of injury visited on the dominated and to further erase any proof of responsibility.} If proof of injury, or the identity of the individual and entities that created the injury, or both, is required to justify the use of affirmative action, affirmative action is unjustifiable. For reasons that
are addressed below, however, affirmative action is justifiable and sensible notwithstanding the fact that the injurers and the injured cannot be identified.

Once it is determined that affirmative action is justified, a remedy must be crafted to rectify the harm, a remedy that is somewhat independent of the identity of the injurer and of the injured. The remedy must follow the right in order to give effect to the right. Stated another way, there must be congruence between the right and the remedy in order for the remedy to be effective. A remedy based on the identity of specific individuals is doomed to fail when those individuals cannot be identified. Thus, to require one to prove that he or she is a victim of specific acts of racial discrimination, and to further require that the victim identify the perpetrators of the racist acts would create the perfect irremedial right. This violates the concept of justice because it perpetuates wrongful inequality.

The use of quotas in this context does not violate justice or other important principles as long as there are enough qualified individuals available to meet the quota. What I advocate is the explicit use of quotas through which law schools must admit people of color according to their proportion in the relevant pool. Of course, defining the pool then becomes the important, all-determining task. Because producing objective standards that measure with certainty the capabilities of an individual to perform in law school and succeed as a lawyer is impossible, my presumption is that the pool of qualified applicants can be computed in one of four ways: (1) by taking the percentage of blacks in the relevant general population; (2) by taking the percentage of blacks graduating from undergraduate schools; (3) by taking the percentage

103. See infra notes 111-41 and accompanying text.
104. See Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 30-32 (1913) (duty is correlative to right).
105. See Johnson, supra note 2.
106. Indeed, if the pool is designed as the proportionate ratio of blacks/whites who receive above a 170 on the LSAT, the relevant pool, and therefore proportional representation of blacks, would be negligible and would more than likely result in a reduction of the number of blacks admitted to law schools per the quota. Because very few schools (if any) admit only those students with above a 170 LSAT score, however, defining the pool in this fashion is discriminatory and illegitimate. As noted below in the section discussing admission standards, the minimum threshold for succeeding in law school cannot be objectified or reduced to a formula or numeric equation. Thus, comprising the pool based solely on objective indices is highly suspect.
107. This begs the question of what is the relevant population: is it local or statewide for a state school, or national for a school that has a national reputation, and should it matter that the school is private? For example, the population of the state of Virginia is approximately 20% black, although blacks comprise less than 10% of the country's population. The University of Virginia School of Law is perceived by just about all as a "national school" that admits significant numbers of nonresident students (approximately 47.5% of the entering class). If I had to answer the question, I would argue that its quota should reflect the facts noted above and its proportional share of blacks should be between 10-20%.
108. The justification for determining the pool in this fashion rests upon an assumption that the absolute minimum requirement for matriculation at a professional school is the attainment of a college or undergraduate degree. Thus, the applicable pool is not all blacks in some relevant general population, but only those blacks who have a college degree. This number may differ significantly
of blacks applying to law schools;\textsuperscript{109} and (4) by taking the percentage of blacks applying to a particular law school.\textsuperscript{110}

At this stage, it is not important to decide which, if any, standard is better or preferred to provide the relevant pool to supply the quota, or to address the results that would ensue from failure to meet the imposed quota. The key point in this debate is to establish the need for quotas and their legitimacy in this context in order to provide for a remedy that is consonant with the harm inflicted by the injury.

VII. QUOTAS IN THE EMPLOYMENT CONTEXT: A PERFECT ANALOGY

Defending the use of quotas as the most efficient and preferred remedy for past discriminatory acts is justifiable when one examines the analogous situation in the employment context in which courts have vacillated between using a "disparate treatment" and a "disparate impact" standard in employment discrimination cases for proving improper racial or sexual discrimination. The distinction between these two methods or standards of remediying the effects of past discrimination becomes important, however, only if there is initial substantial agreement that a wrong has occurred (systemic, institutionalized racial discrimination and oppression), that the injury occasioned by the wrong continues to exist and affect the descendants of those who were the object of the original harm (the current minority or black population), that the descendants of those who caused the harm are still reaping the benefits and advantages realized from the harmful behavior (current majority population, i.e., white males), and that distributive justice requires that a remedy be provided to correct the inequities created by the situation just described.\textsuperscript{111}

In the employment context, employment discrimination law takes two basic approaches: the disparate treatment approach and the disparate impact approach.\textsuperscript{112} The disparate treatment approach is very simple and quite direct: the employer is guilty of improper discrimination when it is objectively determined that the employer has engaged in spe-

\textsuperscript{109} The theory here is that one cannot force blacks, even those blacks with undergraduate degrees, to apply to law school—so if blacks comprise only eight percent of the applicants applying to all law schools (or eight percent of applicants applying to a particular type of law school), then the school should have a quota of eight percent. The problem I have with this approach is that it would "reward" law schools that discourage blacks from applying by maintaining a hostile environment.

\textsuperscript{110} The problem with this approach is rather obvious: schools that wish to continue to discriminate may obtain what they perceive to be a premium—less black applications—by treating black students more harshly than white students, thereby discouraging other blacks from applying to that institution.

\textsuperscript{111} For a discussion of distributive justice concerns, see Johnson, supra note 2.

\textsuperscript{112} Much of the material in this section discussing the different standards of disparate treatment and disparate impact in employment discrimination law is drawn from Strauss, supra note 84, at 1643-44.
cific acts of discrimination. Conversely, the disparate impact standard focuses not on harmful acts, but on the positive acts of the employer. In other words, the disparate impact approach looks to how many minority employees the employer has hired or promoted to determine if the employer is engaged in wrongful discriminatory behavior.

The second approach does not seek to determine whether an employer has engaged in acts of discrimination but instead focuses on the number of minority employees the employer has hired and promoted in each job category. If those numbers are not proportionate to the numbers of minorities in some relevant population, then the employer is at least prima facie liable [for racially discriminatory hiring practices].

As Professor Straus demonstrates, the use of the disparate treatment standard to monitor and police employment discrimination is problematic in two respects: first, given the sophistication of employers, it is almost impossible to detect acts of discrimination that would give rise to a remedy pursuant to the disparate treatment standard because those acts tend to be covert. Simply put, it is no longer fashionable, practical, or very smart (efficient) to be overtly discriminatory in an area in which the threat of litigation and damages is a reality. Hence, most such behavior that continues to occur must by necessity be covert.

In the educational context, it is less likely that schools have a "taste for discrimination," that is, that they derive some pleasure or utility from discriminating. It is possible, however, that professional schools may be practicing a form of statistical discrimination that is best remedied by the use of quotas. It is a form of statistical discrimination because no current law or professional school uses race alone as a proxy for characteristics related to productivity and bases admission decisions on that proxy. Instead, discrimination occurs when information about minority students is unreliable.

113. Id. at 1644.
114. Id.
115. Id.
116. Indeed, assuming arguendo the existence of overt discriminatory acts which are easy to police, employers whose taste for discrimination manifests itself in overt discriminatory acts will be sanctioned or run out of business in the very short run. In the meantime, those employers who are intelligent enough to engage in the requisite covert behavior will remain difficult to detect and correct.
117. This assertion may not be totally true, although it would be very hard to impeach. A school, including a law school, may derive some benefits from being regarded as a discriminatory institution. It, for example, may attract a certain type of student or donor because of its discriminatory practices. Indeed, some very prestigious, august institutions pride themselves on not applying or using any sort of affirmative action programs or plans in admissions, thereby essentially creating an all-white student body and faculty. Although the motivation may not be discriminatory, the result of such a situation is the attraction of those who oppose affirmative action for legitimate as well as illegitimate reasons.
118. See Straus, supra note 84, at 1639-40, for a precise discussion and definition of statistical discrimination.
119. Id. at 1640.
In other words, notwithstanding the success of minorities in matriculating and graduating from law school, and subsequently becoming successful lawyers, many professional schools in their admission process give too much weight to so-called objective factors like the LSAT\textsuperscript{120} and grade point averages because the other information they have about minority applicants is less reliable than the information they have about white students:

Erroneous statistical discrimination can occur if the information employers have about minority employees and applicants is less reliable than the information they have about non-minorities. This probably happens often. Employment [admission] tests may be geared to non-minorities and not measure potential minority employees' abilities with the same degree of reliability. Potential minority employees may go to inferior schools whose grades and other methods of evaluation are less reliable. . . . In occupations in which subjective evaluations are important, a non-minority employer may be less confident of his or her ability to "size up" a potential minority employee by evaluating characteristics that cannot be objectively measured. Potential minority employees also may not have as good a network of contacts that can convey reliable information about them to prospective employers.\textsuperscript{121}

Briefly, the negative effects of statistical discrimination are threefold: underinvestment of human capital, perpetuation of past discriminatory acts, and further racial stratification.\textsuperscript{122} Utilizing the disparate impact approach is the most efficient way to combat the negative effects of statistical discrimination. The human capital problem is resolved because blacks are given an incentive to compete for scarce seats in professional school because they are assured a seat if they can out-perform other minority students who are also minimally qualified. The disparate treatment approach would not rectify this problem because the student claiming discrimination would have to show acts of discrimination in the admission process.

Past discriminatory acts are not perpetuated when the disparate impact standard is used. In fact, compensatory justice arguments are complied with when the disparate impact standard is used because it provides redress to those who are suffering the effects of past discriminatory acts.\textsuperscript{123} "The disparate impact approach directly addresses racial stratification by seeking to improve the status of members of minority groups" and it "accomplishes this objective without incurring the pointless cost of proving individual acts of discrimination."\textsuperscript{124} The disparate treatment standard, on the other hand, is not only an impossible standard to com-

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\textsuperscript{120} See supra notes 34-38 and accompanying text.
\textsuperscript{121} Strauss, supra note 84, at 1641.
\textsuperscript{122} Id. at 1651.
\textsuperscript{123} See Johnson, supra note 2.
\textsuperscript{124} Strauss, supra note 84, at 1651.
ply with, but is also irrelevant to the compensatory justice principle.125

Moreover, even if it cannot be shown conclusively that professional schools are engaged in a variant of statistical discrimination, quotas are the preferred remedy because discriminatory effects in the admission process represent the equivalent of covert discrimination in the employment context, which the discriminatory impact standard (quotas) is best suited to remedy. In essence, covert discrimination is discrimination that is concealed or hidden. The actor discriminates, but does so in a fashion that is not blatant or easily discoverable by the parties who are injured. In other words, the actor's discriminatory intent is somehow masked.

The disadvantaged plight of blacks in American society amounts to a form of covert discrimination. Although the actors' original animus was overt in that the discriminatory acts undertaken were clearly and blatantly discriminatory, the passage of time has served to obscure both the actors and the animus. What remains visible is the effect. The discriminatory effect remains, although those affected or injured by the harm cannot point with specificity to the discriminatory events that created the current state of discrimination or harm. In that sense, the discriminatory effects that linger in our society are analogous to covert discriminatory acts.

VIII. QUOTAS REPRESENT AN EFFECTIVE GROUP-BASED REMEDY

The issue of appropriate use of quotas may be reduced to the question of whether one adopts an equality as result model or an equality as process model in the race discrimination context—an issue that also implicates a group-based versus an individual-based model of racial discrimination.126 The equality as result model supports the remedial use of quotas in this context:

Under the [equality as result] model, which has not been widely followed by the courts, the concern is neither with protecting individuals from specific acts of discrimination (although it would bar such acts) nor with assuring the neutral governmental treatment of groups themselves [the equality of process model], but rather with eliminating the conditions of inequality under which groups exist. In contrast, the traditional ideology lacks this concern with assuring equality of results and does not conceive of discrimination as the perpetuation of structures of inequality.127

Thus, discrimination is defined as the failure to eliminate conditions of subordination.128 The most effective method to eliminate subordination is to focus on the plight of the group and not of the individual. The

125. Strauss, supra note 84, at 1651-52.
128. Id. at 1187 n.37.
most efficient remedy to accomplish this objective is the use of quotas that focus on proportional or group representation within the subject classification.

Those opposed to all affirmative action tend to base their opposition to preferential programs on some variant of what I characterize as an equality as process model. These opponents assume that as long as the process that awards an entitlement is fair, neutral, and nondiscriminatory in its operation, discrimination will eventually be eradicated in society. Those in favor of benign affirmative action plans, while remaining opposed to malignant quota plans, tend to rely on a vision of social justice that falls short of the equality as result model because their concern is protecting individuals from either current or past acts of discrimination. Proponents of benign affirmative action plans fail to embrace quotas as an acceptable vehicle to remedy racial discrimination because these “political” supporters of affirmative action insist on some nexus between the individual benefited and the harm that occurred. Their focus is on the individual, and quotas, because they focus on the group, are rejected as inappropriate.

IX. QUOTAS AND STANDARDS

The quota issue has become the political “hot-button” issue of the eighties and nineties. Many, including some of the more vocal supporters of affirmative action, make the incrementalist argument that benign affirmative action programs are good, but that malignant affirmative action plans (those that employ quotas), are inherently wrong and unjustifiable. As a result, many who concede the need for affirmative action reject affirmative action programs that employ quotas. Conceding the quota issue while maintaining a defense of affirmative action in other contexts is erroneous for three reasons.

First, conceding the quota issue while maintaining support for benign affirmative action programs is contradictory because without quotas, affirmative action programs are rendered practically ineffective through the manipulation of the implementation process. Without firm quotas those who oppose affirmative action can delay the implementation of even benign programs by failing to make sincere efforts to achieve the “goals” of those programs and by blaming the failure of benign programs on the people who are intended beneficiaries of such programs. Yet the responsibility for such failures clearly belongs on the institutions charged with remedying the harm.

One variation of this ploy is what I term the “pool problem” which is frequently abused by both sides in the affirmative action debate. In legal education, both in the admission process and in the hiring process for law school faculty, the frequent excuse for the failure of any benign

129. See supra notes 88-90.
affirmative action program as measured by its results or lack thereof is: "It's not the program's fault—every effort was made to identify, recruit, hire, etc., the objects of the program. Unfortunately, there simply weren't enough (any) qualified persons to admit or hire." This is the so-called pool or minimal qualifications problem that all have heard about at one time or another. The basic argument flows as follows: we (the entity or institution subject to the affirmative action mandate) have minimum standards that must be rigidly employed to award the entitlement that is the subject of the debate. This threshold or floor is objectified. Frankly, identifying the threshold or floor is often dispositive in awarding the entitlement. One cannot be considered even for the benefit that is provided by the benign affirmative action program unless one meets the threshold qualifications. This, of course, controls the size of the applicable pool.

The end result of this process is that the benign affirmative action program fails to succeed or effectuate change because there are no (or too few) individuals in the pool due to the nature of the standard used to define the applicable pool. The fallacy of this approach is two-fold. First, it ignores the benefits engendered by the use of affirmative action programs—even benign ones—and fails to include in the calculus of cost/benefit analysis the societal value to be gained by the inclusion of the beneficiaries of affirmative action in the subject pool. 130 In other words, a value choice is made—one that perpetuates the existing hegemony and social structure, including the distribution of benefits and disadvantages of past discrimination—when a minimal threshold or standard is used that has the effect of excluding or reducing the pool of qualified minority candidates.

Second, such an approach ignores the first-order question of why such a large, diverse group fails to meet or is underrepresented in the pool created by the standard. As discussed above, 131 assuming there are no inherent, genetic traits that either favor or disadvantage one group when compared to another, why is it that similarly situated individuals—individuals who attended the same type of undergraduate schools and received the same type of grades—do so consistently differently when judged by certain metrics. Either one or two things is at work: either the differentiation is due to past discrimination which has not yet been overcome—which is what the affirmative action program is designed to take into account, but apparently inefficiently or negligently fails to accomplish—or the differentiation is an illegitimate product of standards that are not valid for the purposes intended.

Thus the second reason why conceding the quota issue is erroneous is based on the legacy of institutional racism in this society. That legacy is quite clear: the creation of the chasm between whites and people of

130. See, e.g., Kennedy, supra note 91, at 1329-30.
131. See supra note 3 and accompanying text.
color (when measured by whatever metric) because people of color have
been systematically, legally, overtly, and covertly discriminated against
in American society. In the instant case, the focus is on educational at-
tainment or lack thereof. The differing levels of achievement between
whites and people of color is a product of the inferior educational oppor-
tunities afforded to people of color in American society, not only in pre-
vious generations, but in this generation as well.\textsuperscript{132} In this area, people of
color once again comprise the bottom of American society as a result of
the effects of past discrimination which have only recently, incre-
mentally, begun to abate.

Even assuming that the standards that are employed to award enti-
tlements are fair, to adhere to such standards with the concomitant result
that few, if any blacks meet the standards in an affirmative action plan
that does not employ quotas (and is therefore relatively ineffective), is to
perpetuate an illegitimate situation pursuant to which whites have gained
an advantage over blacks in current society as a result of past wrongful
behavior. Such a state cannot be allowed to exist consistent with the
principles of distributive justice.\textsuperscript{133}

This raises the third issue: what is the value of standards and mer-
itocracy? Here there are actually two quite distinct questions. First, are
there valid “objective standards” that are employed in awarding entitle-
ments such as admission into professional schools in a nondiscriminatory
fashion? Second, assuming such standards exist and can fairly be ap-
plied, should we defer to the use of such standards in awarding the enti-
tlements in light of the historical legacy of racism that permeates this
society?

With respect to the first question, the evidence is clear that no objec-
tive standards are applied in the admission process to award seats in pro-
fessional schools. The second question, although much tougher, also
generates a negative response. Assuming we exist in a world in which
there is a fairly uniform consensus that objective standards exist that can
be uniformly applied across the board to award entitlements and that
everyone agrees accurately measure and correlate ability to perform a
certain task (here the ability to succeed or do well in professional school),
such a standard must still be rejected for two reasons. First, such stand-
ards contain a built-in bias that results in the privileging of those who
have benefited by past acts of discrimination over those who were
harmed by the same discriminatory acts. Second, applying such “neutral
standards” across the board, without remedial assistance for those who
have been harmed by past discriminatory acts, solidifies the effect of the
discriminatory acts and consigns those who were harmed to a second-
class status in a society that is allegedly premised on the equality of
opportunity.

\textsuperscript{132} See supra notes 53-73 and accompanying text.
\textsuperscript{133} See Johnson, supra note 2.
Moving away from assumptions to the state of current reality, the entire notion of "standards" is premised on a notion of meritocracy that is highly chimerical in this context. One quite common objection to the use of quotas, and to affirmative action generally, is that preferential programs violate the notion that educational opportunities are awarded on the basis of merit and not on the basis of need. That argument is misleading and erroneous because it presupposes first that there is some objective standard that is being uniformly and fairly applied across the board to award the entitlement.

A belief that there is an objective standard that is or can be fairly applied to award seats in professional schools flies in the face of the realities of the admission process. Such a view is too abstract and ahistorical. Many question the validity of so-called objective standards such as the LSAT score and undergraduate GPA for the task which they have been assigned in light of the subjective admission process employed at law schools. Most importantly, even assuming the existence of valid objective standards, it is clear that such standards are not uniformly and fairly applied across the board to award entitlements. As with most other processes, subjective factors infect the process in ways that undermine the use of objective criteria.

This raises a second, related objection to the use of merit or so-called objective standards, in the admission process. In order to have a standard which measures merit or desert, one must by necessity have a definition of meritocracy upon which the standard is based. Indeed, there is a nested quality to the debate over the existence and use of standards and merit to award entitlements which is beyond the purview of this article. What is apparent, however, is the subjective, contextually-based nature of merit. In other words, there can be no objective standard by which to award entitlements because the entire notion of merit upon which such standards would have to be based is subjective in whole or in part. Professor Kennedy said it best:

[M]any . . . recognize the thoroughly political—which is to say contestable—nature of "merit"; they realize that it is a malleable concept, determined not by immanent, preexisting standards but rather by the perceived needs of society. Inasmuch as the elevation of blacks addresses pressing social needs, they rightly insist that considering a black's race as part of the bundle of traits that constitute "merit" is entirely appropriate.

 Basically, the belief in the concept of merit that is premised on the use of objective standards that allegedly can be fairly applied to discriminate between the deserving and the undeserving is not only factually in-

134. In other words, one can easily turn this argument around and allege that the standards are both a function of and product of merit in that they both define merit and measure it by incorporating those attributes which are deemed worthy of reward or recognition.
135. Kennedy, supra note 91, at 1333 (footnote omitted).
apposite, but is premised on a foundational claim of "acontextualism" that rejects the thoroughly contextually dependent nature of merit and standards. No objective standards exist independently of the context within which they are applied. Moreover, because context, like society, changes and evolves, any belief that universal standards exist that can be applied fairly is too narrowly conceived and constrained to recognize the historical, evolutive, and contextual nature of merit.\footnote{Indeed, what is frequently thought of as meritocratic is that standard which privileges the existing hegemony of society, e.g., white males, to the exclusion of others even though the standards may have no true or provable relevance to the attributes purportedly being measured. For a discussion of the contextual nature of merit in an analogous situation involving the use of merit in evaluating scholarly works, see Alex M. Johnson, Jr., Scholarly Paradigms: A New Tradition Based on Context and Color, 16 VT. L. REV. 913 (1992).}

Consider Professor Nancy Ehrenreich's insightful observations: [T]he prevailing ideology [based on meritocracy] systematically ignores differences among the citizenry as a whole, promoting a homogeneous vision of American society that both excludes those groups who do not fit the accepted American model and elevates a small but powerful elite to the status of universal "type." . . . Rendering such groups invisible by ignoring their differences (or even their existence) and assimilating everyone into a purportedly general type, American ideology [based on meritocracy] conceals the conflict created by those differences and thus allows us to avoid the hard decisions that such conflict requires. Only by denying diversity have we been able to see ourselves as tolerant of it.\footnote{Ehrenreich, supra note 127, at 1234 (footnote omitted).}

X. THE MYTH OF PROPORTIONALITY: WHY BLACKS MERIT DIFFERENT TREATMENT

Finally, assuming that all are in agreement with the primary arguments in support of the use of quotas in this article: (1) that quotas are the only effective way to remedy the effects of past discriminatory behavior; (2) that quotas do not result in the award of an entitlement to unqualified individuals; and (3) that the debate over the use of quotas is frequently illegitimate because those who oppose the use of quotas do so on racist as opposed to morally justifiable grounds; and assuming that all reject the related argument that quotas result in the debasement of standards—there is still one objection to the use of quotas that must be addressed. Why favor blacks to the exclusion of other discriminated or subordinated peoples?

Thus, there is one final, nonracist argument against the use of quotas in affirmative action. I call this argument the myth of proportionality. It goes something like this: first, even though I oppose the use of quotas, I recognize that blacks are underrepresented in certain key segments in American society, including the professions. Blacks, however, are no different from any other minority that has attempted to make its mark on
American society, including but not limited to Jews, Asians, Latinos, etc. Over time, these other groups—with varying degrees of success—have been able to infiltrate every level of American society. Nevertheless, it does take time. In time, blacks will likewise be successful in, for example, professional schools, now that the institutional impediments (racism) to achievement in that area have been eradicated. So be patient, your time will come.

There is a second component to this argument: assuming I buy your distributive justice argument that blacks are entitled to these positions today and should not be forced to wait for incremental progress that is multigenerational, quotas are the wrong solution because in the long run your position will be hurt because everyone can and will make the claim that their ethnic, racial, or religious group is entitled to proportional representation.

Once again, these arguments are misconceived and wrong because they are too abstract and ahistorical. Taking the last argument first, other ethnic, racial, and religious groups may not be able to make the same claim to proportional representation that blacks can, because these groups were not subject to slavery and the intense institutional racism that has been directed at blacks by American society. Simply put, these groups by and large have not suffered the effects of racism to the same degree as blacks because they have not been subjected to the same extent and intensity of racism.

Of course, as with any blanket statement, a partial attack can be made that refutes the totality of the general statement. Thus, those of Chinese extraction can argue that they were subject to racism in the United States, as can Japanese-Americans, who can buttress their claim with the internment of their people during World War II. Those of the Jewish faith also can claim that they were and are subject to discriminatory treatment in American society. And the list could properly include Latinos, Indians, Native Americans, and others too numerous to list. The problem with these claims, and equating them with claims of blacks for compensatory justice, is that the injury that occurred to these


139. Abram, supra note 138, at 1321-23. This argument is not threatening to blacks, but to whites who control a disproportionate number of positive entitlements.

140. See Justice Delayed (Peter Irons ed., 1989) (discussing Korematsu v. United States, 323 U.S. 214 (1944), which affirmed conviction of Japanese-American for failing to vacate area declared off limits to individuals of Japanese ancestry); Sandra Takahata, Comment, The Case of Korematsu v. United States: Could it be Justified Today?, 6 U. Haw. L. Rev. 109 (1984). I would like to note at this point, however, that the Japanese-Americans who were interned at least received reparations ($20,000 per individual pursuant to the Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b-4(a)(1) (1988)) while blacks are still waiting for their “40 acres and a mule”.

141. Indeed, with respect to Native Americans a strong case can be made that their situation closely resembles that of blacks in the United States, with the exception that they never were formally enslaved.
groups and others was not as severe and long-lasting as the injury to blacks which is being remedied by the use of quotas and other types of affirmative action programs. Arguing that all ethnic, religious, and racial discrimination, of whatever type, length, or severity, is similar and should be remedied universally is the same as arguing for the death penalty for any and all criminal violations. What is lacking, of course, is proportionality.

Similarly, arguing, as Thomas Sowell has, that blacks should be treated like any other ethnic group in American society with the result that blacks eventually will achieve a Pareto optimal place in American society through their efforts untainted by affirmative action, must likewise be rejected. First, comparing blacks to other ethnic groups is ludicrous in light of the fact that in 300 years blacks have been unable to obtain what other nonblack ethnic groups have been able to obtain in a couple of generations. This leads me to conclude that the plight of blacks is significantly different than their discriminated against immigrant peers.

Aside and apart from the severity and length of discrimination, other ethnic groups—with the exception of those of Asian descent—have one advantage that blacks did not and do not have: the possibility of racial identification with the majority group. The Italians and Irish, for example, and to a lesser extent Latinos, are much less conspicuous targets of discrimination because of the color of their skin. They, unlike blacks, can enter the mainstream of white American society more easily. They perhaps are more easily absorbed or assimilated in the American melting pot because identifying them is comparatively difficult.

The point is that the experience of blacks in American society is different than that of all other ethnic, racial, and religious groups in American society. This difference justifies the use of quotas or proportional representation in affirmative action programs that are designed to benefit blacks. Considering the black experience in a historical and contextual framework that focuses not only on the past, but the future of American society, the use of quotas is the most efficacious method for achieving racial equality in contemporary American society.