

EQUALITY AND THE MANTRA OF DIVERSITY

*Laurence Thomas**

In response to the decision rendered by the United States Supreme Court in *Grutter v. Bollinger*,¹ University of Michigan's president, Mary Sue Coleman, claimed that "[o]ur diversity is our strength".² Not too long ago, it seems, attracting and training talented minds was held to be the very essence of a university. And a positive correlation was thought to hold between the quality of a university and the quality of the students that it attracted. There were perhaps other aims. However, these aims were clearly thought to be subordinate to the aim of attracting and training talented minds. The only proviso here is that this should be done in a morally responsible way. I shall say a word about this in Part III below.

Now, to be sure, both defining and recognizing talent has always had its difficulties; and no doubt it always will. In this regard, it is perhaps fair to say that the very idea of talent is necessarily an evolving one. Still, the thought used to be that the primary aim of the university is to attract talent rather than something else. Indeed, if a university made attracting something else its primary objective, then on that account alone it was considered a lesser institution of higher learning.

This, of course, raises the issue of diversity. Certainly, there is nothing wrong with diversity as such. However, it would seem that those who support diversity under the aegis of affirmative action are making a quite extraordinary claim, namely, that diversity should be on a par with attracting and educating talent. That is, achieving diversity should be a competing first principle in a university's admissions process. Recruiting talent remains a first principle, but now it has a competitor. As I have just said, there is nothing wrong with diversity as such. It has its benefits, as does height or good looks or physical strength. However, it cannot be on a par with talent. And it is disingenuous to insist

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1. 123 S. Ct. 2325 (2003).

2. U.S. Supreme Court Rules on *University of Michigan Cases*, EL-CONQUISTADOR-NORTHWEST.

that it should be, as I shall show below in these introductory remarks, with an example from athletics. Worse, making diversity a first principle harms the very people who are intended to be the beneficiaries of affirmative action. On the other hand, excellence takes many, many forms; and the academic pursuit of minorities is best served by what I shall refer to as idiosyncratic excellence.

Focusing upon skin color or ethnicity is, I hold, a way of not taking seriously the very individuals that one aims to help. This is because the truth of the matter is that focusing upon idiosyncratic excellences, forged in the face of oppression, is a resounding way in which to affirm the richness of a group's traditions and experiences. What is more, since the prevailing—and surely correct—view is that there are no intellectual differences between races and ethnic groups, is not justice itself better served by looking for idiosyncratic excellences where traditional forms of excellences are not readily apparent? We do not have to make a god out of standardize tests. I shall defend these claims in what follows. First, though, I should like to quickly deal with the matter of legacy and sports.

I. MONETARY GIFTS AND BRAWN

It is commonplace to suggest that affirmative action is no different than the practice of admitting students for the purpose of playing sports, and likewise for the legacy practice of giving special weight to the applicants of children of alumni or to the applicants of children of large donors. These two practices may or may not be just; however, it is painfully obvious that there is no parallel here to favoring a person solely on the basis of race or ethnicity. Let me just take the case of donors.

Many minority sports players, for example, earn huge sums of money. Any one of them could donate a million dollars to an institution of higher learning. Or, collectively, several could pool their resources and do so, or make an even more impressive donation. And they could do so in the name of a community or an individual or a cause such as scholarships for minorities. For example, Bill Cosby (that is, William H. Cosby, Ph.D.) donated twenty million to Spelman College in Atlanta.³ Needless to say,

3. 20 PHILANTHROPY NEWS DIGEST (June 1999). The report maintains that for the *decade* of the 1990s, the total donation from wealthy blacks to historically black colleges and universities (HBCU) was 32 million dollars in the form of three gifts. According to the report, the other two donors were Willie Gary (10 million to Shaw University) and Oprah Winfrey (2 million to Morehouse

were any of his family members or recent (or perhaps even distant) descendants to apply to Spelman College, their application would be given special consideration. And the same would be true if, instead, he had given that amount of money to any other university, including any one of the Ivy League Schools.

Fifty years ago, owing to racism no doubt, few blacks were in the position to make large monetary gifts to colleges. Not so nowadays. What is more, it takes only one such gift to make the difference. So it is not the case that if those of whatever hue have not given thus far, then they are at a disadvantage vis-à-vis those who have done so. Institutions of higher education are always looking for new sources of income. And they are willing to ingratiate themselves to a considerable extent in order to get substantial donations. Of course, twenty million is a spectacular gift by any measure. However, schools have all been known to accept with glee a “meager” one million. Collectively, then, black athletes have the monetary power to make it the case that more minorities benefit from the legacy practice. Black athletes may choose not to do so. After all, it is their money. But then this stance serves to vitiate the complaint, since it is no less true among those who have given that they, too, could have chosen not to do so.

Obviously, blacks have benefited and are benefiting enormously from the practice of admitting students for sports programs. However, it is no secret that admission here is based upon—dare I say it—the ability to play the sport in question. No one is admitting blacks to play sports solely for the purpose of having a rainbow look, or whatever, on the playing field. Rather, the operative criterion is ability. Accordingly, those who think that this practice shows that affirmative action is justified on the grounds that affirmative action is rather analogous to it might want to think again. For that practice from which blacks have benefited enormously unmistakably fixes upon ability, albeit a nonintellectual one. The practice does not now treat, nor has it ever treated, skin color as an ability in and of itself. If no one is choosing sports players on the basis of skin color and ethnicity,

College). Let us assume that the report is not entirely up to date and that some blacks have, for instance, set up charitable programs to help minorities, as opposed to making a donation to an HBCU. Even so, it is striking that some of the athletes whose names readily come to mind are not mentioned. I understand that most sports players do not earn such sizeable salaries throughout their lifetime. That is one reason why I mentioned pooling resources. I am grateful to Jason Holtz for discussions regarding the arguments of this section.

but on the basis of raw talent instead, then nothing could be more ludicrous, disingenuous, and utterly incongruous than insisting that color and ethnicity are relevant in an admissions policy at institutions of higher learning. Try the comparison explicitly: in the matter of sports skills—such as throwing, catching, or hitting a ball—race or ethnicity is absolutely irrelevant, but in the matter of intellectual skills race or ethnicity is relevant.

II. THE O'CONNOR VOTES: SOME REFLECTIONS

Justice Sandra Day O'Connor voted to uphold the admissions policy of the University of Michigan Law School (Law School),⁴ but to strike down the admissions policy of its College of Literature, Science, and the Arts (Undergraduate School).⁵ On the one hand, it might be thought that she was rather inconsistent here. On the other hand, Ralph Waldo Emerson's remark that "[a] foolish consistency is the hobgoblin of little minds"⁶ might seem very apropos. Not really, though; for we most certainly do not have a little mind in the person of Justice O'Connor. At the end of this Part, I offer some detailed and sympathetic comments regarding O'Connor's opinion for the Court.

Clearly, Justice O'Connor is very sensitive to the history of racism in America; and she believes (with some justification to be sure) that had there not been this history of racism in the United States, minorities—blacks in particular—would have a greater presence throughout American society.⁷ There is no gainsaying the spirit of this point, though the details are another matter.

For instance, without there ever having been racism, it does not follow that a group would be sufficiently visible in all segments of society, certainly not if sufficient visibility is to be assessed by the criterion of proportionality. Complete liberty and equality in a society is compatible with there being cultural traditions, say, that incline members of a group to pursue one walk of life rather than another. All the liberty and equality in the world is not likely to change the fact that far more blacks are apt to take a liking to gospel music than are Muslim Arabs or Jews. More generally, taking cultural diversity seriously entails acknowledging that

4. *Grutter*, 123 S. Ct. at 2331.

5. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2431 (2003).

6. RALPH WALDO EMERSON, *SELF-RELIANCE* (1841).

7. See *Grutter*, 123 S. Ct. at 2339-41.

interests may differ across ethnic and racial groups. Hence, the absence of a minority group in one sphere of life rather than another may be benign, as opposed to reflecting social opposition (subtle or explicit) to the group's participation in that activity. What is more, if respect for cultural traditions is taken seriously, it could even be wrong to try to shift those preferences. The ideal of cultural diversity denies what we might call a Kantian conception of the deep self, according to which there are common interests (over and above basic needs, of course) that all human beings share by virtue of being human.

Still, there is no denying O'Connor's substantive point that had there not been racism in America, blacks in general would have prospered more than they have done thus far; accordingly, success among blacks would, at once, be both more routine and more visible.⁸ With this poignant truth in mind, it seems that O'Connor wanted to make a moral gesture towards this unsavory aspect of America's past.⁹ She was, it seems, guided by the idea that a nation ought to do something to help a people whom it had terribly wronged, but in a way that is least at odds with the American ideal that people should be rewarded on the basis of merit and not the color of their skin.¹⁰ Thus, she voted to strike down the admissions policy of the Undergraduate School because that policy flagrantly violated the ideal of merit by automatically awarding an entire one-fifth of the 100 points needed for admission to minorities solely on the grounds that they were minorities; whereas she upheld the admissions policy of the Law School because it merely allows that race can be taken into account.¹¹ That is, race can—but need not—be a plus factor.¹²

Even the most ardent opponent of affirmative action can see a significant difference between these two policies. Nothing can possibly justify awarding minority students (merely on account of their being such, and without any regard for their academic record) a fifth of the points that they need for admissions. This makes an absolute mockery of merit. By contrast, merely making race relevant seems not too far removed from the business of admissions as usual. For everyone knows that there are lots of

8. *See id.* at 2340-41.

9. *See id.*

10. *See id.* at 2341-42.

11. *Compare Gratz*, 123 S. Ct. at 2416, 2430-31, *with Grutter*, 123 S. Ct. at 2342-44, 2347.

12. *Grutter*, 123 S. Ct. at 2345-46.

factors that go into the decision to admit or deny applicants. So if race is just one among these many factors, then allowing for the mere relevance of race almost seems innocuous. This is so because it does not look as if race alone can ever carry the day. There is the rub, however. For precisely what is true, as a result of the Court's decision, is that race can carry the day.

It will be remembered that Barbara Grutter (GPA 3.8; LSAT 161) lost her case to be admitted to the Law School, although minorities with lower scores were admitted.¹³ In fact, in 1995, six out of eleven minorities were admitted with a grade point average between 2.50 and 2.99 and an LSAT score between 161-163, whereas none of the thirty-nine white applicants with identical scores were admitted.¹⁴ Universities maintain that geographical location is relevant, and we understand that. Yet, most people would be horrified to learn that a student from Oregon was admitted over a student from Mississippi even though the latter had significantly higher grades. For most people, the intuitive idea here is that geographical location can count if things are more or less equal between two candidates. Geographic diversity is a good thing when, and only when, other far more important desiderata are satisfied. Alas, this is definitely not what the Supreme Court's decision has said about race. For as the figures above indicate, the Law School's admissions policy is such that there can be a considerable spread between the lower scores of a minority student admitted and the higher scores of a Grutter rejected, where it turns out that no white with equally low scores is admitted.

Suppose, just for a moment, that the Law School had admitted one or two among the thirty-nine whites with the low scores indicated above. Then a not implausible case could have been made that there is a certain special quality that shows itself among students with this constellation of low scores. It could be further said that although blacks are more likely to showcase this special quality, whites also exhibit it; and we are inclined to accept students, whatever their origin, who have these scores and exhibit this special quality. Against this scenario, Grutter's argument immediately becomes somewhat less compelling, since a composite picture could easily suggest that someone is

13. *Id.* at 2332, 2334; Petition for Writ of Certiorari at 5-8, *Grutter*, 123 S. Ct. 2325 (No. 02-241).

14. Petition for Writ of Certiorari, *Grutter*, 123 S. Ct. 2325 (No. 02-241).

excellent even if the person's GPA is rather abysmal. After all, idiosyncratic excellence, as I shall call it, is excellence nonetheless; and a student who does exceptionally well by the traditional criteria really has no grounds for complaint if idiosyncratic excellence outshines her or him.

However, the Law School's admissions policy is decidedly not an embodiment of the scenario that I have just described. Rather, the school's policy is one according to which a black with far lower scores than a white can, in the name of diversity, be admitted simply by virtue of being black. I cannot imagine a minority person who would want to be the object of that sort of admissions policy, even if the policy were only used to select between different minority groups. Thus, the school says to minority person Smith: "Yes, yes! We realize that you are quite qualified indeed, but you see, Smith, we want to have more individuals from this other minority group. For balance, you understand, because not enough of them have been successful. Given our goal and being that you, Smith, are a minority who knows oppression, we are sure that you will understand why in this instance we accepted a less qualified member from one of these other minority groups thereby excluding the more qualified you." It is inconceivable to me that a minority would find this morally palatable. Surely this policy does not become morally palatable if we switch the actors, and it is a more qualified white who loses to a less qualified minority. No matter what, we have an affront to the very idea of merit; and this is so even if we are rightly mindful of the shameful racism that was a part of America's past. This is why I claim that O'Connor widely missed the mark in this regard in voting to uphold the Law School's admissions policy. That policy embodies the idea that race can trump excellence. And no amount of window dressing can change that.

Minorities might have missed the perniciousness of the policy by supposing that collectively it is "us minorities against them whites." This is nothing but an illusion. The groups that are accorded favored minority status by the school include African, Mexican, Puerto Rican, and Native American. So the balancing scenario that I described two paragraphs ago, according to which in the name of balance a less qualified minority person of one group is accepted over a more qualified minority person of another group, could be much closer to truth than fantasy. For example, if a Native American's excellence may not be sacrificed

for the sake of balance, why should a white's? Or, to put the point more forcefully, if respecting all persons means that a Native American's excellence cannot be sacrificed for the sake of balance, then does it not also mean that a white's excellence cannot be sacrificed for that end? The Court's opinion notes that, in the case of comparable scores, blacks (twelve out of twelve admitted) were favored over Hispanics (two out of twelve admitted) by the University of Michigan Law School. This is an Orwellian moment, if I may paraphrase the famous remark from *Animal Farm*: all minorities are equal, but some are more equal than others!¹⁵

15. GEORGE ORWELL, *ANIMAL FARM* (1946). LAWRENCE BLUM, "I'M NOT A RACIST, BUT . . .": THE MORAL QUANDRY OF RACE 96 (2002), strikes me as quite sensitive to the concern being raised here. He writes, "The admissions committee continues to favor black, Latino, and Native American applicants because they believe—incorrectly—that doing so is required to meet valid institutional objectives."

As I have said, it seems to me that Justice O'Connor wanted to make a moral gesture towards America's despicable past with regard to the matter of race. This, in and of itself, is perhaps a laudable stance. Moreover, the Law School's admissions policy admits of a very innocuous description, namely that race can be a plus factor in admitting a student.¹⁶ On a most straightforward understanding of these words, race seems to be doing very little work; accordingly, they do not have the ring of violating the ideal of merit. Thus, the moral gesture seems understandable if not, in fact, appropriate. Alas, what words mean must sometimes be gleaned from the nature of the practice(s) to which they are applied. And the actual practice of the University of Michigan Law School's admissions policy reveals that the words in this case mean something quite pernicious, namely, that a minority who falls significantly below whites in terms of qualifications may nonetheless be admitted. In particular, these words do not mean that if a minority has exhibited what I have called idiosyncratic excellence, then she or he may be admitted. Hence, what these words mean is that merit may be violated. This is an unacceptable moral gesture for addressing the wrongs of the past. And the proof of this is that, in the case of two individuals from different minority groups in competition with one another for admission, the more qualified minority would surely not want to be excluded on the basis of this policy simply because the less qualified minority would add greater diversity.

The idea of idiosyncratic excellence is extremely important; and I believe that Justice O'Connor had something like it in mind when she voted to uphold the Law School's admissions policy. For she wrote in her opinion that "[t]he hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'"¹⁷ She further noted, with approval, that "[t]he policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant."¹⁸ This latter point, which is compatible with the first, tells us what we all know: namely, that the highest test scores do not entail that a student is the most brilliant; likewise, the lowest

16. *Grutter*, 123 S. Ct. at 2333-34.

17. *Id.* at 2331.

18. *Id.* at 2332 (internal citations omitted).

test scores do not entail that a student is intellectually vapid. Test scores are very powerful indicators; however, they are not the sole indicators of a person's intellectual wherewithal. Accordingly, if there are strong indicators of excellence from other quarters, including experience itself, then that ought to count. Strictly speaking, then, between any two candidates A and B, the more suitable candidate could turn out to be the one with lower test scores, even where the other has the highest possible scores.

Thus, suppose that a candidate speaks several languages fluently and has written several remarkable novels exhibiting ingenious depth and subtlety of plot, but has quite low test scores. Only someone a little too in love with test scores could fail to see the considerable merit of such a candidate. This is an instance of what I am calling idiosyncratic excellence. For contrary to what one would naturally think given this person's accomplishments, this individual might not have high test scores.

So I read O'Connor's opinion as an endorsement of idiosyncratic excellence. One problem is that on conceptual grounds idiosyncratic excellence cannot be limited to race. The other problem is that there is no indication that idiosyncratic excellence is behind the decision of the Michigan Law School to admit minorities with a GPA ranging from 2.50 to 2.99 and with an LSAT score ranging from 161 to 163.¹⁹ Had these minorities performed outstanding community service? Had they shown extraordinary determination? Were they authors? O'Connor's opinion makes no mention of these forms of excellence, which suggests their absence.²⁰

It is tempting to think that surely the idea of idiosyncratic excellence is an implicit feature of the admissions policy of Michigan's Law School. One would very much like this to be the case. One has to think, though, that if idiosyncratic excellence were the explanation for why, from the 1995 pool of applicants, the Law School admitted six out of the eleven minority applicants with the scores mentioned above, but no whites out of thirty-nine with identical scores, then officials would have wasted absolutely no time in pointing out this policy, as nothing would have silenced critics faster: "Oh, Ms. Grutter, you are talking about the black, whom we admitted over you, who wrote that amazing novel and

19. See *supra* note 13 and accompanying text.

20. See *Grutter*, 539 U.S. at 2332-35.

did six years of social service in South America, but who had only a 2.50 GPA.” Significantly, supporters of the Law School’s policy do not appeal to idiosyncratic excellence. They appeal either to diversity *tout court* or to reparations, neither of which has anything whatsoever to do with merit.²¹

21. Though I do not follow their views, my thinking about reparations owes much to the work of BERNARD BOXILL, *BLACKS AND SOCIAL JUSTICE* (1983), and HOWARD MCGARY, *RACE AND SOCIAL JUSTICE* (1999). I am much indebted to their challenges down through the years. The idea of idiosyncratic excellence introduced in the text is meant to address some of their concerns. It is also meant to address the concern of self-esteem raised by Thomas Nagel, *Equal Treatment and Compensatory Discrimination*, in *PHILOSOPHY AND PUBLIC AFFAIRS* 492 (Joel Feinberg & Jules Coleman eds., 1973). The idea of idiosyncratic excellence owes some of its inspiration to the work of Martha Nussbaum, *Human Capabilities, Female Human Beings*, in *WOMEN, CULTURE, AND DEVELOPMENT* (Martha Nussbaum & Johnathan Glover eds., 1995). Regarding reparations, my view is that (a) reparations place a burden upon innocent people, since the U.S. government has no independent monies of its own and many have come to this country, whites and minorities, long after slavery, and (b) a monetary value is not properly attached to some wrongs, as in the case of murder and rape, for example. I have developed this argument in my essay *The Morally Obnoxious Comparisons of Evil: American Slavery and the Holocaust*, in *YEAR BOOK OF THE FRITZ BAUER INSTITUTION* (2002). I should mention that Dworkin himself is not impressed with the reparations argument. See Ronald Dworkin, *The Court and the University*, 50 *N.Y. REV. BOOKS*, May 15, 2003, at 8.

Famously, the distinguished legal scholar Ronald Dworkin has argued that no one has a right to be admitted to the schools to which she or he applies; hence, not being admitted does not violate an applicant's right.²² This, of course, is a cogent point. However, this very cogent point must not be thought to negate the truth, accepted by Dworkin, that applicants do have a right to have their applications treated fairly. Fair treatment does not entail admissions; and Dworkin pushes this point very hard in favor of affirmative action.²³ One could agree with Dworkin that those whom society has made particularly vulnerable need protection, and with perfect consistency disagree with him over what he thinks that protection should be. Protection, to be sure, is a benefit. Nonetheless, it is specious reasoning to suppose that if we are justified in bestowing one kind of benefit upon a group, namely, the benefit of protection, then we might as well suppose that we are justified in bestowing upon them the benefit of a special advantage when it comes to admissions. And it is certainly just as specious to suppose that bestowing this latter benefit upon a group does not present a problem, because in the first place no one has a right to be admitted to the schools to which she or he applies. Fairness remains an issue; and everyone has a right to be protected from unfair institutional practices. A candidate can be treated unfairly in being denied admissions notwithstanding the fact that she or he had no right to be admitted. Why, that sort of thing used to happen all the time in years gone by when blacks applied to colleges and were summarily rejected. We called it racism. And rightly so. That charge does not come in for reassessment because we now understand, thanks to Dworkin's eloquent argument, that no one has a right to be admitted to the institution to which she or he

22. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 393-97 (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 223-39 (1977) [hereinafter *RIGHTS*]; RONALD DWORKIN, *A MATTER OF PRINCIPLE* 293-315 (1985). Of Barbara Grutter, Dworkin writes that "[t]he disadvantage that affirmative action plans cause white applicants is very often exaggerated. Barbara Grutter, the plaintiff in the law school case, would have had only a slightly greater chance of being admitted if no affirmative action plan had been in effect, and would very likely not have been admitted anyway. But no moral right of hers was violated even if she would have been admitted." Dworkin, *supra* note 21, at n.12; see also Ronald Dworkin, *Is Affirmative Action Doomed?*, N.Y. REV. BOOKS, Nov. 5, 1998, at 10, where he discusses this thesis more explicitly in the context of the equal protection clause. I am at pains to understand Dworkin's reasoning with regard to Grutter. So often in life, the only chance that one has is a slight chance, from which it hardly follows that one might as well not care if, in a wrongful manner, someone ruins even that slight chance or that one has no grounds for complain if the person did.

23. See, e.g., *RIGHTS*, *supra* note 22, at 227.

applied. And I repeat: showing that minorities deserve special protection from the insidiousness of racism does not entail showing that they also deserve a special advantage with regard to admissions.

At any rate, it seems to me that those in favor of affirmative action are so besotted with Dworkin's support of it that they do not attend to all that he says. He writes:

But what if a law school faculty, in the exercise of its right to "determine for itself . . . who shall be admitted to study," decided to count the fact that an applicant is Jewish as a negative consideration, though not an absolute exclusion, in the competition for all its places? It might decide that it is injurious to "diversity" or to the "robust exchange of ideas" that Jews should form so large and disproportionate a part of law school classes as they now do. Or what if a Southern medical school one day found that a disproportionately large number of black applicants was being admitted on racially neutral tests, which threatened the diversity of its student body, to the detriment, as it determined, of its educational process? It might then count *being white* as a factor beneficial to admission, like being a musician or having an intention to practice medicine in a rural area.²⁴

Suffice it to say that most supporters of affirmative action think it entirely out of the question, as a matter of principle, that whites could ever be the beneficiaries of the practice. Why, they would insist that such a thing would be radically unfair! Yet, given what is said to be the "browning" of America, Dworkin's fanciful scenario may turn out to be anything but that.

24. Ronald Dworkin, *The Bakke Decision: Did it Decide Anything?*, N.Y. REV. BOOKS, Aug. 17, 1978, at 11.

I do not know whether O'Connor's opinion was informed by Dworkin's argument. However, some of her remarks echo his position; for he, too, thinks that diversity alone is a compelling reason for affirmative action, due to the fact that racism in America has been what it is.²⁵ There can be no doubt that O'Connor is mindful of the morass of race in America. Hence, her remarks: "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."²⁶ Thus, I believe that although O'Connor would prefer that matters of race and admissions be handled by way of idiosyncratic excellence, she has been prepared to allow that race itself counts if that would serve to close the chapter on a horrible aspect of American history. Whereas Dworkin thinks that the idea of taking race into account can flow from the deliverances of justice itself,²⁷ O'Connor is simply being expedient at the cost of justice strictly understood. Most assuredly, she does not think that reparations carry any weight.²⁸ Quite simply, she holds that admitting an occasional minority with very low scores is worth it if that will hasten the day when the standing of minorities in society is such that minorities—the black race in particular—are no longer haunted by the stigma of racism. Better a quick solution at the expense of justice than a protracted one at the further expense of lives that have already been sorely damaged. From a different direction, O'Connor could very well have supposed that she was acting, not in the name of expediency, but righteousness itself, where righteousness is understood to be yet a higher form of moral excellence than justice.²⁹

III. JUSTICE THOMAS AND THE MATTER OF STIGMA

To the disappointment of many, Justice Clarence Thomas is not a supporter of affirmative action, unlike the late Thurgood Marshall who staunchly supported the practice. Thomas holds that affirmative action gives rise to a formidable problem, namely,

25. See, e.g., Dworkin, *supra* note 21, at 4; Dworkin, *supra* note 22, at 12-13.

26. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2330 (2003).

27. See Dworkin, *supra* note 21.

28. See *Grutter*, 123 S. Ct. at 2338-39.

29. I have developed this line of thought in my essay *Forgiving the Unforgivable*, in *MORAL PHILOSOPHY AND THE HOLOCAUST* 201, 222-26 (Eve Garrard & Geoffrey Scarre eds., 2003).

that of stigma.³⁰ He wrote: “The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving.”³¹ Thus, Thomas thinks that the practice occasions the very concern that Justice O’Connor hopes it will alleviate. It is poignant and of great significance that Thomas came in for a torrent of venomous criticism for his views about affirmative action. To hear many blacks tell it, the only thing that a self-respecting black person can do is support affirmative action. Even prior to the Court’s decision, Thomas was seen by many blacks as “a study in arrested human development . . . blaming other victims of racism for the scourge of racism, itself.”³² However, for his vote on affirmative action, an online newspaper, *The Open Line*, declared that he earned the Buckwheat Award;³³ and the white columnist Ellen Goodman insisted that he was trapped in his past.³⁴

30. *Grutter*, 123 S. Ct. at 2362 (Thomas, J., concurring in part and dissenting in part).

31. *Id.* (Thomas, J., concurring in part and dissenting in part).

32. *All About Clarence: Self Loathing on the High Court*, THE BLACK COMMENTATOR (Mar. 6, 2003), at http://www.blackcommentator.com/32/32_commentary.html.

33. *Justice Clarence Thomas: Earns Buckwheat Award*, THE NORTHSTAR NETWORK (June 24, 2003), at <http://www.thenorthstarnetwork.com/news/opinion/182027-1.html>.

34. Ellen Goodman, *Thomas Trapped in His Past*, WASH. POST WRITERS GROUP (2003), at <http://www.postwritersgroup.com/archives/good0708.htm>.

Further, it is held by many that Thomas was a beneficiary of affirmative action; and from this premise it is inferred that consistency requires that he be supportive of the practice.³⁵ It is precisely this line of reasoning that Maureen Dowd advanced in comments upon Thomas after the Michigan decisions had been rendered.³⁶ The fallaciousness of this line of reasoning is too obvious for words. Consider an analogous claim: “Many white men have benefited from the old boy network, so consistency requires that they be supportive of it.” Obviously not. Or imagine that a mother was a prostitute. She now changes and becomes an upstanding and successful businessperson in the pharmaceutical industry. Let us suppose, further, that some of her success is owing to her horrendous past. Her daughter then finds about her past, goes into the prostitution business, and throws the mother’s past in her face, exclaiming: “Look where it got you!” Does anyone really want to suggest that the mother has no moral grounds for criticizing her daughter?

35. The substantive moral charge, obviously, is that Clarence Thomas is a hypocrite—and a vicious one at that for having profited from affirmative action and then, as one critique put it, pulling the ladder up behind him. Though determining the truth of this charge is obviously beyond the purview of this essay, I wish to make a merely formal statement about what does not count as a hypocrite. A person who actually has a change of heart about matters is not, on that account alone, a hypocrite. Of significance, however, is that it is not clear that Thomas ever supported affirmative action. And one does not have to support affirmative action in order to think that racism has and still does exist. Has Justice Thomas benefited from the practice? Perhaps. Whether that makes one hypocritical depends on how one has done so. Without being a hypocrite, one can benefit from the mistakes of others without endorsing the thesis that people should make mistakes or without going out of one’s way to discover the mistakes of others or without in any way contributing to their mistakes. I am grateful to Laura C. Schlessinger for this point. I have relied upon her criteria for distinguishing between the hypocrite and the non-hypocrite. I also wish to thank my students Rawan Jabaji and Christopher Kirker for helping me to sharpen my discussions of Thomas.

36. Maureen Dowd, *Justice Clarence Thomas Denies His Past*, INT’L HERALD TRIBUNE (June 26, 2003), available at <http://www.ihrt.com/articles/100755.htm>. She wrote: “Other justices rely on clerks and legal footnotes to help with their opinions; Justice Thomas relies on his id, turning an opinion on race into a therapeutic outburst.” *Id.* For the record, the following should be noted: The opinion of the Court, written by O’Connor, was 36 pages in length. Replete with a multitude of references in the text itself, the opinion contains no footnotes (*i.e.*, a numbered comment at the bottom of the page that corresponds to a point in the text). Thomas’s dissent was 32 pages in length. It is also replete with a multitude of reference in the text itself. It also contains 16 footnotes. The issue here is not whether one opinion is better than the other; for brilliance of legal opinion is hardly a function of footnotes or, for that matter, references in the text. The point here is simply that Dowd utterly distorted the style with which Justice Thomas’s opinion was written, implying that his dissent did not even have the appearance of a legal document suitable to the character of the august institution of which he is a part. I do not know how she missed the fact that O’Connor’s opinion had no footnotes whatsoever.

At any rate, arguments that attack the person in lieu of what she or he says are called *ad hominem*s. Whatever the explanation might be for why Thomas is not supportive of affirmative action, or for how he got where he is in life, the real issue is whether his central argument against affirmative action is sound. Interestingly, the university might serve as a marvelous context for testing the soundness of Clarence Thomas's thesis precisely because universities, including many of the most prestigious ones, sing the praises of this practice. Moreover, they have been doing so for over two decades now. Recall that it was twenty-five years earlier, in June of 1978, that the *Regents of University of California v. Bakke*³⁷ case was decided. Further, the university setting is generally considered a veritable cauldron for liberal thought.

37. 438 U.S. 265 (1978).

So nothing is more mysterious than that, according to most minorities on university campuses that support affirmative action, after more than two decades of affirmative action the very stigma of inferiority about which Thomas expressed grave concern seems to be alive and well.³⁸ Indeed, they insist that this is the case. Surely something is amiss here. Universities offer orientation sessions in political correctness and everyone knows, for instance, that “black” is out and “African American” is in. Why, even students from foreign countries who sometimes have trouble expressing themselves in English know to say “African-American.” Nowadays, white students think nothing of suggesting that Jimmy Hendrix or Miles Davis are in a league with Mozart or Beethoven in terms of being a musical genius. Not only that, nearly every professor proclaims her or his commitment to affirmative action. In advertisements for new faculty members, it is *de rigueur* to invite applications from minority members. So if it is true that affirmative action does not raise the specter of inferiority for minorities, then surely it ought not to do so in a context in which it is embraced with open arms. And surely it ought not to do so after more than two decades of it. If there is any social context in America, outside of their own communities, in which minorities should feel quite at home, and so quite free to be themselves, it surely ought to be the university. Yet, one of the central arguments for affirmative action that is continually put forward by its defenders, including Ronald Dworkin himself, is that minorities do not feel at home in the university environment.³⁹ In other words, if Thomas is wrong, this is anything but obvious given the very history of both affirmative action itself and the claims made in support of it.

38. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2362 (2003) (Thomas, J., concurring in part and dissenting in part).

39. See Dworkin, *supra* note 22, at 16.

Now, let us not confuse the claim that Thomas did make with a different claim that he did not make. His issue was about being tarnished with the image of inferiority.⁴⁰ He did not claim that minorities who are the beneficiaries of affirmative action go on to be failures in life. And it will not do to say that if minorities were so tarnished, then they would not go on to be successful; for it could be said that they are successful precisely because they had to work extra hard in order to make sure that this image was not an impediment to their succeeding and that it did not come to inform their conception of themselves. Precisely what makes the life of Frederick Douglass so impressive is that he, mindful of the negative stereotypes of whites regarding blacks, masterfully exploited those stereotypes. He reports challenging whites to spell a word, knowing full well that they would spell the word in order to show their superiority, thereby in fact teaching, contrary to their intentions, what he did not know.

Let me suggest a poignant contrast between Justices Thomas and O'Connor. O'Connor could have looked at the stigma of inferiority that plagues minorities from a very different vantage point than did Thomas. Both could abhor that stigma without it occasioning identical visceral feelings in them, just as we suppose that decent women and men both abhor rape without supposing that identical visceral feelings are occasioned in both. It is implausible to think that she could grasp the weight of that stigma in the way that he could, just as it is implausible to think that he could grasp the weight of the reality of rape in the way that she could. In each case, what we have at hand is two different ways in which life itself is *experienced* as opposed to merely witnessed. So O'Connor might have thought of affirmative action as providing relief for that stigma without being informed by the experience of the weight of that stigma, whereas Thomas was profoundly informed by the weight of that stigma.

40. *Grutter*, 123 S. Ct. at 2362 (Thomas, J., concurring in part and dissenting in part).

One might think that this analysis is terribly flawed because the late Thurgood Marshall, also a black, was an uncompromising supporter of affirmative action.⁴¹ Well, Marshall was a giant in his own right, having won twenty-nine of the thirty-two cases that he had argued before the Supreme Court prior to being appointed to that august body⁴² and having written 112 opinions for the United States Court of Appeals for the Second Circuit between 1961 and 1965, none of which were overturned.⁴³ His record is so formidable that none could have doubted his talent whatever they might have thought of his opinions. This sort of standing is true of very few people, whatever the hue of their skin. An image of inferiority will never be an issue for intellectual giants like this, for they will tower in any case. The ordinary person is another matter entirely—certainly the ordinary person whose self-esteem has been ravaged by the shackles of oppression.⁴⁴ And this, I suggest, is at the very heart of Thomas's concern.

Is Justice Thomas wrong? Let me just repeat a point that was made earlier. Notwithstanding the fact that the practice of affirmative action has been in place for over two decades, those who defend it do so on the grounds that the university is not yet a sufficiently hospitable environment for minorities.⁴⁵ If this is so after more than twenty-five years, what reason is there to think that things will turn out for the better in this regard given an additional twenty-five years of it? Normally, the failure of a practice to produce the desired results after such a lengthy period of time constitutes a formidable reason to end it on the grounds that the practice is impotent with respect to producing the outcome that was claimed on its behalf.

41. See *Bakke*, 438 U.S. at 401-02 (Marshall, J., concurring).

42. Andrew Simmonds, *Amah and Eved and the Origin of Legal Rights*, 46 S.D. L. REV. 516, 607 (2000-01).

43. Larry M. Boyle, *Legal Masterpieces: The Giants of American Law*, 46 ADVOC. 26, 31 (2003).

44. Some read slavery as having had a devastating impact upon the self-esteem of blacks. See generally, Michele M. Moody-Adams, *Race, Class, and the Social Construction of Self Respect*, 24 PHIL. FORUM 251 (1992-93). Others insist that this was not the case. See MCGARY, *supra* note 21, at 138-40. I shall just say this. Part of what made Louis Farrakhan of the 1980s such a lightning rod is that although he insisted that whites were devils, he also spoke to the need for blacks to underwrite their sense of worth. See Laurence Mordekhai Thomas, *The Matrices of Malevolent Ideologies: Blacks and Jews*, in *ESSENTIAL READINGS ON JEWISH IDENTITIES, LIFESTYLES & BELIEFS: ANALYSIS OF THE PERSONAL AND SOCIAL DIVERSITY OF JEWS BY MODERN SCHOLARS* 227, 248-49 (Stanford M. Lyman ed., 2003).

45. See generally, e.g., Dworkin, *supra* note 22.

I would imagine that the supporters of affirmative action think that the problem lies primarily in the absence of a critical mass of minorities. Indeed, then Dean of the Law School, Jeffrey Lehman, suggested that a critical mass “means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.”⁴⁶ There are many problems with this view; and Justice Thomas was not unaware of them. Regarding the word diversity, he wrote the following: “[F]or all of its devotees, [diversity] is more a fashionable catch-phrase than it is a useful term, especially when something as serious as racial discrimination is at issue.”⁴⁷

So not least among the problems with Lehman's view is that a critical mass is defined entirely subjectively without any regard to the validity or plausibility of those subjective feelings. Why should only the unscrutinized subjective feelings of minorities be the guide here? For suppose that, according to minorities, the minority population had to be ninety percent of the student body before minority students (or those of a particular minority) ceased to be plagued by the feelings specified by Lehman. Is it not reasonable to claim that something is wrong with the minority students in that case? Besides, if minorities feel comfortable only when their numbers are at ninety percent and that percentage is brought about through affirmative action, then we effectively have a white minority who might legitimately have a claim to feeling uncomfortable. But that cannot be allowed if only the feelings of minorities count when it comes to numbers. Obviously, it is just plain silly to allow only the uncritical feelings of minorities to count. For minorities, like all human beings, are subject to making distortions with regard to their feelings. An independent measure is clearly needed.

Then, too, let us not forget that the term “minority” is an umbrella term that ranges over a number of minority groups. Surely, each minority group cannot be entitled to having its numbers in the student body being of the same subjective ninety percent. For it is simply impossible to have a student body that is at once ninety percent black and ninety percent Native American and ninety percent Latino, and so on. What is more, although blacks and Native Americans and Latinos and Asians are all non-

46. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2333-34 (2003).

47. *Id.* at 2353 n.3 (Thomas, J., concurring in part and dissenting in part).

white, it is demonstrably false that they all get along and understand one another. Native Americans, for example, would rightly take umbrage at this suggestion. And having said this, I want to stress the following: We shall have true equality in America only when the day has come when any member of any racial-ethnic group—Asian or Arabic or white or whatever—is as comfortable being in the minority as she or he is being in the majority.

I argued in *Group Autonomy and Narrative Identity*,⁴⁸ a common enemy does not a people make. This is a purely formal point. Two people can readily agree that a lion, for instance, is dangerous and will fight and combat it in order to stay alive, without sharing a single set of values regarding what counts as the good life. So truth be told, a common enemy does not even make for genuine harmony. The suggestion here is not that whites are the enemy. Instead, I am merely making the much simpler point that minorities do not themselves constitute a unified group no matter how much we define them in contradistinction to whites. To lose sight of this is not to take minorities seriously. Insofar as minorities ignore this, then they themselves do not take one another seriously. Blacks generally are as uninformed about Native American or Arabic culture(s) as whites. And neither Native Americans nor Arabs are under a delusion about this. To speak as if the moral burden of understanding others falls only upon whites is to mischaracterize the moral and political reality of the day.

48. Laurence Thomas, *Group Autonomy and Narrative Identity: Blacks and Jews*, in *BLACKS AND JEWS: ALLIANCES AND ARGUMENTS* 286, 292 (Paul Berman ed., 1993).

Unthinkingly, Lehman took as his reference point whites: minorities should not have to be spokespersons to whites or to feel isolated among whites.⁴⁹ It never once occurred to him that a like problem could arise among minorities vis-à-vis one another.

Not at all. And this brings us back to Justice Thomas's central point. Lehman was so busy touting the virtues of diversity that the moral reality of dealing with diversity and feelings of isolation among minorities themselves, with whites aside, was of no importance to him. And that, alas, is a way of tarnishing minorities with inferiority. One of the ways in which we tarnish others with the mark of inferiority is by not taking them as seriously as we should. It is striking, is it not, that we should find this shortcoming among those who insist that they are doing just the opposite.

IV. THE MANTRA OF DIVERSITY

Commenting on Justice Antonin Scalia's questioning during the oral arguments, commentator Lucas Morel made the following observation:

If [the University of Michigan Law School] really believed that diversity was crucial to their educational mission, they could simply lower their admissions qualifications and thereby increase minority enrollment without using the suspect classification of race to benefit a few at the expense of others.⁵⁰

Needless to say, no one wants that. This, of course, is just to say that the very idea that diversity should be a first principle that competes with recruiting talent is both ludicrous and morally bankrupt.

The claim is that in and of itself diversity makes for a better learning experience. Surely, however, that is not right. For one thing—and this again raises Justice Thomas's concern regarding the stigma of inferiority—the idea of black inferiority (both intellectually and morally) is shared not only by (some) whites,

49. See *Grutter*, 123 S. Ct. at 2333-34.

50. Lucas Morel, *A Judicial Role Call on Affirmative Action, Part II: The Conservative Wing*, The Ashbrook Center Editorials (April 2003), available at <http://www.ashbrook.org/publicat/oped/morel/03/michigan2.html>.

but by (some) individuals among numerous non-white groups as well. Thus, in this regard, it is anything but obvious that blacks are better off merely on account of having more non-black minorities added to the minority mix. This raises serious concerns about the efficacy of mere diversity, given the reasonable assumption that stereotypes can have a deleterious effect upon those who are their object.

One thing is clear: diversity makes for a better learning experience only if from the outset there is mutual respect between the various groups. And it is in no way a part of the logic of diversity that people of different ethnic and racial backgrounds are naturally disposed to respect one another. Diversity, alas, is compatible with utter contempt and disdain, even outright hate, for the other.⁵¹ What is more, everyone is capable of such a despicable mindset. The Nation of Islam was once known for harboring and advocating precisely this mindset among blacks towards whites. In a much discussed French novel by Randa Ghazy, *Rêver la Palestine*,⁵² we find articulated precisely this sentiment on the part of some Palestinian-Arabs towards Israeli Jews:

il hait, il hait (. . .) il hait les soldats, il hait chaque Israélien qui vit à la surface de la terre, c'est une haine inconditionnelle, irrationnelle qu'on ne peut expliquer, justifier, mais non plus critiquer.⁵³

An unconditional and irrational hate that cannot be criticized. If this mindset should happen to be the backdrop against which diversity occurs, the only thing that people will learn is how to stay out of one another's way. Diversity is a context for learning only if in the first place mutual respect obtains between the various groups involved.

Now mutual respect simply cannot be a function of how many individuals there are of a different kind in the learning

51. I am much indebted here to the work of David Haekwon Kim who masterfully wrestled with both American black experience and the Asian experience. My thoughts about contempt owe much to his remarkable essay, David Haekwon Kim, *Contempt and Ordinary Inequality*, in *RACISM AND PHILOSOPHY* 108, 120-22 (Susan E. Babbitt & Sue Campbell eds., 1999). In my reflections upon the limits of diversity, I am also grateful to Adam Schechter who has forcefully argued that the way in which black Americans see themselves aligned with blacks in Africa may not at all be the way in which blacks in Africa view black Americans.

52. RANDA GHAZY, *RÊVER LA PALESTINE* 199 (Anna Buresi trans., 2002). Much controversy surrounded the publication of this book. See *Polémique Entre le CRIF et Flammarion*, *LE MONDE*, Nov. 28, 2002. CRIF is le Conseil Représentatif des institutions juives de France.

53. GHAZY, *supra* note 52, at 199.

environment, whereby having twenty minorities of kind M would entail more respect for the M-group than having only ten minorities of kind M. This is just absurd. If mutual respect prevails in an environment, then it will be present whether there is only one member of the M-group in the environment or 100 members of that group. This had better be the case; otherwise, the very idea of mutual respect is doomed from the outset. For if this is not the case, then what one really needs is not merely a critical mass of minorities on campus, but rather a critical mass in every classroom. Not only that, a critical mass of each minority group, since on the diversity view of things no one group can speak for another except in a patronizing way.

Let me pause to avoid a misunderstanding. I most assuredly hold that if diversity takes place against the backdrop of mutual respect, then diversity can be an extraordinary benefit. It is too obvious for words that, for example, a searching discussion among the adherents of the three monotheistic religions can be most illuminating. But not if for the adherents of one religion, the non-negotiable point of departure is that all the others are moral scoundrels who deserve to rot in hell. This point remains valid regardless of how many of each religion we have. No one can have all the experiences that life offers. Necessarily, it is through the lives of others that our grasp of the richness of life is rendered more complete. This is one of the reasons why traveling abroad is so instructive. Though we should immerse ourselves in another culture for but a moment, the experience is invariably riveting. Knowing and interacting with people from different backgrounds is one of the gifts of life, provided that this takes place against the backdrop of mutual respect.

It would be marvelous if it were true that minorities were particularly inclined to learn and explore across their boundaries. The unvarnished truth, though, is that parochialism knows no boundaries. More often than not, those who criticize others for being closed-minded when it comes to learning about others are often just as close-minded in that regard. This gets to the very heart of the matter. Necessarily, true diversity is incompatible with being close-minded. Accordingly, the battle cry of diversity is nothing more than a series of shrill sounds so long as minorities can steadfastly refuse to learn from, and make themselves vulnerable to, one another, all the while being ever so content with the charge that only whites are close-minded. The issue is not whether there are close-minded whites. There are, to be

sure. The point, rather, is that being close-minded is not any less of a vice, nor any more of a virtue, when it is practiced by non-whites.

As I have said, diversity makes a difference for the better only against the backdrop of mutual respect. I have also indicated that mutual respect is not a function of numbers. To be sure, one can have more or less fear depending upon the numbers. I trust, though, that everyone knows that fear is not respect. I quote Justice O'Connor's opinion at length:

In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.⁵⁴

In the words of the Law School itself, the thought, obviously, is that as a result of exposure: "a mix of students with varying backgrounds and experiences who will respect and learn from each other."⁵⁵ For young children, shorn of deep animosities, misconceptions, entrenched rationalizations for their mistaken views, and very visceral feelings, it is undoubtedly the case that exposure alone breaks down barriers between them. With adults, who come well "fortified" with all these things, this happens far less often. Accordingly, matriculated students need to have an antecedent commitment to respecting and learning from others, and so to running the risk of moving beyond the status quo of their convictions. Otherwise, they will take their places in the work force having held fast to the same biases and hostilities regarding one another with which they took their places in the halls of learning.

Drawing upon the idea of exposure, much is made these days of the idea that attracting and educating talent is not the only legitimate mission of institutions of higher learning, but that these institutions also have as a mission to produce morally responsible members of society. Versions of this argument have been

54. *Grutter*, 123 S. Ct. at 2340 (citations omitted).

55. Resondent's Brief at 2, *Grutter*, 123 S. Ct. 2325 (No. 02-241).

advanced by Ronald Dworkin,⁵⁶ and also by Amy Gutmann.⁵⁷ This further mission seems plausible enough. It would be abominable if universities were to teach talented students racist and sexist ideas, or if in general universities were a pulpit for doctrines of hatred. Respect for all humankind should be at the very center of attracting and training talented minds; and universities and colleges should make this view a “living belief,” to borrow an expression from J. S. Mill’s work *On Liberty*.⁵⁸ The basic idea here is quite simple: people should not take a good thing, namely knowledge, and do something bad with it. Thus understood, what we have here is a restriction on how people should use knowledge, and not at all a restriction on the acquisition of knowledge. Accordingly, the acquisition of knowledge is not made subordinate to principles of institutional moral responsibility. Rather, it is the use of knowledge that is made subordinate to these principles.

56. Dworkin, *supra* note 21.

57. See Amy Gutmann, *Responding to Racial Injustice*, in *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (K. Anthony Appiah & Amy Gutmann eds., 1996).

58. JOHN STUART MILL, *ON LIBERTY* (1859).

However, those who draw attention to this further mission of institutions of higher learning insist that accepting this mission thereby commits one to the view that it is legitimate to count race or ethnicity as a plus factor. Well, this most certainly does not follow from the view of institutional moral responsibility that I have just put forward, which suggests that the proponents must have in mind a rather different *conception* of the idea of institutional moral responsibility. No doubt. But then surely their thesis cannot be that the only morally defensible conception of institutional moral responsibility is the one that yields the conclusion that it can be legitimate for race to count as a plus factor, or, from a different direction, only a morally bankrupt person would fail to embrace such a conception of institutional moral responsibility. It is well acknowledged that John Rawls's book, *A Theory of Justice*,⁵⁹ is the most significant treatise in political philosophy of the latter half of the twentieth century.⁶⁰ The plausibility of his two principles of justice remains a matter of much dispute. If reasonable people can continue to disagree here, it would be absolutely stunning if the idea of institutional moral responsibility admitted of only one interpretation, namely the one according to which it is legitimate to make race a plus factor.

Though much has been made of exposure, Justice Antonin Scalia signaled a very different reality when he wrote as follows concerning anticipated lawsuits:

Tempting targets, one would suppose, will be 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.⁶¹

Indeed, in the name of diversity, precisely what many minority students do not want is exposure to other traditions and peoples.

59. JOHN RAWLS, *A THEORY OF JUSTICE* (1971). See also Thomas Nagel's majestic and moving review of Rawls's writing in Thomas Nagel, "The Writings of John Rawls," *CONCEALMENT AND EXPOSURE* (2002).

60. See generally, e.g., Nagel, *supra* note 59.

61. *Grutter*, 123 S. Ct. at 2349-50 (Scalia, J., concurring in part and dissenting in part).

This is because diversity, as it has come to be used, is not at all synonymous with the idea of America as a melting pot. Diversity has become a battle cry for erecting impermeable walls between cultures and a justification for steadfastly refusing to learn about other cultures in the name of protecting one's own culture. This stance might be somewhat comprehensible if it were made only against the supposedly homogenous white culture. Unfortunately, though, this stance is taken by very nearly all minority groups against all groups, and so against one another, with the result being that one is apt to get more intercultural exposure on a public transportation vehicle in a major city (where people of different races and ethnicities actually sit next to one another) than on a university campus.

What does mutual respect entail? I cannot here even begin to offer a satisfactory answer to this question. So I shall just make two comments regarding the parameters of mutual respect. One is that mutual respect cannot possibly mean that each side must tolerate whatever the other side does. A corollary to this is that mutual respect cannot mean that one side is always right and therefore the other is always wrong. Thus, between minorities and whites, it cannot be that one group respects the other only if it tolerates whatever the other does. Nor can it be that one group is always right and the other is always wrong. The same holds between any two minority groups. On the face of it, this is so obvious as to seem trivial. But not so; for just these two restrictions alone entail that how individuals should interact with one another cannot, given mutual respect between them, be settled simply by the subjective feelings of one individual or the other. They also entail that being a victim of oppression does not thereby make one always right. Finally, they entail that the demands of diversity, merely taken as such, cannot always be justified. Advocates of affirmative action treat diversity as if it were a moral good in and of itself, when the truth of the matter is that diversity stands as a moral good, if that is the correct characterization, only insofar as it is regulated by the precepts of morality.

It is fitting to conclude this section with a report from Claude Steele's program implemented at the University of Michigan, the aim of which was to produce a learning environment free of negative intellectual stereotypes regarding blacks. Steele writes:

The program (which started in 1991 and is ongoing) created a *racially integrated* "living and learning" community in a 250-

student wing of a large dormitory. It focused students on academic work (through weekly “challenge” workshops), provided an outlet for discussing the personal side of college life (through weekly rap sessions), and affirmed the students’ abilities (through, for example, reminding them that their admission was a vote of confidence). The program lasted just one semester, although most students remained in the dormitory wing for the rest of their first year. Still, it worked; it gave black students a significant academic jump start. Those in the program (about 15 percent of the entering class) got better first-year grades than black students outside the program, even after controlling for differences between these groups in the skills with which they entered college. Equally important, the program greatly reduced underperformance: black students in the program got first-year grades almost as high as those of white students in the general Michigan population who entered with comparable test scores.⁶²

It should be noted that the success of Steele’s program has been tied to integration and not what Justice Scalia called tribalism: each minority group associating only with its own kind.⁶³ In Steele’s own words: “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.”⁶⁴

V. IDIOSYNCRATIC EXCELLENCE

One of the very striking things about the tenor of current arguments in favor of affirmative action is just the fact that the importance of excellence itself seems to have been downgraded.

This is because we are told something that no one can really believe, including those who utter it with seemingly the utmost

62. Claude M. Steele, *Thin Ice: “Stereotype Threats” and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44, 54, available at <http://www.theatlantic.com/issues/99aug/9908stereotype.htm> (emphasis added). Steele does not speak to the percentage of black to white students who lived in the experimental dorm. On the assumption that those who participated in the program did so voluntarily, then we have a predisposition to interact across racial lines, which speaks to the point that I have made in the text with regard to mutual respect. I am very grateful to Stephen Darwall for bringing this work to my attention.

63. *Grutter*, 123 S. Ct. at 2349-50 (Scalia, J., concurring in part and dissenting in part).

64. Steele, *supra* note 62, at 54.

sincerity, namely, that sheer diversity contributes to excellence. Were that the case, then a mere lottery would work just as well as an admissions policy according to which each applicant is viewed individually. And no one believes that.

The ways of excellence are boundless, notwithstanding some common and useful indicators. And it behooves all of us to be mindful of this, lest we should find ourselves more than a little in love with the indicators of excellence rather than excellence itself.

Excellence that is not indicated by the typical vectors is what I have been referring to as idiosyncratic excellence. On the assumption that all races and ethnicities are equally talented, one might imagine that idiosyncratic excellence would be more common among those peoples who were systematically denied access to the more traditional forms of training in excellence. On the other hand, though, there is no reason to suppose that idiosyncratic excellence is to be found only among such individuals. That said, my point is that a social environment might favor idiosyncratic excellences among one group and not another. This is not a novel point. We already know the general point to be true. Generally speaking, the social environment of blacks in America favor their singing gospel music with a richness and a passion that simply has no equal anywhere in the world. No one, I trust, thinks that this has anything to do with genetics per se.

So the obvious question is this: Rather than focusing upon skin color or ethnicity, why not explicitly define affirmative action by reference to idiosyncratic excellences? Idiosyncratic excellences would favor minorities over non-minorities, at least in the quite relevant cases, without compromising the ideal of excellence itself. Is it not better to focus upon the richness of excellence than to pretend that diversity in and of itself counts as an excellence? A minority (with low test scores) who is awarded admissions on the basis of his skin color may be ever so grateful to have been admitted. However, the individual cannot, when the going gets rough, turn around and invoke his skin color as a badge of merit. By contrast, the minority (with low test scores) who is awarded admissions on the grounds that the admissions office identified in her portfolio a marvelous idiosyncratic excellence can turn around and do just that when times get tough. What is more, the latter minority is not at all in an awkward position when confronted by a peer with the traditionally high scores. She has no need to become defensive. Instead,

she can be quite untroubled by his high scores, rightly noting that he cannot begin to match the excellence that secured her admissions to the program. This she can say, be the challenger white or Asian or Arabic. Not so with the first minority. There is no story that one can tell that will make skin color, and nothing other than skin color, a badge of excellence. And it is ever so disingenuous to suggest otherwise. On a charitable interpretation, we have misplaced compassion when this is done.

On an uncharitable interpretation, we have willful myopia. Quite simply, nothing resonates with a story of excellence like another story of excellence. Focusing upon skin color rather than idiosyncratic excellences deprives those admitted without traditional high scores of a story of excellence to tell. Though "We believe in you" is wonderful, it is no substitute for "You have a reason to believe in yourself and we acknowledge it."

Then there are the marvelous social reverberations of this approach. Making skin color a relevant factor does nothing to inspire excellence within the individual's community; whereas awarding admissions on the basis of idiosyncratic excellences does. Moreover, drawing attention to, and rewarding people for, idiosyncratic excellences would constitute a kind of cross-fertilization with respect to excellences. For it is by virtue of feeling secure in one form of excellence that people are often tempted to try another form of excellence. As I have said, idiosyncratic excellences are not necessarily the purview of minorities. Naturally, we should expect to find instances of it among whites. Unquestionably, that should count. And one reason why it should is that there are whites in the United States who have been the victims of grave injustice, and who are looked down upon by everyone. These whites sometimes are called "rednecks" or, even less graciously, "poor white trash." Have some of these individuals been racists themselves? No doubt. But if the only people admitted, under any policy, are those who have not been racist towards anyone, then surely few souls would be admitted. For blacks have been racist toward Asians, and Arabs have been racist toward blacks. And so on. People shorn of many of the bases of social power can still willfully distort or ignore the record of others, despise them without warrant, and deliberately harm them in a multitude of ways.

At any rate, if we focus upon idiosyncratic excellences, then, as I have indicated, minorities might very well be favored with regard to exhibiting such excellences, and therein lies the strength of

drawing attention to such forms of excellences. The idea, then, is that we have the ideal of excellence itself, and at least two forms of that ideal, namely, traditional and idiosyncratic excellences. And the fact that one group of people is favored to exhibit one form of excellence, whereas another group is favored to exhibit the other form of excellence, is utterly irrelevant from the standpoint of the ideal of excellence as such.

So once again the question arises: Why not explicitly define affirmative action in terms of idiosyncratic excellences rather than focusing upon skin color?

I understand that some think of affirmative action as a form of reparations; and on that model there is nothing more that a black person need do than be black. But what better way could there be to speak to a wrong that can never be made right than to inspire those who have been thus wronged to be excellent? And what better way could there be to do this than to identify those forms of idiosyncratic excellence that were forged by the pain of those who had been wronged and their concomitant will to survive? What better way could there be to take seriously the lives of those who had been touched by this ignominious past and to acknowledge the poignant truth that so many blacks who had been wronged nevertheless did right by many whites? The greatest wrong wrought by evils like American Slavery and the Holocaust is that the very humanity of the oppressed individuals is viciously called into question.⁶⁵ Identifying the idiosyncratic excellences of a community so wronged is one of the greatest moral gifts that can be offered to it.

So the question remains: Why have universities, in the endeavor to bring in minorities, made race a plus factor rather than focusing upon the idiosyncratic excellences that might be found in the communities of minority groups whose members have failed to do well by the traditional measures? My answer is haunting.

I noted in Part II that the University of Michigan has admitted minorities with a GPA between 2.50 and 2.99 and a LSAT score between 161 and 163, without admitting any whites with identical scores. I remarked that had these minorities exhibited some form of idiosyncratic excellence, this would surely have been noted.

65. As I have tried to show in LAURENCE MORDEKHAI THOMAS, *VESSELS OF EVIL: AMERICAN SLAVERY AND THE HOLOCAUST* (1993).

For nothing would have silenced the critics more quickly. Alas, the problem with the criterion of idiosyncratic excellence is that it involves hard work. It really involves taking others seriously and learning about them. University leaders might very well have to go into the communities; and, in turn, these communities would have to reflect deeply upon the values that they wish to embrace and showcase. Relying upon idiosyncratic excellences is not the sort of thing that is achieved by a pen stroke. By contrast, using race as a plus factor is very easily done while excusing individuals from expending the necessary energy and effort learning about the other. Yet as a strategy of appeasement, employing race is ever so convenient. Nowadays, affirmative action is but a way of appeasing and excusing.

Let me hasten to add the obvious. It is primarily with respect to blacks that the practice of affirmative action was first put into place; and it was initially conceived of as a response to the injustice of racism. Consequently, it is no accident that skin color was involved. I do not wish to question the good will of those who did so back then; for it is reasonable to think that good will was there in abundance. My problem is with the fact that the practice has not evolved into focusing upon, and so making explicit, the good of idiosyncratic excellences. My answer is that moral lethargy set in because focusing upon skin color so easily appeases and excuses.

I should certainly acknowledge that the good will of which I have just spoken owes much philosophical inspiration to John Rawls's *A Theory of Justice*. Although Rawls never addressed the matter of race in the book, he argues eloquently for helping the least advantaged. In his latter work, *Justice as Fairness: A Restatement*, Rawls sees not addressing the issue of race as an omission;⁶⁶ and Thomas Nagel has suggested that Rawls would indeed endorse affirmative action as a way to secure a just society while acknowledging the injustices and damage of the past.⁶⁷ I should like to think that the idea of idiosyncratic excellence speaks even more fully to the impulse of Rawls's thought. For there is no better way to affirm those who have been institutionally wronged in this way than to acknowledge with grace and purity of heart the excellences that they have forged in

66. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 66 (2001).

67. Thomas Nagel, *John Rawls and Affirmative Action*, J. BLACKS IN HIGHER EDUC., Spring 2003, at 82.

the face of injustice, and then to incorporate those forms of excellence into the basic structure of society.

VI. CONCLUSION: OUR STRENGTH

As I remarked at the outset of this essay, University of Michigan president Mary Sue Coleman claimed that diversity is our greatest strength. Interestingly, Aristotle observed that morally speaking we are neither good nor bad by nature. Human diversity is simply found in nature. What we do with that diversity is another matter entirely. To suggest that diversity in and of itself is first among moral goods is to deny what is utterly important to human beings at the most fundamental level, namely, genuine affirmation. What all human beings have in common is both the need for genuine affirmation and the wherewithal to provide it. The ability to affirm others genuinely is none other than a moral power. To the extent that we reserve the exercise of this moral power for only those who look like us, we shortchange both ourselves and others. We shortchange others by failing to exercise it when doing so could make a profound difference for the better. We shortchange ourselves by failing to cultivate more fully this moral power and by excluding ourselves from the lives of those who might majestically affirm us.

Our greatest strength lies not in our diversity, but in our wherewithal to look beyond a person's physical features or background to the forms of excellences that the individual's life exhibits and then to exercise our moral power of affirmation. The mark of the racist is that she or he does no such thing. And this is truly sad and shameful. Alas, it is no less sad and shameful when those who should know better, having perhaps been forced to recoil from the mean-spiritedness of racism, should also refrain from exercising their moral power of affirmation just because the person who exhibits the excellence in question is not of her or his minority group. And to the extent that diversity serves as an excuse, nay a justification, to ignore and walk over others who are not like our kind and to treat such individuals with contempt and disdain, and to wallow in our distortions of others and to dismiss them out of hand, then diversity is far from being our greatest strength. In that case, it is, instead, one of our greatest weaknesses.