1.   Difference Discourse

Plaintiff is a black woman who seeks $ 10,000 damages, injunctive, and declaratory relief against enforcement of a grooming policy of the defendant American Airlines that prohibits employees in certain employment categories from wearing an all-braided hairstyle. . . . She alleges that the policy violates her rights under the Thirteenth Amendment of the United States Constitution, under Title VII of the Civil Rights Act . . . in that it discriminates against her as a woman, and more specifically as a black woman . . . plaintiff assert[s] that the "corn row" style has a special significance for black women. She contends that it "has been, historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society." The style was "popularized" so to speak, within the larger society, when Cicely Tyson adopted the same for an appearance on nationally viewed Academy Awards presentation several years ago. . . . It was and is analogous to the public statement by the late Malcolm X regarding the Afro hair style. . . . At the bottom line, the completely braided hair style, sometimes referred to as corn rows, has been and continues to be part of the cultural and historical essence of Black American women.[1]

This has long been an easy case for the antiracist left. A large, impersonal, uptight, mainstream, and possibly racist corporation versus a proletarian underdog whose deeply personal mode of self-expression is also the literal embodiment of the soul of a subject people. Milquetoast versus multiculturalism; bureaucracy versus braids: we know what side we're on.

But isn't the argument as the plaintiff Rene Rogers advanced it at least disquieting? Corn rows are "the cultural and historical essence of Black American women"? The theory of racial discrimination and civil rights underlying Rogers's claim raises tough questions for anti-discrimination law. Leaving aside the volumes of critique of racial essentialism as a conceptual matter, I would maintain that the claim of historicism is questionable as a matter of fact: Rogers's own

pleadings assert that the style was popularized *in the 1970s* by Hollywood ac-
tress Cicely Tyson. Raising the historical point may seem like nit picking, but
it does problematize the link between race and the hairstyle: if the style was
popularized by a Hollywood actress, how different is it from the coif Farrah
Fawcett made famous at roughly the same time?

Very different if we believe that Tyson's and Rogers's braids, unlike Far-
rah's feathered tresses, made a political statement of racial pride: Rogers's
briefs evoke Malcolm X in support of the political importance of the cornrow
hairstyle for blacks. But should anti-discrimination law protect politically
controversial, if racially salient, behavior advanced through the vehicle of
physical grooming? Suppose some black women employed by American Air-
lines wished to wear cornrows and advance the political message they ostensi-
bly embody, while others thought cornrows damaged the interests of black
women in particular and reflected badly on the race as a whole (given the cul-
tural politics of black America in the mid-to late 1970s, there almost certainly
were such black women employed by American Airlines and even more cer-
tainly there were such black women among its customers). Suppose further
that the management of American Airlines, either formally or informally,
sought out and considered the opinions of its employees as well as of its cus-
tomers and made its grooming policies based at least in part on such informa-
tion. Now Rogers's claim is no longer plausibly described as a claim on behalf
of black women. Instead it is a claim on behalf of some black women over the
possible objections of other black women.

Rogers and her supporters might object: "What business is it of other
black women whether *we* wear braids—no one will be forced to wear them."
But this individualistic account of the stakes of the case flatly contradicts the
proffered rationale for conceiving of the hairstyle as a legal right: cornrows are
the "cultural essence," not of one black woman but of black *women*. If this
claim is to be taken seriously then cornrows cannot be the cultural essence of
only those black women who choose to wear them—they must be the cultural
essence of *all* black women. And in this case *all* black women have a stake in
the rights claim and the message about them that it will necessarily send—not
only those who support the political and cultural statement conveyed by
cornrows, but also by those who oppose that statement.

We'd need a fairly detailed account of the cultural and political stakes of
cornrows to have a real sense of the political dimensions of this legal conflict.
Does the wearing of cornrows track social class (are most cornrow wearers work-
ing class "authentics" or bourgeois trendies?) or ideological splits (nationalist
v. integtrationist?) within the black community? Do cornrows reflect a sophisti-
cated racial politics in which the essentialist message is subordinate, ambiguous

or even ironic or is a crude essentialism a central or indispensable part of the politics of cornrows? Is the symbolism of cornrows widely shared and well understood at least within some subset of American society or is it ambiguous?

It bears noting that we'd also need a definition of "cornrows" or a list of protected hairstyles in order evaluate the implications of Rogers's claim. There are a lot of different all-braided hairstyles: the true "cornrow" style, so named because of the wide parts between each braid, the "style, distinguished only by the presence of tiny braids in lieu of single strands of hair"[2] that law professor Paulette Caldwell defends in her article focusing on the *Rogers* case, the style in which each braid corkscrews in a difference direction, popularized by rap artists such as Busta Rhymes and the dreadlock style (technically not braided, but I suspect most people would include it in a right-to-cornrows) first associated with Jamaican Rastafarians. One might think some but not all of these styles are appropriate for certain workplaces: the style Caldwell describes for instance, is clearly the most conservative while the dreadlock style (especially if divorced from its religious origins) or the Busta Rhymes style might be more analogous to a punk rocker's Mohawk or "liberty spikes."

What's clear is that the assertion that cornrows are the cultural essence of black women cannot be taken as conclusive evidence that a "right-to-cornrows" is an unadulterated good thing for black women. Even if we take it on faith that cornrows represent black nationalist pride as against the integrationist and assimilationist coiffure of chemically straightened hair, it's clear that a right to cornrows would be an intervention in a long-standing debate *among* African-Americans about empowerment strategies and norms of identity and identification. More generally, it is by no means clear that an argument that presumes that blacks or black women have a cultural *essence as blacks* or *as black women* is a vehicle of racial empowerment. A right to group difference may be experienced as meddlesome at best and oppressive at worst even by some members of the groups that the rights regime ostensibly benefits. For the black woman who dislikes cornrows and wishes that no one—most of all black women—would wear them, the right not only hinders her and deprives her of allies, but it also adds insult to injury by proclaiming that cornrows are *her* cultural essence as a black woman.

There are also implications for people who aren't members of the "protected" group, but who want access to the cultural styles or artifacts that the rights regime would link to a particular group. In shorthand, the *Rogers* case implicates that increasingly common fixture of American college campuses and urban centers: the dreadlocked blonde. Most obviously, Rogers's theory of the case implied that a black woman who wished to adopt Cicely Tyson's hairstyle would have a right to do so, while a white woman who wished to

emulate Bo Derek's hairstyle (or Cicely Tyson's hairstyle or Bob Marley's hairstyle) would not. One might conclude that the Bo Dereks of the world would be no *worse* off after a Rogers's victory—they would have the same limited opportunity to wear braids as before. But this is not *quite* so. If an all-braided style is the cultural essence of black women *by law*, mightn't this imply that Ms. Derek and her emulators are black-coiffed (if not black-faced) minstrels or "white Negro" wanna-bes? It's likely that a right premised on the immutable link between blacks and braids will discourage white and Asian women from wearing braids by sending the message that the hairstyle "belongs" to another social group. Although a right to cornrows might seem only to enhance the freedom of potential cornrow wearers, it is arguably better understood as a policy of segregation through which a set of grooming styles are reserved for a particular group.

We might expand the "dreadlocked blonde" category to include anyone who believes that society is enriched by cultural cross-pollination. Rogers's favored rights outcome would have two likely consequences. It would almost certainly increase the number of black women wearing cornrows, both because employers would no longer be able to forbid them for black women and because the judicial embrace of Rogers's theory of the case would encourage black women to identify cornrows as their cultural essence and thereby popularize the style. It would also likely reduce the number of non-black women wearing the style as those women would also internalize the legally disseminated message that the hairstyle was the cultural property of black women and conclude that their adoption of the style would be inauthentic or even a type of cultural trespass. The result would be an increased racial divergence in women's grooming. The stereotypical assimilationist would of course find this result distressing, but so should the type of multiculturalist who believes that groups of differing racial, social and cultural backgrounds should freely mix and freely exchange ideas and aesthetic conventions.

Even for the black women who affiliate with the cornrow hairstyle, legal enforcement comes with hidden costs. The legal discourse underlying such a right-to-difference can easily take on a life of its own and have unintended side effects. In large part this is because the claim that braids are uniquely important to black women conceals a host of distinct and often contradictory descriptive claims and normative rationales. Even in the years that I have spent developing this critique, I have heard a number of distinct arguments for why Rene Rogers should have prevailed. Some people have insisted that cornrows are of particular importance to black women because they are a part of African heritage dating back long before the European encounter. But are we then to limit this right to those who can trace their ancestry to the regions of the

continent where braids were worn and limit the protected styles to those worn by the defendants' ancestors (if this seems a fanciful suggestion, notice that courts employ precisely this type of analysis in cases dealing with Native-American cultural claims[3])? Others have argued that braids are one of a few hairstyles that allow many black women to obtain the long, flowing hairstyles favored for women in contemporary society without chemical straightening. On this rationale, should the right to braids be limited to those black women for whom this is true? (Black women with fine-textured hair who wish to wear braids in order to signal racial affiliation would lack standing under this interpretation of the claim?) Doesn't this rationale raise the disquieting implication that black women should be free of ostensibly Eurocentric grooming norms only to conform better to patriarchal ones? In fact, isn't the desire for long, flowing hairstyles actually a symptom of the Eurocentric grooming norms that right is supposed to resist? And doesn't this rationale undercut the "heritage" rationale by locating the impetus for braids in the aesthetic sensibilities of contemporary *Western* culture rather than in ancient African tradition?

Most disquieting is the possibility that the cultural rationale could set precedent that might apply in other cases. If braids are the immutable cultural essence of black women, what else is? There are a great many possible answers to this question—some disturbing—that many people will find as intuitively plausible Rogers's assertion regarding braids. Consider another case in which an employer's policy implicates a theory of racial difference:

> TPG [The Parker Group] is a telephone marketing corporation, often hired to perform work for political candidates. The conduct at issue in this case involves TPG's work making "get-out-the-vote" calls for various political candidates. . . . Approximately 10% of such calling is race-matched, such that black voters are called by black TPG employees who use the "black" script, while white voters are called by white TPG employees who use a different "white" script. . . . TPG employees doing the race matched calling in 1994 were assigned separate calling areas and separate scripts according to race. . . . TPG also physically segregated employees who worked at race matched calling. Black callers were segregated into one room and white callers segregated into another.[4]

Is TPG's policy, as the court held, racially discriminatory because it is "based on a racial stereotype that blacks would respond to blacks and that . . . race was directly related to . . . ability to do the job"? Or is the policy the natural outgrowth of the recognition of cultural differences between the races and therefore justifiable, perhaps even laudable? If Rogers's cultural essence as a black woman gives her an intrinsic relationship to a hairstyle, mightn't even a good

faith employer conclude that her cultural essence would also enable her to better persuade other blacks and disable her from connecting with whites?

I hope it's clear up front is that these objections do not necessarily go to the substantive outcome of the dispute, but instead pertain to the rationale employed in an effort to reach a given outcome. My sympathies lie with Rene Rogers; I think she should have been allowed to wear her braids. If I were in charge of the grooming policy I would have rewritten it to exclude the prohibition against braids. If I were a member of Congress I would consider legislation to prohibit employers from adopting rigid grooming policies generally as a matter of federal labor law (although such a legal rule presents a complicated case, as I will argue below.) It is also possible that the regulation as applied to Rogers was a part of a pattern of harassment and should have been construed as actionable racial harassment or as constructive termination. But I think that the argument that Rogers and her attorneys actually made was a bad one and that the court was right to reject it. Similarly, there are countless arguments made with good motivations toward ends I generally support that I will critique in this book.

. . . . .

The logic and assumptions underlying both Rogers's claim and TPG's policy are strikingly similar: both assume that an ascriptive social identity—in these cases race—corresponds to a vague but intrinsic characteristic: culture. Both insist that this correspondence should have consequences for the organization of the workplace. Both Rogers's rights claim and TPG's policy are determined by a thick account of the sociocultural entailments of group identity, an account that is central to what I have called "difference discourse."

Below I'll sketch a portrait of what I will call "difference discourse." I'll use some fairly broad strokes to begin this portrait, filling in the details later in the book.

One broad stroke is the idea of a discourse. My ambition is to describe a set of beliefs, conversations and practices that the reader will recognize as interconnected, mutually reinforcing and socially pervasive. Difference discourse describes social identities such as race as a manifestation of underlying differences—a racial culture—while at the same time generating those very differences: for instance, Rogers's claim describes cornrows as the essence of black womanhood and in so doing encourages black women to wear cornrows while making them off-limits or at least peculiar for non-blacks.

Discourse analysis is inevitably unfair to its objects. It does not, and does not attempt to, do justice to the wealth of subjective sentiment behind a statement

or motivations driving an act; it gives short shrift to "authorial intent"; it is indifferent to biography; it is unsentimental, impersonal, cold. The analysis of a social discourse treats individuals, not as autonomous agents, but as agents of a field of social power; human action is symptomatic of ways of thinking and doing, of constellations of habits, of institutional tendencies. So in my discussion of *Rogers* my goal is not to criticize Rene Rogers; instead it is to offer up the social clash in which she participated, the case caption that bears her name, as an object of analysis, as an example of a larger trend to which it contributes and from which it was produced.

Although many of my examples will concern racial identity, difference discourse is not limited to racial identity. Strikingly similar claims, undergirded by parallel conceptions of identity, have been made in the context of gender, ethnicity, national origin and sexual orientation/preference. We are also witnessing the birth of a host of less familiar "identities" with their own difference claims such as the obese and in my hometown San Francisco, dog owners and bicyclists. My approach in this regard is not to advance an elaborate justification for the suggestion that these claims are genetically related, but rather to describe the proposals and arguments and let the reader judge their family resemblance.

A (Abridged) History of Difference

But at the same time that the universalist ideologues were preaching the merits of Westernization or "assimilation," they were also (or others were also) preaching the eternal existence and virtue of difference. Thus a universalist message of cultural multiplicity could serve as a justification of educating various groups in their separate "cultures" and hence preparing them for different tasks in the single economy. The extreme version of this . . . is apartheid. But lesser versions . . . have been widespread. . . . Furthermore, we can enlist the dominated groups in their own oppression. Insofar as they cultivate their separateness as "cultural" groups[,] . . . they socialize their members into cultural expressions which distinguish them . . . [and valorize] some at least of the values attributed to them by racist and sexist theories. And they do this, in a seeming paradox, on the grounds of the universal principle of the equal validity of all cultural expressions.[5]

Academic literature, legal advocacy and social activism have increasingly focused on a specific approach to racial justice: the assertion of racial *difference*. It is a fantasy of many multiculturalists that the American mainstream is hell-bent on destroying cultural difference, that the new face of racial hegemony speaks

the false gospel of assimilation. Consider the following excerpt from an article by law professor Dorothy Roberts:

> In the past whites in the United States used the law brutally to suppress other peoples' cultures. . . . Most of the time, however, the law promotes the dominant culture in much more subtle ways. . . . [W]hites, as a result of their dominant political position, have been able to incorporate their own cultural perspective into legal principles; they have labeled these legal principles as universal despite their one-sided pedigree; then judges claim to be impartial when they impose these principles without regard to . . . people from minority cultures.[6]

Alex Johnson's discussion of the role of the card games Bid Whist and Tonk in African-American culture provides another articulate expression of this view:

> Bid Whist and Tonk, like many other African-American institutions, are maintained because they are ours: they provide us with a *safe harbor* for the preservation of the idiopathic rules, customs, and norms that developed in our community while we were kept separate from whites by law. This safe harbor also allows those who choose not to fully embrace the norms of white society to retain a place in an African-American *community in which confrontation between African-American norms and conflicting white norms never takes place.* Moreover, this safe harbor protects African-American culture, because when the assimilationist version of integration occurs *African-American culture is typically not merged into majoritarian culture but obliterated by it*—leaving no trace of what was once a unique cultural vehicle.[7] (Emphasis is mine.)

In these accounts, certain social practices belong to minority groups and provide safety from a hostile majority with inconsistent practices that threaten to obliterate the practices of the minority group. In fact, more than inconsistent *practices* are at stake according to the account: here a "culture" includes not only practices but distinctive norms, ideologies, cognitive maps, and epistemologies (at one point, Johnson describes the African-American culture as a distinct "nomos" following the work of legal theorist Robert Cover).[8]

The conflict between the norms of minorities and the inconsistent norms of mainstream or white society is assumed to lead, almost inevitably, to the obliteration of the minority group's norms and culture. For instance, Roberts insists that "The assimilationist ideal . . . has only operated in one way. . . . While whites have demanded that nonwhites assimilate to an Anglo-American way of life, the possibility that whites should assimilate to nonwhite cultures seems downright un American"[9] and Johnson argues that "a white cultural

perspective or norm . . . has the effect of stifling or *eradicating the consciousness* of African-American[s]"[10]

Here assimilation is comprehensive and inescapable, an imperative and a legal injunction that gives no quarter and brooks no compromise. This reading is both devastating and perversely attractive: The enemy is monolithic and implacable, the multiculturalists can fancy themselves a heroic *resistance*, keeping the flame of liberty alive against all odds as they wait for the reinforcements from the Allies (or the courts).

These claims are impossible to evaluate in the absence of a definition of minority and white culture respectively, a thorough examination of assimilationist policies and a study of at least some instances in which cultural conflict has occurred. Yet the claims are so familiar and so accepted that otherwise thoughtful scholars simply advance them without support. Below I will argue that this narrative is flawed as both a descriptive and a normative matter. For now, however, it is sufficient to dislodge it from its position as a background presumption and to identify it as a subject of legitimate debate.

The difference approach is not the only approach, and, as I will argue, it is not the best approach, to racial justice. The focus on difference diverts attention from racism—a social institution based on a formal status hierarchy and a set of ideologies that justify that status hierarchy—and instead misleadingly suggests that racial injustice is primarily the result of objective and intrinsic difference among natural racial groups. "Difference" invites imprecise analogy: if the problem of the color line is the failure to appreciate and accommodate difference, then any unpopular out-of-the-ordinary social group can claim to be victims of similar prejudice. The resulting set of absolutist rights claims are a bad way of dealing with the conflicts that arise because of real cultural and social difference—conflicts that involve objective social costs, which must be allocated pragmatically. Worst of all, by insisting that socially imposed statuses are defined by real differences in cultural characteristics, the difference focus encourages members of minority groups to define themselves in terms of group stereotypes.

How did we get here? How did the idea that racism is primarily a consequence of cultural difference, and the corollary notion that any and all conflicts arising from cultural difference are analogous to racism, get started? I will suggest that law—particularly civil rights law and the political struggle surrounding its passage and implementation—played a critical role in the development of this approach.

Historian Harold Cruse asserts: "American Negro history is basically a history of the conflict between integrationist and nationalist forces."[11] The

"difference approach" to racial justice was a reaction to a mainstream civil rights discourse, which, over time, came to be preoccupied with racial integration, formal colorblindness and assimilation. Over time the American mainstream has come to consider integration and assimilation to be effective strategies for racial justice, considered in terms of economic and political empowerment, as well as laudable ends in and of themselves. As law professor Gary Peller notes, "[t]he embrace of integrationism as the dominant ethos of race discourse is the symbolic face of the new cultural center. . . . Relative to this center, black "militants" and white "rednecks" were defined together as extremists."[12] The utopian aspiration of racial integration and assimilation was captured in the figure of the colorblind society, a society in which race has no normative significance, in which it is scarcely noticeable at all. Indeed, some imagine that racial difference will literally be eliminated through intermarriage and miscegenation: Ward Connerly, former regent of the University of California and key sponsor of the ballot initiative that eliminated affirmative action in California believes that "[a]s our population blends and the lines of race become blurred, eventually the racial categories that many consider 'fixed' will collapse of their own weight."[13] Similarly, the painter Ed Ruscha opined, "I think everybody is gradually mixing here. . . . A hundred years from now there will be some gorgeous mono-ethnic race living here."[14]

It is important to emphasize that colorblindness was not simply an ideal that a white mainstream forced on people of color; instead it was one pole of a long running tension within black liberationist thought. Some of the most passionate advocates of colorblindness, strong racial integration and even assimilation were people of color who truly believed in the moral justice and pragmatic necessity of these goals. In the 1960s and early 1970 colorblindness was a truly radical idea. Programmatic racial desegregation of schools had only recently begun in earnest. Many workplaces and public accommodations had formally excluded people of color a few years earlier. Mixed-race marriages were not legally recognized in some states until 1967: the Supreme Court decision in *Loving v. Virginia* changed the blackletter law but not black-baiting public attitudes. In this context integration and even assimilation—born of a universalist humanism—were the ideas of a courageous avant garde. Historian Clayborne Carson chronicles the emergence of this radical integrationism in the context of the Student Nonviolent Coordinating Committee's (SNCC) organizing efforts in the deep American south during the 1960s:

> [SNCC project director Charles Sherrod] concluded that [it] . . . was necessary to "strike at the very root of segregation. . . . [T]he idea that white is superior. That idea has eaten into the minds of the people, black and

white. We have to break this image. We can only do this if they see white and black working together, side by side, the white man no more and no less than his black brother, but human beings together."[15]

Opposition to integration in the name of tradition and racial difference, while a competing position of the "nationalist" left, was also and most notably the position of the racist right. Indeed, black separatism had its roots in earlier positions that sought to improve black welfare while accommodating white racism. The almost perennial "back to Africa" movements such as Martin Delany's plan in the antebellum period to colonize part of West Africa for the settlement of American blacks and most famously Marcus Garvey's Universal Negro Improvement Association and plans for the "repatriation" of American blacks, arguably had for their prototype the American Colonization Society (ACS). Founded by whites and animated by an explicitly white supremacist ideology in the early nineteenth century for the purpose of resettling free blacks in Africa, the ACS achieved the only successful back-to-Africa movement culminating in the establishment in 1847 of the African nation of Liberia. Garvey's nationalist back-to-Africa movement in the 1920s had the open support of the Ku Klux Klan and other white racists who hoped "it was likely to attract Negroes who might otherwise be resentful of their subordinate caste position in the United States."[16] Booker T. Washington's self-help ideology was likewise met with favor by white supremacists who preferred racial separatism and self-help to demands for civil rights and access to mainstream institutions.

On the other hand, contemporary popular consciousness notwithstanding, the "integrationist" Martin Luther King's vision of racial equality was as radical in its critique of existing social norms and institutions and in its prescriptions as Malcolm X's nationalism. Radical integrationism's ecumenical vision of a society where black and white would join in a humanist kinship did not entail formal colorblindness, but instead a transcendence of social status through a sober and arduous reworking of the social practices that underwrite bigotry and subordination. Those inspired by this vision would not be satisfied with today's status quo of formal equality under the law leavened with de facto racial stratification and tokenism within mainstream institutions. Radical integrationism—the true legacy of Martin Luther King Jr., as his growing focus on issues of economic equity in his later years demonstrates— entailed a fundamental critique of political, social and economic institutions.

Integration (especially colorblindness and assimilation) became the ideals of the mainstream in the late 1960s and 1970s. To a real extent this must be considered a decisive victory for the radicals. But the rhetoric of integration

was also deployed for more conservative ends: colorblindness was used against affirmative action, integration was used to undermine any form of racial solidarity, the norm of assimilation became a bludgeon to crush any practice that made the milquetoast mainstream uncomfortable. This story is familiar. But this was not the inevitable result of an integrationist ideology; instead it is the story of the domestication of a potentially radical integrationism.

The tug of war between integration and separatism (and between colorblindness and race consciousness; assimilation and recognition of difference) reflected real substantive disagreements and a pervasive ambivalence about the terms (both conditions and language) of racial justice even among those unequivocally committed to it. Despite the incorporation of integrationism into mainstream civil rights, nationalism and separatism survived as a "loyal opposition" to integrationist civil rights. Some people accepted integration only as a means to an end—"green follows white"—while others embraced it as a goal. Some thought integration should naturally lead to assimilation and a colorblind utopia, others thought it would lead to W.E.B. Du Bois's ideal of separate nations living together.[17] These conflicts became more pronounced when the initial battles for formal equality were won (and the victories proved inadequate): the question "What now?" was as much a philosophical question as a strategic one.

The civil rights movement never resolved the conflict *within the black community* between integration and separatism. Nor could it have. The tug of war arguably reflects not only conflict between committed ideological combatants, but ambivalence as well. Rather than distinctive and coherent options between which one could choose, integrationism (colorblindness and assimilation) and separatism (race consciousness and cultural nationalism) are symbolic and rhetorical oppositions, which one must constantly negotiate and juggle. Even the most extreme forms of separatism contained elements of integration and assimilation: back-to-Africa movements actively courted white support and were self-consciously "colonialist," envisioning American blacks' occupying a position in Africa analogous to that of Europeans in the new world (a position that they, tragically, in fact occupied in Liberia where, in 1930 a League of Nations report accused the Liberian government of sanctioning "forced labor . . . hardly distinguishable from slavery."[18]) Self-reliance movements always envisioned trade with white society and therefore focused on the development of skills and production of goods that would be marketable to whites: in this sense black communities were envisioned as adjunctive to white society.

Conversely, integration assumes racial distinctiveness—or else there would be no reason to care about integration and indeed no meaningful races to integrate. Integration requires intense race consciousness: we need the collection

and tabulation of racial data to know whether or not integrationist policies have succeeded. In its accommodationist mode, integration promises to present racial difference in a mild and palatable form for the edification of whites. In its more confrontational form, integrationist movements have long promoted racial solidarity for political purposes and have embraced a pragmatic understanding that colorblindness is a long-term goal of a political struggle that today, takes place in a racially charged, if not polarized, society.

So, contra Harold Cruse, the history of antiracist thought has been, not the history of conflict between integrationist and nationalist *forces*, but rather the history of a wide array of agendas, policy proposals, benevolent enterprises, self-sacrificing struggles and opportunistic schemes, fought out in terms of a finite array of rhetorical resources. The true "stakes" of the conflicts may vary widely, depending on historical, economic, social and institutional context, but the language used to describe them has been remarkably constant: when racial merger is desired, it is "integration"; when resisted, it is "assimilation." Difference is a celebrated as "pride," "authenticity" and "culture" when "assimilation" is under attack; it is condemned as "segregation" and "stereotype" when "integration" is the goal.

All these positions cohabitate in the current rhetoric of "difference." Take higher education as an example: merger is advanced as integration in the university admissions process even as it is resisted as assimilation in the context of ethnically identified fraternities, sororities, clubs and theme houses; difference is celebrated as authentic culture and group pride in the admissions and racial fraternity/club/ethnic theme house contexts, but condemned as stereotyping and segregation almost anywhere else.

To be clear, the charge is ambivalence, not hypocrisy. And in a sense, this ambivalence is an inevitable feature of the terms of racial conflict. Racism's characteristic catch-22 insists on racial difference and then punishes it as deviance. Integration/assimilation is a reaction against the insistence on racial difference, but in its more uncompromising manifestations it underwrites the punishment of any group solidarity as a form of deviance. Difference discourse does precisely the opposite: in reacting against the punishment of difference, it reinforces the insistence that racial differences are intrinsic and real. Ambivalence is perhaps the only intelligent response to this catch-22.

Although the "politics of difference," which has more recently emerged as the dominant discourse of progressive antiracists, was a necessary corrective to the earlier dominance of integrationist colorblindness, it was also a partial victory of one approach or set of approaches to antiracism over another. For those who wished to save the ideals of radical integrationism from their neoconservative hijackers, the rise of the politics of difference is a hard blow.

For example, the historian John Hope Franklin, author of what is still today the definitive history of African-Americans, *From Slavery to Freedom: A History of African-Americans*, insists that "I don't believe you can have a peaceful, multiracial society when people are parceled or separated out, ghettoized, Balkanized or however you want to say it." In an interview with the *New York Times*, Franklin was

> appalled by the degree to which some whites and blacks, frustrated with integration, talk of resurrecting and finally delivering on the South's old empty promise of separate but equal education. "Let's say you've got pristine schools, racially divided, white schools, black schools," he [Franklin] says. "Say they've both got everything and then they graduate. Where do they go now? Where are the whites going to learn about blacks? Where are the blacks going to learn about whites? You're just postponing the conflict until they get grown, and it's much harder to learn anything then." In that vein, he criticizes the media's infatuation with what he sees as the false promise of Louis Farrakhan's black nationalism.[19]

The difference agenda seems to some like a natural extension of civil rights, but resistance to it may reflect not retrenchment but honest disagreement about what racial justice entails and legitimate concern that the difference agenda will lead to a dead end or an ambush.

The Production of Group Difference as Common Knowledge

The politics of difference can be understood as a reaction to the hegemony of integrationism and assimilation, and to their cynical redeployment as limits on racial justice. But what if the politics of difference threatens to become another hegemony, no less totalizing, no less obsessive, no less myopic than the assimilationist ideal that preceded it? Although Rogers lost in court, the theory of racial identity and cultural membership entailed by her Title VII claim is widely accepted, not only among left/liberals and communities of color, but by mainstream American society. The idea that our familiar group identities are defined by *objective characteristics* that are shared by members of the group—a racial culture, for example—is so widespread and accepted that it is taken for granted. Group difference is a matter of common knowledge.

The "Repressive Hypothesis"

It's a familiar story. Ever since the limited but decisive victory of the American civil rights movement, racism—daunted, but not defeated—has sought a new

front from which to attack. Meanwhile, the same principles that successfully made the bigots of the 1950s eat Jim Crow have been deployed against analogous prejudices—sexism, homophobia, ageism, the dominance of the able bodied over the differently abled, the tyranny of the thin over the portly. And so too, these bigotries have retreated only to regroup and fight another day, on another battlefield, with new and as yet undiscovered weapons of mass discrimination.

We have it on good authority that one of the most potent of these new weapons is a covert form of discrimination that functions by misdirection. Bigotry will target not natural groups but their distinctive practices. The law will not countenance discrimination against blacks, but we can stigmatize Ebonics; one wouldn't dare discriminate against women, but we can repress feminine styles of social interaction. The result is a new bigotry—not of types of people but of ways of being. To be clear, the goal of the new bigotry is subtly different than that of the old bigotry. The goal is not to exclude the previously stigmatized people through the use of proxies; the idea is not, for instance, to screen out blacks by punishing their speech patterns. Instead, the goal is to transform the previously stigmatized groups, to remake them in the image of the *übermench*. The ultimate goal is arguably more vicious, more comprehensive, than simple exclusion. It is a bloodless extermination—a cultural genocide.

This story is familiar, not only because it has been told so often, but also because it a type of story that has an archetype. The story of the new bigotry is a story of repression; it is a reiteration of what Michel Foucault in the *History of Sexuality*, *Vol. 1,* called a "repressive hypothesis." The repressive hypothesis that Foucault attacked began with the Victorians and involves dark powers of sexuality, while ours begins with the American bourgeoisie and involves the sexy cultures of the dark skinned. But the parallels are striking.

Foucault argued against the familiar story in which the institutions of bourgeois society from the Victorian era to the present have operated to repress the natural and authentic sexuality of individuals (the "repressive hypothesis"). Instead, Foucault argued, the Victorians were (as we, their legatees, are still today) obsessed with sexuality: they saw it everywhere, they constantly discussed it, insisted on its relevance and deployed it as a description of many forms of human behavior. They *produced* sexuality by defining human behavior in terms of sexuality, defining individuals as sexed in various ways and cataloguing and constructing sexual typologies. Far from repression, this *production* of sexuality is, according to Foucault, what defines the modern attitude toward sex. The production, (rather than or at least in addition to the repression) of sexuality was a means of control. It was (and is) a technology

that defined the self according to its sexuality, and thereby kept individuals under a type of sexual surveillance. Further, if anything repressed authentic eroticism (a term whose ontological status is, for Foucault, questionable at best), it was the incessant production of sexuality that limited the possibilities of erotic expression by imposing upon individual eroticism a narrow universe of sexual types.

Finally, *the idea that sexuality is repressed* demands interrogation in its own right.

> The question I would like to pose is not, Why are we repressed? but rather, Why do we say, with so much passion and so much resentment against our most recent past, against our present, and against ourselves, that we are repressed? . . . What led us to show, ostentatiously, that sex is something we hide . . . and . . . do all this by formulating the matter in the most explicit terms, by trying to reveal it in its most naked reality . . . ? [W]e must also ask why we burden ourselves today with so much guilt for having made sex a sin. . . . How to account for the displacement which, while claiming to free us from the sinful nature of sex, taxes us with a great historical wrong which consists precisely in imagining that nature to be blameworthy?[20]

Now let's turn to culture. The implicit presumption underlying the "repressive hypothesis" that I described a few pages ago is that group cultural differences are natural and authentic and that failure to respect these differences is a form of tyranny. Here, as in Foucault's "repressive hypothesis" power is exercised through censorship and repression; justice entails nothing more than the absence of repression; a willingness to let human nature take its course and embrace the mysterious and beautiful forces that already surround and comprise us.

But suppose, with respect to this repressive hypothesis, that something like what Foucault argued for in the context of sexuality is also true of group cultural difference. Suppose our era is defined, not (or at least not only) by the *repression* of group difference, but by its *production*? Suppose further that the repressive hypothesis is one of the mechanisms by which this production of group difference is achieved.

There is evidence to support the proposition. We live in a society in which human beings are sorted (and sort themselves) with remarkable comprehensiveness, precision and efficiency into a number of almost canonical social groups. You know what they are (and more importantly, you know who *you* are.) Think about the neighborhood magazine kiosk, where the grandfather of identity niche marketing *Ebony* magazine competes for space with *Essence* (for black women) *Latina, Yolk* (Asian-Americans, get it?) and *Out* (gay and

lesbian) magazines. Consider cable television, where Black Entertainment Television shares the dial with a growing number of identity-oriented lineups, featuring ethnically targeted advertising and ethnic variations on that stale staple of prime time: the family sit-com (as if barbecue sauce, salsa or kimchi could make that week old Wonder bread go down easier) and where bold programming entails a gay character who never has a romantic partner or liason but consistently exhibits stereotypically "gay" mannerisms. Notice the student organizations in colleges (and many high schools), an "alphabet soup" of race, ethnicity and sexual orientation (in law school we have Black Law Students Association (BLSA), joined by South American and Latino Students Organization (SALSA), Asian and Pacific Students Organization (APALSA), and winning the award for both cleverness and for bucking the trend of initials, OUTLAW ("out" gay and lesbian law students)). And consider the new, check-every-box-that-applies U.S. Census, where racial data simultaneously acquires the aura of objective science and the patina of subjective self-affirmation. If there is a plot to repress group differences, it has numerous and powerful enemies in the media, industry, politics and higher education.

This is more than the recognition of group identification born as a collective response to social prejudice. It is the production of identity as a lifestyle, a way of being. In the popular anthropology of group difference there are types of food, music, hairstyles, sports, clothing, television and radio programming, magazines, and intoxicating liquors (or lack of them) appropriate to the various canonical identity groups. These group specific lifestyles offer an easy solidarity, a V.I.P. pass to belonging. For socially isolated individuals, social identities offer companionship, distinction, a sense of purpose, a link to history. Like an arranged marriage, the prefab camaraderie is seductive because it demands acquiescence rather than deliberation and decision. Social identity promises to be the backdrop of all other social relationships, something you can rely on and take for granted because it is the precondition of entry into the social, the sine qua non.

The necessary correlative to this unearned solidarity is an unwarranted presumption about the entailments of group membership. There is a peculiar variant of political correctness: it regulates not what can be said about a minority group by outsiders, but instead the behavior of group members. This political correctness requires and duly produces opprobrium for people who miss their cue: we encounter "Oreos"—blacks on the outside who don't "act black" and therefore presumably aren't black "on the inside"—and, quickly enough, other racial groups acquire similar figures (for some odd reason all refer to food): Asian "bananas", Latino "coconuts," Native-American "apples." These figures of scorn imply that there is a particular type of

behavior that is appropriate to a given race, and thereby censure deviation from it. Thus we hear from Henry Louis Gates Jr. that black college students who frequent the library are chastised by other black students with the epithet: "incognegro." Meanwhile their white classmates offer the unwelcome compliment: "I don't even think of you as a black person." Or notice that the complexities of sexuality and gender identification demand an ever-expanding list of homosexual types: butch, femme, queen, dyke, lipstick lesbian. Conformity to these recognizable types is a prerequisite to acceptance in many social circles. These relatively trivial epithets reflect a quite pervasive and potent social discourse, an orthodoxy as powerful and coercive, if not as comprehensive or pervasive, as the social mores of Victorian England.

The fact of intrinsic racial difference is cited (as a story one already knows) in countless and diverse forms: the racist humor of the blackface minstrel, Steppinfetchit, Amos n' Andy, Uncle Remus, Uncle Tom, Sanford and Son, Chico and the Man; but also, in the Moynihan Report on the pathology of black urban culture, the literature detailing the elements of a distinctive "black learning style" and the popular pseudo-science of the metaphysical properties of melanin. In contemporary popular culture, racial difference is the dominant figure in a host of "odd couple/buddy" films (the prototype is the now classic *Silver Streak* starring Richard Pryor and Gene Wilder, perhaps the most popular are *48 Hours* and *Beverly Hills Cop*, both starring Eddie Murphy) in which two protagonists of difference races are forced together by circumstances and overcome treacherous and comic obstacles (at least one of which must involve racial passing or racial displacement—a white guy in the ghetto or a black guy in a redneck bar) and ultimately, *despite their severe cultural differences*, manage to see that people are people after all.

These racial "buddy films" illustrate the Janus-faced nature of contemporary racial ideology. They advance a colorblind ideology while simultaneously reinforcing the idea of distinctive and unassimilable, if not opaque, racial cultures. Issues of racial subordination are generally absent from these films (*Silver Streak* is a notable exception)—racism is reduced to one or two "incidents" that are relatively easily and comically overcome—while cultural difference is portrayed as natural and inevitable: the natural place for Eddie Murphy's character in *Beverly Hills Cop* is Detroit, not Beverly Hills, and after gaining the respect and admiration of the Beverly Hills police force despite his distinctive racial culture, he goes back where he belongs. So the ideal minority is one who retains his distinctive culture, functions effectively in the mainstream despite it, and, because of his culture, both knows his place and wants to stay there.

This orthodoxy sends a pernicious message: The status distinctions that divide society (such as distinctions of race, gender, ethnicity and sexual orientation) are defined (and perhaps justified) by real and profound differences in lifestyle, morality, temperament, norms and aesthetic sensibility. This message not only provides ready justification for continued bigotry and aversion on the part of those outside the group in question; perhaps worse yet, it also encourages group members themselves to emphasize their differences from outsiders, to exaggerate the degree, importance and antiquity of those differences (every trait becomes a cultural practice, every practice a tradition and every tradition hails from the misty domicile of "time immemorial") and even to invent traditions (to borrow Eric Hobsbawm's evocative phrase[21]) that never were. (An apt citation here would be the invention of Kwanzaa by black nationalist Ron Karenga in the late 1960s as an African-American "tradition," as if the heavily Protestant African-American community needed "our own" non-Christian Christmas substitute.)

What passes for an objective description of group difference is all-too-often nothing better than a common stereotype. Moreover, such descriptions of group difference are inevitably exercises of power—attempts to legitimate a particular and controversial account of group culture over the objection of those who would reject or challenge that account. The idea that minorities should hew to "their" cultural traditions is as hegemonic as the idea that they should assimilate to a mythical white-bread mainstream. Therefore, a right-to-cultural-difference will not simply leave people free from repression; instead, it will install a specific set of ideas about what it means to be a member of whichever group the right "protects." The normative component of the repressive hypothesis is in an important sense a self-fulfilling prophesy passing as an empirical observation. (I realize this idea requires a good deal of elaboration; much of this book will be devoted to providing it.)

Like Dr. von Helsing in Bram Stoker's *Dracula*, difference discourse is obsessed with a specific evil: the demand for cultural assimilation. This is an evil that lurks in the dark, unnamed and unknown; it seduces the innocent, attacks the righteous and drains the lifeblood of minority cultures. The counter strategy has been to expose assimilationism to the daylight by naming it and to counteract it with it its opposite: recognition of difference. If public celebrations of difference and condemnation of assimilation are the wolf's bane and holy water of multiculturalism, then a legal right-to-difference is a wooden stake.

But this demon—assimilation—is Janus faced. Assimilation is both compulsory and unavailable. Even as certain formal rules, official proclamations and cultural narratives insist on the moral necessity of assimilation to a common

norm and identity, others reinforce the inevitability and natural character of difference. The non-assimilated minority is to blame for her disadvantage, while the assimilated minority is to be apprehended with suspicion—she is a mutant, warped and unnatural like a leopard who changed its spots, but also deceptive, like a werewolf in sheep's attire.

Prescriptively, the repressive hypothesis issues a clear call for a counter attack, or perhaps a preemptive strike: against repression, we need to assert rights to the expression of difference. The more complicated story I have offered suggests no simple prescription. Rights-to-difference might counter unwarranted social repression, but they also might feed popular presumptions about group difference, presumptions that I will argue are forms of regulation and control in their own right. Multiculturalists have been right to argue that pressure to assimilate can be a mechanism of oppression. But they have largely failed to see that the oppressive machinery that produces assimilationism also contains and relies on its opposite—the discourse of cultural difference—and therefore cannot effectively be resisted by simple opposition. The attempt to run from compulsory assimilation toward recognition of difference delivers us all the more firmly into the grasp of a racism that always includes both.

"Diversity": Difference Discourse as Corrupt Détente

> Those who create and re-create race today are not just[,] . . . the people who join the Klan and the White Order. . . . They are [also] the academic "liberals" and "progressives" in whose version of race the neutral shibboleths *difference* and *diversity* replace words like slavery, injustice, oppression and exploitation, diverting attention from the anything-but-neutral history those words denote.[22]

In the 1980s something called multiculturalism made a big splash in the academy and later in political and popular conversation. At first many believed (hoped) that multiculturalism was a fad that would sweep through the ivied halls of higher learning for a time and then fade into obscurity, like designer jeans or mopeds. They were half right: multiculturalism was like designer jeans. The astute reader will note that designer jeans did not exactly fade into obscurity: instead they morphed into designer chinos, designer T-shirts, designer windbreakers, designer polo shirts and even more designer jeans. Similarly, although the heady days of the canon wars and Western Civ skirmishes are behind us, multiculturalism's durability is marked by its new ubiquitous anonymity. Multiculturalism is no longer notable because it is everywhere. As with designer jeans, many who will not admit being fans of multiculturalism

still wiggle into it every morning and many more will resort to it when we don't have anything else to wear.

My hypothesis is that despite its popularity today, liberal multiculturalism is best understood as the terms of a sort of Faustian detente that much of the left—especially the race-conscious left—was effectively, if not intentionally, maneuvered into.

Multiculturalism vindicates long-standing and strongly held commitments among many members of socially subordinated groups. For instance, black nationalism's conception of racial difference as the marker of a rift dividing incommensurable norms, epistemologies and social practices offered a sharp, coherent ideological framework and a penetrating political agenda. A nationalist would insist on a significant redistribution of social resources—not onetime cash reparations for isolated historical injuries, but a renegotiation of the background rules through which labor and raw materials are controlled—and on group self-determination, not as a weary trope to support individualist rights assertion but as an ideal to guide institutional reform on the scale necessitated by a thorough, group-focused rethinking of the entailments of democracy itself.[23] To some extent, these powerful ideas are reflected in liberal multiculturalism.

But liberal multiculturalism domesticated these ideas, blunting their sharp critique of specific economic and political institutions and distorting their prescriptions for social transformation. The nationalist belief in a deep epistemological rift between blacks and whites and the radical incommensurability of both groups' goals and values became, in its liberal multiculturalist variant, the idea of a different but epistemologically compatible "perspectives"—a multiracial group of blind men groping at the same elephant—about a unified social field that could be "leveled" by reformist tinkering. The nationalist conception of unsentimental, arms-length negotiations among sharply defined communities with distinct and opaque norms morphed into a liberal multicultural "tolerance" and commitment to "diversity" with its condescending implication of noblesse oblige and its Orwellian hierarchy of equals. The goal of social, economic and cultural autonomy was reduced in its multiculti knockoff to ethnic theme houses and an empty and defensive celebration of isolated and impoverished ghettos under the rubric of "community."

Driven by the imperatives of rights assertion and legalism generally, contemporary legal race consciousness has "split the baby" between the nationalist insistence on incommensurable group difference and the integrationist faith in transcendent humanism. As Solomon's risky bluff would suggest, the infant has been on life support ever since the bisection. Instead of a coherent approach to racial justice we have a contradictory discourse in which

difference is deployed as both a mode of regulation and an alibi for continued racial status–consciousness, while the lure of integration undermines durable racial solidarity from within and discredits it from without.

Moreover we have a set of double binds for everyone involved. Minorities are pressured to conform to socially pervasive ideas of their intrinsic culture and are admonished that the continuation of these practices is their birthright and their duty by society in general and by their own communities in particular. But they are also required to assimilate to mainstream social norms—understood to exclude the practices ascribed to minority identities—in order to participate in the institutions that provide esteem and resources in society at large. Meanwhile everyone in society is required to recognize the distinctiveness of various social groups, but we are also chastised for stereotyping when we do.

This now dominant difference discourse was not, I submit, either the inevitable outgrowth of a long-held political consensus among people of color, the left or champions of social justice; nor was it the product of considered and thoughtful strategic or normative analysis. Instead, the development of difference discourse in this peculiar contemporary form was largely reactive and defensive; the commitment to it, the function of a plausible, but I contend misguided, tactical essentialism that has become confused with ultimate ends.

Alan Bakke: Multiculturalist?

One of the most important figures in the development of liberal difference discourse in the United States was neither a lawyer nor a person of color when his ideas so profoundly changed modern civil rights. He was a white male and an aspiring medical student named Alan Bakke. For those few readers not familiar with the notorious case *U.C. Regents v. Bakke*,[24] decided in 1978, a brief summary will suffice. Alan Bakke applied and was denied admission to the University of California at Davis medical school. Bakke discovered that racial minorities with lower grades and test scores than his were admitted under an affirmative action program that essentially established separate admission tracks for different racial groups. Bakke sued the university, asserting that his Fourteenth Amendment rights to equal protection had been violated. Bakke prevailed.

Justice Powell, the author of what is widely considered to be the controlling opinion (the Court splintered 4-1-4 and Powell cast the deciding vote) did not find that all affirmative action was unconstitutional. Instead, he applied strict scrutiny to the university's program, under which in order to be permissible the racial classification would have to serve a compelling governmental interest and be narrowly tailored to the furtherance of that interest.

Powell then found the following: 1) rigid numerical quotas could never be sufficiently narrowly tailored and 2) the governmental purpose of remedying past discrimination was sufficiently compelling only if the university endeavored to rectify and could identify specific instances of institutional discrimination but not to remedy societal discrimination in general.

This was, of course, a bad day for the race-conscious left. But all was not lost. The Powell opinion left one door tantalizingly ajar: a nonquota-based affirmative action plan served a compelling interest (and thereby could overcome strict scrutiny) if it was designed to promote "diversity." Hence, colleges and universities could continue to consider the race of applicants as a factor in admissions provided that their purpose was not to remedy societal discrimination but rather to attain a diverse student body.

Although the opinion was roundly condemned at the time, it didn't take long for race conscious liberals—faced with the alternative of risking the continued viability of affirmative action on the outcome of another round of constitutional litigation—to embrace the *Bakke* diversity rationale like a life preserver. Ever since, a project of race-conscious progressive thought has been to establish that racial minorities have distinctive norms, perspectives, voices and cultural practices. This isn't to say that no one argued for or worked to advance such racial difference projects before *Bakke*. It is to hypothesize that the peculiar idea of racial difference as cultural difference was promoted from one of many ideas about racial salience to a centrality it did not merit because of Powell's *Bakke* opinion.

The diversity rationale embraced in the Powell opinion silently analogized racial diversity to ethnic diversity: both the Powell opinion and the amici curiae brief submitted by Columbia, Harvard, Stanford and the University of Pennsylvania on which Powell relied use the term "racial" and "ethnic" almost interchangably. The Powell opinion silently institutionalized an ethnicity model of race that, by its very nature emphasizes the innocent "fact" of cultural difference over the politically imposed wrongs of status hierarchy. In the ethnicity paradigm, the position of blacks is analogous to that of, say, some Italian-Americans: both have distinctive cultural backgrounds and therefore may contribute a unique perspective to the university environment. What is excluded by this paradigm is any acknowledgement that a very recent history of state-sponsored and institutional subordination distinguishes the two groups. Here the *cultural* identity of racial minority groups is emphasized at the expense of the history of racism.

Before *Bakke*, diversity was one of many reasons selective universities employed affirmative action. For instance, in 1969 a publication of the Stanford Medical School cited the need to remedy and correct for societal

discrimination (now a questionable rationale under *Bakke*): "the Medical College Admission Test . . . may be inaccurate in indicating the basic ability and motivation of a minority student who has been subjected to social . . . barriers."[25] The chairman of the medical school's minority search committee reported that the school sought to increase minority enrollment in order to better serve underserved minority communities (also unacceptable under *Bakke*): "The health problems of the ghetto have become serious. We know from past experience that the [typical white] medical student has failed to meet the challenge. . . . [We need minority enrollment] to increase the number of black and brown physicians, not to integrate Stanford with the most qualified minority students in the country."[26]

The diversity rationale is benign when understood as one of many possible reasons a university might care about the racial composition of its student body. But it is dangerous when enshrined as the only or primary reason race is significant. *Bakke*'s codification of the diversity rationale pushed institutions that wished to engage in affirmative action *and* minority groups themselves to *emphasize* cultural difference. Only by highlighting the stark differences in perspectives, norms and experiences marked by race could universities justify affirmative action post-*Bakke*. Despite judicial and university disclaimers, this rationale effectively requires universities to incorporate a substantive theory of racial difference into their admission processes—the post-*Bakke* universities and their minority applicants needed not only to assert that racial minorities would bring distinctive ideas and perspectives to the seminar table, they also needed at least a sketchy working account of the distinctive perspectives that racial minorities would bring. And a more subtle and much more pernicious implication hovered over post-*Bakke* university life: *only* by highlighting their own distinctiveness could minority students justify their presence in the universities that had admitted or might admit them.

Students don't have to read Supreme Court opinions to get the diversity message. For instance, the Kaplan Test's *Graduate School Admission Advisor* nudges the applicant who may not have thought of it herself: "Does your ethnic or cultural perspective give you a different take on the world?"[27] The cover of Kaplan's *Get into Law School: A Strategic Approach* promises "insider advice from top admissions officers" and includes a section entitled "Special Considerations," which is divided into such chapters as: "Older Students;" "Minority Students;" "Women Students;" "Gay and Lesbian Students" and "Students with Disabilities." The chapter directed at "Minority Students" instructs:

> [T]he U.S. Supreme Court ruled in *Bakke* that race can be a factor in striving for a diverse student body. Therefore . . . [i]f you participated in a minority students organization, list it in your application. . . . [I]f there is

something unique or of special interest as regards your race or ethnicity, whether it relates to your personal or professional development or illustrates how you would add a unique or different perspective to the student body, include it in your personal statement.[28]

These instructions were not lost on applicants to selective universities and professional schools. The number of references to cultural difference in a small sample of personal statements penned by successful applicants to Harvard Law School would make one think she was looking at applications to star in Disneyland's attraction, "It's a Small World," rather than at applications to attend law school:

> "My primary motivation for receiving a law degree surfaces from my personal experiences with the struggles of the Latin American immigrant."[29]

> "My experience with other cultures give me sensitivity to the voices of today's international America."[30]

> "[W]hen I supported funding for the Carolina Gay and Lesbian Association. . ."[31]

> "My curiosity about foreign cultures . . . began early."[32]

> "As the child of Paraguayan immigrants, I too occupy a borderland."[33]

> "I studied American Sign Language and was introduced to Deaf culture."[34]

> "By the time I entered college, I had mastered the language of three communities: the Paraguyan Spanish spoken by my mother at home; the profanity-laden slang of our poor, all-black Washington, D.C., neighborhood; and the textbook English enforced in the private schools I attended."[35]

> "I am a fourth generation Mexican-American with Cajun ancestry."[36]

> "[A]s an expatriate I developed a keen awareness of cultural diversity by actually being a part of different cultures."[37]

> "I want to get involved with the law here to preserve a state wealthy with culture and diversity."[38]

> "If accepted, I will bring to Harvard Law School a very rich and diverse background."[39]

Anyone who has reviewed admissions applications has read scores of slight variations on these deeply personal accounts of ethnic heritage. No doubt some of these narratives are indeed sincere. But it is equally beyond doubt that some are, to be blunt, crass stratagems designed to improve the applicant's chance of

admission to a selective college or university. Many are probably a combination of the two: generations of students are likely to internalize the equation of racial difference with inherited cultural difference and incorporate it into their sincere self-conceptions.

GROUP DIFFERENCE AND STEREOTYPE THREAT

The emphasis on intrinsic group difference may harm the academic performance of minority students in concrete and measurable ways. The internalization of group stereotypes can operate at the subconscious level, often to the severe detriment of individuals burdened with those stereotypes. Consider the research of social psychologist Claude Steele, who has demonstrated that internalized group stereotypes depress the performance of minority race students on standardized tests. In experiments at Stanford University, Steele

> asked black and white Stanford students into our laboratory and gave them, one at a time, a thirty-minute verbal test made up of items from the advanced Graduate Record Examination. . . . When the difficult verbal test was presented as a test of ability, black students performed dramatically less well than white students, even though we had statistically matched the two groups in ability level. . . . We presented the same test as a laboratory task that was used to study how certain problems are generally solved. We stressed that the task did not measure a person's level of intellectual ability . . . and the black students' performance on the test rose to match that of equally qualified whites.[40]

Why? Steele suggests that black students underperform when they feel at risk of confirming stereotypes about their group. He identifies disidentification—a response to the risk of confirming stereotypes:

> [A student] may learn to care less about the situations and activities that bring [the risk of stereotyping] about—to realign his self-regard so that it no longer depends on how he does in the situation. . . . This withdrawal of psychic investment may be supported by other members of the stereotype-threatened group, even to the point of its becoming a group norm. But not caring can mean not being motivated. And this can have real costs . . . [which] African-Americans in all academic areas—may too often pay.

Against this background, pervasive ideas about group difference, especially when connected to academic achievement, may play a significant role in minority disidentification and poor performance. The litigation-driven dominance of diversity rhetoric in almost every university statement concerning race reinforces the already widespread idea that cultural difference is intrinsic

to minority race students. Students who are consistently told that they were admitted because of their cultural distinctiveness rather than their academic promise (post-*Bakke* universities can't admit that affirmative action corrects for grades and test scores unfairly depressed due to societal discrimination or stereotype threat) likely will be tempted to embrace all-too-familiar notions of culturally specific learning styles as an excuse for anticipated poor performance. One such siren's song is the theory of Janice E. Hale-Benson in *Black Children: Their Roots, Culture and Learning Styles*. Among the distinctively black cognitive traits identified by Hale-Benson are:

> "Afro-American people tend to respond to things in terms of the whole picture . . . [whereas] the Euro-American tends to believe that anything can be divided and subdivided into pieces."[41]

In other words, blacks are not inclined toward a basic technique of analytic reasoning; if this were so it would not surprise us to find that,

> "Afro-American people tend to prefer inferential reasoning to deductive or inductive reasoning."[42]

So much for the black Sherlock Holmes (not to mention black scientists and philosophers.

> "Afro-American people tend to approximate space, numbers, and time rather than stick to accuracy."

If this were true, it would be a good reason to avoid employing black engineers, doctors, accountants.

> "Afro-American people in general tend not to be "word" dependent. They tend [instead?]to be very proficient in nonverbal communications."

Shocking, given this fact about Afro-Americans, that the literary Harlem Renaissance ever got going.

> "Black people think in terms of approximation of time, rather than punctuality. An "in house" expression is "C.P.T."—meaning "Colored People's Time"! . . . Meetings that begin on C.P. Time usually begin about twenty minutes after the appointed time."

Little wonder, some might think, that blacks have trouble competing in the environment of the industrialized West, in which many enterprises rely on the precision of mechanical time.

Despite her attempt to sugarcoat these tired stereotypes, Hale-Benson's account of black cultural styles reads like an apology for racial hierarchy.

Such unsubstantiated popular hypotheses about racial difference—plausible precisely because they echo familiar racial stereotypes perpetuated for centuries by white racists—can easily become a comfortable rationalization for withdrawing from challenging academic situations. As comfortable as warm quicksand.

Happily, Steele and his colleagues found that minority student underperformance due to stereotype threat could be reduced, if not eliminated. The cure is not racially segregated safe havens or racial diversity cheerleading, but rather racially integrated "living and learning" environments wherein minority students can meet and get to know their fellow students of all races. Steele reports that such environments "greatly reduced underperformance: black students . . . got first-year grades almost as high as those of white students in the general . . . population who entered with comparable test scores."[43] So diversity of a particular sort *is* the answer. But here diversity eschews the separatist path of least resistance and fulfills its promise. Here diversity doesn't involve minority students' exhibiting their distinctiveness for the edification of whites; instead diversity serves minority and white students by allowing them to discover what they share in common. Steele concludes:

> when members of one racial group hear members of another racial group express the same concerns [about academic performance] they have, the concerns seem less racial. Students may also learn that racial and gender stereotypes are either less at play than they might have feared or don't reflect the worst-feared prejudicial intent. Talking at a personal level across group lines can thus build trust in the larger campus community. The racial segregation besetting most college campuses can block this experience, allowing mistrust to build where cross-group communication would discourage it.[44]

This type of experience requires universities to resist racial separatism and insist on integrated environments despite student agitation for comfortable but detrimental segregation. Ethnic theme houses and the other official or quasi-official accommodations of group separatism that exist at most universities typically are considered markers of "diversity," but such policies are inconsistent with the most educationally constructive interpretation of the diversity rationale those universities advance in defense of affirmative action. As Justice Scalia noted in dissent from the majority opinion in *Grutter v. Bollinger*, which reaffirmed *Bakke*'s diversity rationale, one might question

> the bona fides of the institution's expressed commitment to the educational benefits of diversity . . . [in the case of]those universities that talk

the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate, minority only graduation ceremonies.[45]

DIVERSITY *ÜBER ALLES:*

Twenty-five years after *Bakke*, the Supreme Court reaffixed its by then faded imprimatur to "diversity" and only "diversity" in *Grutter v. Bollinger*.[46] *Grutter* upheld the University of Michigan Law School's race-conscious admissions policy—a policy that followed the blueprint drawn by Justice Powell in *Bakke*. The law school's admissions policy avoided the use of quotas, but did consider race as one factor among others, for the purpose of achieving "diversity" in its student body.

Writing for the majority, Justice O'Connor endorsed Powell's opinion in *Bakke* and upheld the law school's admissions policy. But *Grutter* does more than simply maintain the post-*Bakke* status quo. It exacerbates the troubling effects of *Bakke*. *Grutter* unambiguously installs diversity as the sole permissible rationale for affirmative action. The majority opinion asserts that "Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." And the opinion emphasizes that "Powell rejected an interest in 'increasing the number of physicians who will practice in communities currently underserved.' "[47] And more so than *Bakke*, *Grutter* gives explicit marching orders to applicants as well as selective universities and professional schools: "All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation and an essay describing the ways in which the applicant will contribute to . . . diversity."[48]

The *Grutter* opinion endorses *Bakke*'s rejection of an interest in "reducing the historic deficit of traditionally disfavored minorities" (described as impermissible "racial balancing") and its rejection of an interest in remedying "societal discrimination."[49] Yet, as if the majority were aware that "diversity" alone cannot justify race-conscious affirmative action, the *Grutter* opinion notes in passing that "*By virtue of our Nation's Struggle with racial inequality*, [minority] students are both likely to have experiences of particular importance to the Law School's mission, *and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.*"[50] This single sentence all-too-subtly acknowledges a point that the diversity rationale obscures: racial minorities are likely to have suffered from a distinctive type of *discrimination* that often will

affect detrimentally their grades and performance on standardized tests. This fact justifies affirmative action as a remedial measure. This remedial rationale, based on a frank acknowledgement of the persistence of racism, need not suggest that minority students must exhibit their racial difference in recognizable forms in order to merit admission. This alternative rationale—less than one sentence buried in thirty-two pages extolling the virtues of diversity and only diversity—suggests a compelling rationale for affirmative action, one which offers a more dignified portal of entry to minority students than diversity alone and one that undoubtedly comes closer to accurately describing the sincere motivations of selective universities and professional schools than does diversity alone. Yet the prospects of anyone openly acknowledging this shadow rationale are dim indeed; because the *Bakke* and *Grutter* courts rejected a remedial rationale in the context of "societal discrimination," to do so would invite a lawsuit.

In order to fully appreciate the costs of *Bakke*'s and *Grutter*'s diversity rationale one need only consider the experiences and performances of racial identity that the opinion excludes. *Bakke* and *Grutter* reject what was one of the most important justifications for affirmative action in professional school admissions before the *Bakke* litigation: the presumption that minority graduates are more likely to serve underserved minority communities. They explicitly exclude the idea that racial identity entails an ongoing and contemporary relationship to patterned and predictable forms of bias and discrimination, which may detrimentally affect the grades and test scores that selective universities rely on to sort applicants for admission. Post-*Bakke* universities want to know all about the unique culture of the ancestors of their minority applicants, but ignore the discrimination suffered by the applicants themselves. "Diversity" allows that the enslavement of a black applicant's great-grandmother over 150 years ago is relevant to her application, but implies that the racism suffered by the applicant herself at the hands of high school teachers and administrators a few years or even months ago is not.

In this light it would appear that a central function of "diversity" is to finesse, if not obscure the salience of contemporary racism. "Diversity" is popular with college administrators and student activists, corporate executives and civil rights lawyers, the Congressional Black Caucus and leaders of the Republican Party because it hints at racism (mollifying the activists) without being so impolitic as to name it (to the relief of the elites). Diversity—an exemplary form of difference discourse—allows all of us to focus on something pleasant, rather than on racism (*so* 1968!); it eschews a blunt assessment of the affects of bigotry in favor of a conversation about culture, a topic fit for social encounters where etiquette demands one avoid controversial subjects such as race, religion

or politics. By describing status hierarchy as a problem of intrinsic difference, difference discourse transforms what should be an indictment of social practices of exclusion and subordination into a plea for "tolerance" of a "diversity," the origins of which are left unexamined. As a result, the beneficiaries of status hierarchy are able to misdescribe and misunderstand their position as that of unwitting and repentant cultural hegemonds, too recently converted to the benevolent practice of tolerance rather than as occidental Brahmins who enjoy an inheritance of status privilege. This misunderstanding mangles the historical record, softens the diagnosis of social injustice and as a result prescribes a palatable placebo in place of a badly needed, if bitter, pharmaceutical.

BEND IT, DON'T END IT

To be clear, I do not suggest that the Court's diversity rhetoric is the fruit of a conscious plot to suppress a conversation about racism or to force minority students into a interminable production of "It's a Small World." Much less do I wish to suggest that the lawyers, activists and scholars who worked, in many cases tirelessly, promoting and refining the diversity rationale in order to save affirmative action, deserve criticism for their efforts, as if no good deed should go unpunished. For the most part, I'm certain that the proponents of diversity acted from good motives and on sound principles. First and foremost, diversity is a perfectly respectable justification for affirmative action—my complaint in this respect is that it is not the only justification and, in my opinion, is not even the most compelling. After *Bakke*, diversity was the only rationale that seemed likely to survive judicial review. And diversity, precisely because it soft-pedals—when it does not obscure entirely—the issue of bigotry, is less likely to meet with fear, anxiety and resistance. These are all good reasons to emphasize diversity, whether one is arguing before the Supreme Court or writing for the majority of its members.

And I much prefer the outcome in *Grutter*—diversity and all—to the likely alternative: the invalidation of any and all forms of affirmative action. The *Grutter* and *Bakke* opinions preserved affirmation action, a program that I believe is quite important to the educational mission of selective universities and to social justice and racial harmony in society at large. From a political perspective, diversity represented a pragmatic compromise. The *Grutter* and *Bakke* opinions are "difference splitting" at its liberal best and worst—they limited affirmative action without eliminating it. Or, as law professor Chirstopher Edley noted, "The Supreme Court [in *Grutter*] . . . adopted President Clinton's formulation 'Mend it, Don't End it.' "[51]

It's too early to attribute any substantial effects to the *Grutter* opinion, but, as it amplifies the logic and rhetoric of *Bakke*, it's fair to surmise that it will

amplify the effects of *Bakke* as well. And *Bakke*'s difference splitting not only limited the potential *scope* of affirmative action, it also shaped its *character*. With this came an unintended side effect: by altering the character of the institutional treatment of race, it also altered the incentives surrounding the expression and performance of racial identity and ultimately even sincere racial self images, at least among those directly affected by the institutions. Because those so affected were disproportionately wealthy, socially elite and culturally influential (the applicants, students and faculty of selective universities) they in turn profoundly influenced the meaning of racial identity in society as whole. Although a host of factors contributed to the development of racial multiculturalism in its current form, *Bakke* and now *Grutter*, have given the cultural difference conception of race the imprimatur of the Supreme Court and have underwritten it with the force of law. The significance of this intervention should not be underestimated. Hence my hypothesis (which contains an irony that would be funny were it not so tragic): the "conservative victory" in *Bakke* in no small part encouraged the development and popularity of that bête noire of American conservatives: race-conscious multiculturalism.

Difference discourse received a strong "push" from the *Bakke* decision that put diversity at the center of progressive race consciousness in the academy. At the same time *Bakke*'s emphasis on "diversity" hardened into an idea of *cultural* diversity when race-conscious arguments were influenced by a set of arguments developed in Ethnic Studies and the Arts and Humanities faculties that had cultural and symbolic concerns at their very core. These included the emergence of multiculturalism in the academy and later in popular conversation, particularly the "canon debates" in the humanities; the internationalism of cultural studies, which displaced or challenged the more traditional "American Studies" as well as a good piece of traditional sociology and supplemented their focus on America and Western Europe with a study of third world postcolonial struggles; and the growing concerns with semiautonomous cultural and linguistic communities within liberal democratic nation-states.[52] These debates emphasized cultural difference and the challenge that it posed to the dominance of the culture, ideas and values of the United States and Western Europe. They foregrounded the cultural recognition demands of distinct subcultural groups, insisting that liberal societies should accommodate cultural difference and acknowledge the cultural labors and aesthetic artifacts of non-Western peoples. These debates naturally began to focus on the aesthetic and social merit of various social groups.

These debates provided invaluable insights into American race relations. But too often they led to an exclusive focus on culture, a (tactical) exaggeration of cultural difference and denial of commonality, and a subsequent inattention

to economic inequality and political oppression. And as multiculturalism further calcified into identity politics, the laudable cosmopolitan quest for multiple perspectives in scholarship and for the expansion of blinkered university curricula yielded place to a provincial obsession with personal identity and in-group solidarity. For student life, the results were less liberation from cultural hegemony than the morphing of one hegemony into another. As sociologist Todd Gitlin notes:

> The newcomer [to the university] . . . finds exclusive identity groups for partying, dancing, listening to music in a familiar style. She finds the Black Sociology Association and the Asian Business Association. . . . . [P]repackaged identities multiply . . . [and] when everyone else seems to have found a group to eat with, party with, hang out with, and date, the newcomer feels the pressure to find one as well. . . . Even students who feel uneasy about the prefabricated categories feel peer pressure to identify with one. . . . The group allays what is already an adolescent anxiety about finding a place. But the spread of identity-group culture heightens that anxiety in the first place.[53]

Of course we can't know what the racial landscape at America's elite universities and in the nation as a whole would look like had Alan Bakke never brought his lawsuit. But it's safe to say it would look different. Without *Bakke* it is likely that affirmative action programs would have continued to consider race as one factor among many in order to serve a number of goals including the promotion of diversity and the remediation of societal discrimination. Free of *Bakke*'s requirement of specific findings of identifiable discrimination, universities may have used (and admitted using) racial preferences as a means of correcting for the societal racial bias that affects the grades and test scores of many individual applicants. The Court could have eliminated "quotas" without limiting universities to the diversity rationale and there is no reason that affirmative action based on a number of racially sensitive rationales should have been any more expansive or severe than that based only on diversity: the effect on applicants who did not benefit from affirmative action would most likely have been the same.

But the effect on racial identity would not have been the same. Without *Bakke*'s requirement that affirmative action be justified in terms of diversity, other approaches to racial inclusion would have been available to universities. A race-conscious policy that focused on the need to undo the legacy of racial subordination and to correct for its contemporary manifestations might have made a greater number of racial "scripts"[54] available and encouraged a richer and more-nuanced understanding of racial identity. Subtle and overt incentives

for social integration and at times assimilation might have encouraged a different performance of racial identity had *Bakke* not counterbalanced them by explicitly encouraging the emphasis on cultural difference. The resulting racial identities would not have been less or more authentic than those we have today. But they would have been different, and possibly in ways that both the ideological left and right would have preferred: perhaps more overtly focused on social justice as a political matter and less enraptured with cultural difference and the corresponding production of racial affect.

Bakke-free admission policies would not have focused exclusively on diversity (which later hardened into a quite specific idea of *cultural* diversity) with its implicit requirement that people of color stand out in specific and prescribed ways into order to justify their presence. Instead they might have acknowledged that the history of American racial hierarchy creates a mix of racial identities that are based on a complex relationship to mainstream American culture and institutions—a relationship of cooperation and subversion; of sincere admiration, deep-seated contempt and ironic detachment; of a desire for acceptance and an insistence on distance. Such racial identities are indeed distinctive and do contribute to a vibrant and diverse institution. But such diversity can only be fully appreciated in the light of an acknowledgement of racial status and racial hierarchy. In this respect, racial difference marks the difference in experience and perspective developed because of one's position in a race-conscious society, not necessarily *cultural* difference (and even less so intrinsic or inherited cultural difference) in the sense of different norms, traditions, epistemologies or standards of aesthetic evaluation.

Such an understanding of race may well have pleased people across the ideological spectrum more than has the contemporary racial multiculturalism spawned by diversity discourse. Perhaps fewer people would have associated racial identity and racial justice with a suspension or rejection of mainstream norms. Instead, racial identity might have been more widely understood as fluid and kaleidoscopic, and racial justice as potentially consistent with a range of identities and relationships to the mainstream, including the embrace of majority norms and assimilation to existing institutions. At the same time, racial identity might not have entailed an essentially conservative project of cultural preservation and a fetishism of pedigree and tradition as it increasingly does under the rubric of liberal multiculturalism. Instead, racial identity might have been ripe with the potential eruption of new cultural forms and new ways of being, the liberation of the human spirit and the creativity of the avant garde. Finally, difference discourse might not have seemed a logical extension of antiracism in this alternative reality. Instead it might have seemed to be what it for the most part is—a separate project with different normative stakes,

independent factual assumptions and animated by distinct ideological commitments.

It's not too late. We should refine the "diversity" rationale for university affirmative action and admit that the impetus for race consciousness in admissions reflects the common-sense intuition that racial justice and racial harmony require that prestigious selective universities be racially inclusive, and not the questionable (and vulnerable) idea that racial identity necessarily comes bundled with a profoundly distinctive culture. Of course this would require affirmative action proponents to devote the same amount of energy to fighting *Bakke*'s rejection of the societal discrimination rationale that they now devote to securing a stay of execution for the diversity rationale. This strikes me as well worth the effort and the risk. Even the *Grutter* opinion's validation of "diversity" suggests that its days are literally numbered: Justice O'Connor opined that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary." Opponents of affirmative action quickly made it clear that when the twenty-five-year reprieve granted by Justice O'Connor has passed, they'll be there to throw the switch. Those of us who believe that race consciousness is necessary might be more effective in presenting the most compelling principles and intuitions underlying our commitment to racial awareness (rooted in a recognition of historical and ongoing subordination based primarily on ascriptive social status—not cultural difference) when freed from the reflexive, exclusive and obligatory mantras of "diversity."