IS DIVERSITY A SMOKE SCREEN FOR AFFIRMATIVE ACTION?

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Introduction

There is a revolution occurring in America. Just as the civil rights movement of the 1950s paved the way for the creation of a revolutionary change in public policies towards racial inequality, so, too, has the post-Reagan-Bush era led us to the current revolution.

The current revolution in public policies toward racial inequality has had two effects. First, there is an apparent dismantling of the apparatus of the civil rights era. Plans and time-tables are now suspect. Race-based preferences are constitutionally challenged. Set-asides, affirmative action, numerical quotas, and all things that sound like reverse discrimination are banned. Or, at least, that is the conventional wisdom.¹

Secondly, there is a public repudiation of racism and racist acts, language and behavior. College fraternities that host black-face minstrel skits are routinely suspended from campus.² Gags and pranks of dressing in white hooded gowns and pretending to lynch unsuspecting athletic team members are sufficient to cause assistant coaches to lose their jobs.³ The credibility of former police detectives in highly publicized murder trials is challenged by the mere utterance of the offensive term, "Nigger."⁴ So, at least on the surface, it is dangerous to be openly racist.

These are interesting poles of a singular revolution. On one hand, there is a dismantling of the apparatus of the civil rights movement. On the other hand, there is a movement towards eradicating the outward, most visible remnants of racism in American life. The first part of the revolution could reverse all of the gains made over the past 25 years.⁵ The second part of the revolution is sufficient to erase any hint that the first part is the result of racism.

The movement toward diversity in schools and universities is an explicit manifestation of this revolution. The movement away from overt race-based efforts to create diversity and fulfill the promise of affirmative action is another, as is the movement toward calls for civility in discourse about racism.

This essay uncovers the uncomfortable facade associated with these manifestations of the revolution. I will draw several conclusions:

C That diversity is the smoke screen that permits retrenchment in race-based affirmative action efforts;
C That calls for race-neutral evaluation criteria, in the face of persistent and continuing racial inequality, coincide with direct efforts to reverse the gains achieved by African Americans during the civil rights movement; and
C That calls for greater civility in public discourse on race relations work equally to silence overt bigots and to discourage advocates of affirmative action and racial equality. The effect, then, is that diversity—useful on its face—may be no more than an ingenious device
Dismantling of Affirmative Action

Some of the nation's top public managers attended an institute designed to strengthen their management and public policy skills. They were asked whether the *Croson vs. City of Richmond* case banned all minority business set-asides. They were quizzed on the impact of the *Poderesky vs. Kirwan* case. Uniformly, these well-trained lawyers, public executives and legislative officials incorrectly replied that both federal court decisions barred all racial preferences.

The first case involved a white, Ohio-based plumbing contractor who submitted a bid to provide plumbing to the city of Richmond, Virginia, the former capital of the confederacy. Despite a near majority black population, Richmond for years completely locked out black firms from business opportunities with the city. The many millions upon millions of dollars spent by the city on construction, goods and supplies systematically were directed towards white firms, even white firms like Croson, based in other states.

When blacks finally began to win elections in the 1970s and early 1980s, one of their first initiatives was to open up new opportunities for minority-owned businesses. Their model was the federal government, which, through the Federal Highway Transit Authority, the Small Business Administration, HUD and other federal agencies, had developed workable direct policies designed to remedy prior exclusion of minorities in public procurement and contracting activities.

Richmond decided to set aside 30 percent of all contracts for minority vendors and required that majority contractors make good-faith efforts to recruit minority subcontractors. Croson tried and failed to secure the services of one of the few black plumbing supply companies in Richmond in its attempt to comply with the regulations. When it did not receive the award, despite the fact that it was the only firm to bid, it sued the City of Richmond, arguing that the set-asides violated its 14th amendment equal protection rights.

The case, *Poderesky v Kirwan*, involved a white Hispanic student who had applied for the prestigious Regents Scholarship at the University of Maryland. His test scores fell just below the cut-off point. He then applied for the Banneker Scholarship, named after the famous black mathematician. This was a program started by the University in response to federal audits showing it had not complied with an earlier desegregation plan. Initially the program was open to all disadvantaged minorities. But federal officials pointed out that only blacks were covered by the desegregation compliance order facing the University because of its failure to increase substantially its enrollment and retention of African American students. Thus, by the time Poderesky applied for the Banneker scholarship, the Banneker scholarship program was restricted to black students. Poderesky filed suit against the University in federal court, claiming that the blacks-only designation discriminated against Hispanics and,
thus, was unconstitutional.\(^\text{12}\)

These two cases, along with a flurry of other recent ones, have shaped the course of the dismantling of affirmative action in America. Of course, the *Croson* case states that there must be a documented justification for a race-based remedy. And the *Poderesky* case notes that the University of Maryland failed to demonstrate a narrow tailoring of its remedy. Neither case explicitly outlaws racial preferences. Nonetheless, state and local officials--like those visiting the summer management institute--are now often reluctant to speak in explicit terms about "set-asides" or race preferences. They may undertake studies to document prior discrimination justifying race-based remedies; they may make efforts to enroll more minority students. But they generally undertake these new efforts under the guise of race-neutral policies or diversity goals that are far removed from the direct affirmative action now under attack.

College officials across the nation have embraced diversity initiatives and have all but eliminated the language of affirmative action or racial preferences from their promotional literature.\(^\text{13}\) State and local governments have replaced minority business set-asides with disadvantaged business programs and diversity goals.\(^\text{14}\)

In a way, then, diversity has become somewhat of a smoke screen for affirmative action for many institutions committed to opening up opportunities for historically disadvantaged minorities, but leery of running afoul of the new anti-affirmative action majority. But is diversity not also a smoke screen for the elimination of affirmative action and retrenchment of efforts to assist African Americans and American Indians, who continue to be underrepresented in higher education and who, along with Hispanics, consistently score lower on performance examinations given in the 4th grade, the 8th grade and on college entrance examinations?

**Diversity as a Smoke Screen**

One prominent economics department, rated among the top ten in public institutions in the nation, has not graduated a single African American Ph.D. since 1958. To be sure, that graduate is one of the most distinguished black economists in America and he got his degree when many major graduate programs in the nation enrolled no racial minority group members and even restricted entry among women and various religious minorities as well.

Nonetheless, this prominent department boasts of being one of the most diverse economics departments in the nation and perhaps is the most diverse department in the University of which it is a part. It has outstanding Asian and Hispanic graduate students originating from perhaps two dozen or more nations. There are also African and Middle Eastern scholars with simply outstanding credentials. The department looks and feels like the United Nations.

Unfortunately, it does not look and feel like the United States or even the state of which
it is a part. The stark reality is that this is a very diverse program at a University historically committed to affirmative action. But diversity is rewarding a slightly different type of inclusiveness than what was envisioned by the architects of affirmative action.

The architects of affirmative action, of course, were responding to a legacy of racism that yielded a divided America: divided between blacks and whites. The color line was that divide. However, since the 1960s and 1970s there has been a change in the color of the color line. Instead of being white versus black, it has become, for most cities in the nation, white, black, brown and yellow; or, should we say, copper, bronze, caramel, ebony and pink? The fact is that one third of all the 600 Korean business establishments in South Central Los Angeles were damaged in rioting led by blacks and Latinos. The fact is that the worst riots in Washington, D.C., in May 1991 were precipitated by the shooting of a Hispanic vagrant by African American rookie police officers.

When the U.S. Civil Rights Commission reported in 1992 on persistent discrimination against Asians and the dual problems of “glass ceilings” faced by highly educated Asians and menial jobs held by many poorer Asian immigrants, special attention was given to the rising conflict between Asians and other racial minority group members.

Congress passed a law requiring the collection of statistics on hate crimes. Are blacks, poor old Negroes, the most hated group in American society? The answer is no. Asians make up four percent of the population of Philadelphia. They accounted for 20 percent of the victims of hate crimes. According to the U.S. Civil Rights Commission, Asians were more likely to be victims of hate crimes than whites, Jews, blacks or Hispanics. Even blacks in places like southeast Washington, D.C., think that the enemy is the Asian shopkeeper on the corner. Black elected officials in Maryland are attempting to have Asians excluded from the state’s minority business assistance program.

This coloring of America has helped to shape the revolution in public policies on racial inequality. Reducing racial inequalities in the 1990s comes during an era when there is increasingly hostile opposition to the adoption of redistributive measures that ostensibly make one group better off at the expense of making another group worse off. For example, there is virtually uniform opposition among whites in the United States to the adoption of hiring or employment quotas or other preferences that favor blacks and other racial minority group members. The majority may argue in favor of equal opportunity, but when it comes to taking something away from them to give to others—who sometimes appear to be undeserving of help—they insist the line must be drawn, so to speak.

Opposition to race-based remedies like the Banneker Scholarship program stems not just from those opposed to the advance of minorities. The opposition comes not only from overt racists and conservatives and neoconservatives of many stripes, including a growing and vocal group of minority conservatives. The opposition is now very evidently seen in the inner circles of the new Democratic Party leadership, a centrist leadership that gained its
legitimacy from an appeal to core democratic principles espousing fairness and equity in a society where every voice counts.\textsuperscript{22}

The opposition from the new centrists comes about precisely because race-based strategies offend the basic populist sentiments that special interests skew the distribution of outcomes in an unfair manner. This is true, it is held, even if the special interests are those of a previously discriminated against group, for whom equal protection of the laws and basic protection against discrimination and unfair treatment stem from the model of democratic fairness espoused by the centrists. In other words, process matters much in the new centrists’ ideology: if the rules are not fair, then the outcomes of the process are suspect. If the rules of the game are fair, then remedies designed to correct the unequal outcomes become suspect. And, particularly when the remedies on their face are unfair to the nonaggrieved party, the centrists are offended.

Many new pragmatists argue that since the centrist perspective dominates both the traditional liberal and conservative perspectives--after all, a president was been elected based on this perspective--the best hope for reducing racial inequality is to find remedies that are fair to the majority while offering hope of improving the well-being of the minority. These are thought to be nonrace-based remedies, because they can improve the well-being of the minority, without consciously making the majority worse off.

Many "diversity" programs fall outside the offensive category of race-based initiatives. Diversity includes everything from sexual orientation to disability status. Once diversity attempts to accomplish goals that go far beyond the historic attempt to rectify previous discrimination based on race, it can and often does lose its classification as a race-based remedy.\textsuperscript{23}

Unfortunately, there is little hard empirical evidence that nonrace-based remedies like diversity achieve the goal of reducing inequality. Have diversity policies contributed to a substantial narrowing of the gap between blacks and whites? Have vouchers reduced the test score gap between blacks and whites? Is there consensus research that conclusively makes these claims?

The troubling aspect of diversity programs and other nonrace-based initiatives is that they are often put in place as the substitute for affirmative action and other race-based policies--as if the goals remain the same, but the means for attaining them are different. Moreover, it is difficult to disentangle the remedy from the justification for the remedy. And in the case of diversity, the justification--improving the well-being of the majority--need not necessarily be consistent with the end of reducing the gap between the historically disadvantaged racial minority and the majority.

Many of the supporters of diversity also are advocates of the goal of equality. Many are advocates of the goal of fairness. However, the goal of equality often comes into conflict with
the goal of fairness. For those who are privileged and who do not lose materially when racial minority group members fail to reach economic parity with majority group members, the goal of fairness often dominates the goal of equality. An interesting parable illustrates the inherent tension between the goals of equality and of fairness:

**Can there be equality without formal actions designed to attain equality?**

“I am in favor of equality, but I am not in favor of specifying a number or goal to be reached.”

That was the response made by a liberal professor at a large, Midwestern university. The professor had fought in the civil rights movement, was arrested during sit-ins to desegregate lunch counters, had mentored minority graduate students and for all intents and purposes could be considered an advocate of diversity and a dyed-in-the-wool supporter of minority access to higher education. His response was to a formal motion made by an African American colleague in a faculty meeting in 1995 to specify goals for enrollments of minority students. The proposed goals, as a percent of the entering classes, were:

- C Historically Underrepresented Asian/Pacific Islander Groups (e.g., Hmong, Lao, Vietnamese, Samoan, Guamanian, Native Hawaiian) 15%
- C Latino/Chicano/Puerto Rican 15%
- C African American 15%
- C American Indian 15%

In previous years, actual admissions of all minority students ranged from 14 to 18 percent, fluctuating from year to year over a 10-year period with little apparent improvement or positive trend. Average GREs for admitted students in the particular program were among the very highest at the University and considerably higher than those at similar programs at comparable institutions.

The motion was made in response to a report by the Associate Dean lamenting the many difficulties of simultaneously attracting a top-quality class to the graduate program, offering financial aid during times of diminishing resources, increasing diversity and competing effectively with other Universities. The motion stated:

“A central problem, in my view, with the {.....}’s minority admissions policy is that we have no empirical goals. Without a goal, we will never know whether we are doing a good job or a bad job in attaining our diversity objectives. Without a numerical goal there is little direction or bearings for our recruitment strategies, for our admissions decisions, or for our financial aid awards.”
The discussion of the motion included the following remarks:

“I like the idea of specific goals and am sympathetic for it. We need to keep in mind that recruiting these groups is not a free good. The costs of getting the equivalent goal of native Hawaiians is expensive. My point is in our situation in the state of . . . and its location, it may be easier to recruit more Hmong and Native Americans, but some of the other groups may not be easy to recruit. Recruiting is not free. It costs something and in arriving at realistic goals and trying to determine those goals, it takes into account the opportunities to recruit from these groups.”

“I am sympathetic in the purposes and ambitions of [the motion]. But I think it is important when you set quantitative goals that they be realistic within the resources of the organization. Ultimately, we might think that 10 years from now, 60 percent of the incoming class would be exactly like this. But I would be concerned that we try to achieve these goals this fall. I don't think we could achieve them.

Another “liberal” member of the faculty stated:

These figures are far out of line with the ethnic racial makeup of [the state's] . . . population--not as far out of line with the center-city . . . population--but that is not arguably the reference population...I prefer goals that reference some population rather than target arbitrary percentages...Let's pick some relevant reference population--for example, the representation of people under the age of 20 or 30...(The) percentages of Native Americans and Chicanos for the . . . [the city] are way out of line here.

These sentiments converged with those of others who were more reluctant to embrace specific numerical goals at all:

I wouldn't accept these numbers without thought and guidance about it. Why should all groups be equal? Why not 30 percent American Indian, five percent Latino, 15 percent African American? I need more information before I accept the rationale.

I'm not a lawyer, I just read the papers. The Bakke case and others have raised some questions about introducing specific quotas or goals of this kind. Does that lay us open to vulnerability to a suit by someone not in these groups and thereby bring questions of the goals?

At no time during the discussion of the motion were alternative goals, targets or percentages suggested. At no time during the discussion were alternative means of achieving the same result--increasing minority representation--put forward. The only retreat from the general opposition to the goals and specific enrollment targets was the call for more
research:

“I would prefer to defer the next vote for the next meeting and do some analysis of it—look at costs and alternatives.”

In a nutshell, the arguments against these specific goals fall into these various categories:

C The goals are unattainable;

C The goals are not justified;

C The goals are costly;

C The goals are possibly illegal.

The unattainable goal sentiment suggests that, in principle, one is in favor of using targets but is not in favor of setting targets that are difficult to attain. One thinks, however, if the target were so easy to attain, why would there even be the need to directly set a target? If it were easy and people were of good will and people wanted to achieve the target, then perhaps there would be no debate over what the target ought to be.

The unjustified goal argument states more explicitly that there needs to be a rationale, a reasoning, a justification for the target. This is exactly the point Justice Sandra Day O’Conner was making writing for the majority in the Croson case. Of course, justifications abound within academia for specific targets and are well known among admissions officials, who often must report comparisons of eligible and enrolled pools. The 60 percent target is not so unreasonable, using the target of minority students enrolled in public schools in the area where the university in question is located. The minority populations in major urban area schools near the university had grown dramatically in the past decade. Of course, one faculty member argued that the urban public school population is not an appropriate comparison.

The costliness argument is, in effect, an economic argument that long ago has been refuted. This argument suggests that efforts to recruit minority students drain resources away from other worthy causes and inevitably lower the overall quality of admissions.

Finally, the “it might be illegal” argument is the newest excuse for avoiding affirmative action. But just as the public managers attending the summer training institute got their facts all wrong, so, too, did the faculty members at this heated meeting.

The vote was taken. The result: nine opposed, one in favor, two abstentions.

The story of the inability of a group of tenured and tenure-track faculty to agree on a
specific numerical goal for minority graduate student recruitment is replayed in thousands of
departments around the nation. In this specific instance the vote followed four years of
repeated discussions and debates about the low numbers of African American and other
minority students admitted. There was a fully race-neutral recruitment and admissions
process, based on the ideal that fairness and equity virtually demanded equality of treatment.
Although everyone in the process agreed that the results continued to be unequal, what
mattered most was that the process be fair. And by all accounts, the process was fair--on its
face. Digging deeper, however, suggests that the unbridled attachment to the notion of equal
opportunity largely prevented the articulation of plans and strategies for creation of equal
outcomes.

The introduction of diversity goals also matters. Women, disabled students,
international students, gays and lesbians, and people from almost every state in the nation
make for a decidedly diverse population. Since the population quite obviously is more
diverse, why should we care whether there are stagnant numbers of minorities?

After years of good intentions, one of the most liberal and progressive graduate
programs in the nation, located at one of the most liberal and progressive Universities in the
nation, housed in one of the most liberal and progressive states in the nation, consistently
failed to improve its enrollments of minority graduate students. After years of good intentions,
when put to the test, the faculty was unable and unwilling to accept an “outrageous” goal of
tripling the minority enrollment within two years.

Civility and Racial Discourse

Unfortunately, the little fable told above does not end there. The African American
faculty member, the first to hold tenure in the department, challenged the veracity of
administration claims that minority enrollments had increased; charged that there had been
a cover-up of data that would reveal the poor minority recruitment and enrollment efforts; called
the administrators liars; claimed that admissions policies discriminated against African
Americans; contested the failure of the department to recruit students from historically black
colleges or from tribal colleges; and ultimately accused the top administrators of being racists.
This last “intemperate” act was construed as violating the standards of civility and collegiality
in academia.

There is a real danger in “yelling racism in a crowded room.” Persons familiar with
Duke University law professor Jerome Culp's important paper, "Crying 'Nigger' on a Crowded
Campus: Property Rights and the First Amendment," will see the parallels between hate
speech and accusations of racism. Professor Culp's paper deals with the problem of hate
speech and efforts on university campuses across the nation to curb it. It is a part of a large
and growing literature on legislative and public policy attempts to combat racism by thwarting
racist utterings.
The other side of the coin, however, is yelling “racism.” When privileged persons are accused of being racist, the accuser is vulnerable, loses legitimacy and risks even more. Attempts to silence persons who make accusations of racism, while not legislated, nevertheless are institutionalized under the code of civility. Private attempts to combat racism by calling attention to it bring with them substantial burdens. The act of exposing racists is akin to the act of burning crosses on people’s lawns, in those who call for civility in racial discourse.

The impassioned speeches and the strong agitation of feelings about the need to develop and implement sound minority recruitment strategies caused the white faculty to discount, dismiss, ignore and ostracize the African American faculty member. The charge of racism and the labeling of specific administrators as racists caused the following complaints to be made in a disciplinary letter placed in the African American faculty member’s permanent personnel file:

...Yelling, inappropriate displays of anger, accusatory, inaccurate and inappropriate communications...

The tenured African American faculty member was warned that any further outbursts would result in additional disciplinary proceedings.

Old Racism Versus New Racism

Across the nation there are new and outraged accounts of racist incidents on college campuses. The most famous include 1) the post-Red Sox-New York Mets assaults on black students at the University of Massachusetts at Amherst;27 2) The "FIJI Island" Party at the University of Wisconsin at Madison;28 3) The Beethoven controversy at Stanford University;29 and 4) the Dartmouth Review controversy at Dartmouth.30 More recent is the fraternity name-calling at MIT and the "water-buffalo" incident at the University of Pennsylvania.31

These racial incidents have two things in common. The first is that they provoked outrage among both African American students--who often protested and demanded administrative action--and campus leaders, who often responded with campus codes of conduct or speech.

The second is that these responses, especially campus speech codes, restrictions, guidelines, plans, new courses and regulations that were designed to curb racist speech, have now been called into question.

The legal literature has exploded with competing views of the constitutional implications of these limitations of First Amendment protections.32 There is little analysis, from law schools or anywhere else, on whether these remedies to racism have had any effect on racism itself.

Outrage in local governments over hateful acts like cross burnings similarly has resulted
in legislative response. Numerous hate-crime, anti-cross burning, and similar statutes were
enacted prior to the U.S. Supreme Courts’ finding of the unconstitutionality of the hate crime
law in St. Paul, Minnesota. No one knows whether these statutes actually achieve their aim
of reducing racism.

The burgeoning of this legal literature is accompanied by the belief that the reason that
we now--and only now in the 1990s--confront the issue of hate speech and hate crimes is that
these horrible acts apparently are on the rise. Congress has passed a hate-crime data
collection act and, for the first time in history, we have a systematic, empirical database on the
incidence of reported criminal acts motivated by hate.

It is hardly an adequate times series. Naive econometricians who attempt to run
regressions using this data set will conclude that hate crimes originated in America in 1990!
More intuitively, the rise in reported hate crimes and reported instances of hate speech is not
the result of the reemergence of old-style racism. Rather it is the result of a change in racism.
Racism thrives in these odd acts from a bygone era--and it gets reported promptly--but it is
hardly the racism that we must be most concerned about.

I received a letter at my home after the local newspaper published a summary of my
research debunking the popularly held belief that welfare was the cause of black pathology
and increasing black/white inequality. The return address on the letter read "American
Information Committee" and the envelope contained newspaper clippings of black serial
rapists, Patrick Buchanan's writings on the welfare crisis in inner cities and a typed page
listing reasons why America was going down the tubes as a result of the laziness and
degenerate sexual behavior of blacks and other nonwhites. The handwritten note asked
rhetorically, "Why do you so-called Negroes live in lily-white neighborhoods?"

This was hardly the first letter of this sort that I had received. There is a shoebox full of
such letters from all around the country. But the letter was addressed to my home. And my
home address was nowhere listed in the telephone directory or the university directory. The
directory listing residents in the exclusive neighborhood where I live could not have made
mention of the fact that reportedly only one other African American family lived there, since
racial covenants prohibiting Jews, blacks, and Poles from living there were lifted in the 1950s.

My wife was terrified. She knew that it is nearly impossible for anyone who does not
know our respective surnames, which, in fact, do differ substantially, to locate us in the
telephone book. The meaning of the letter to her: "We know who you are and where you live!"

The phone rang and rang for days. When it was answered, the caller hung up. My wife
mentioned this episode to a colleague. Within hours I was visited by the dean, the associate
dean, and the associate vice president for research with expressions of sorrow over this
"horrible act."
What specifically are these horrible racist acts that are being reported with greater frequency? What are these crimes of racial hatred, these racist words that require new legislative restrictions? They include cross burnings, smeared feces on windshields, shouting of offensive phrases, like "Nigger, go home;" "Hey there, jungle bunny" and the like.

In other words, they include exactly the same vile words and deeds that most of us remember from years and years ago. Nothing is new here, except the attempt to curb racism by curbing the words and deeds of those who shout racist words or engage in silly racist deeds. There is absolutely no evidence, not a thin thread of empirical support, for the view that these acts are any more frequent or harmful that they were 30 years ago. Even the recent explosion of black church burnings cannot be labeled an upward trend.

At the University of Texas at Austin in 1976 the "FIJI Island" party was considered the most important party on campus. The black-face minstrel show was a favorite entertainment. That year the Commodores were the invited artists. Black students not only were not outraged by these racist and offensive antics of the fraternity, they seemed genuinely excited about the prospect of jamming with these frat brothers to the music of what was then one of the hottest African American male groups in the nation.

Burning of crosses? Black-face minstrels? Calling names like “nigger,” “jungle bunny?” Is this the racism that we are or should be most concerned about? And will suppression of this name calling or criminalization of these acts eliminate this racism?

While such words and deeds are obviously the work of the older-style type of racism, they are not the main problem contributing to low retention rates of African American and other students of color on our college campuses, to the declining presence of African American faculty, the drop in the production of black Ph.D.s and the alienation of a whole generation of blacks from higher education. These racist words and deeds are not what causes higher loan denial rates among blacks than whites, the high rates of conviction among blacks for drug crimes and the long prison sentences for these crimes.

When the Minnesota legislature increased the penalty for possession of one gram of crack cocaine to a felony punishable by a minimum of five years in jail, it did not do so while calling the African Americans in Minneapolis who would be affected disproportionately by this law names like “nigger” or “jungle bunny.” It did not burn crosses on these young black males' front lawns. Instead, it argued that this was a more serious crime than possession of powdered cocaine and, thus, it should be punished more severely. I don't know if the people who wrote this legislation believe that blacks are innately inferior to whites or instinctively more crime prone than whites, but I do know that these people didn’t need to call the subjects “niggers” in order for the effect to be to punish them more harshly.

Whereas I received personal visits from my superiors when word of "horrible racist acts" got out, colleagues were silent when minority admissions fell. There was no response to
to repeated requests for changes in minority admissions policies that systematically resulted in few if any African Americans enrolling in the graduate program. Whereas the old-style racism is denounced by nearly all in positions of leadership at elite institutions, it is hard to find anyone taking a stand on continued objective racial inequalities that persist in those institutions.

If there is racism that is worth fighting, it certainly is this more inbred, institutionalized form and not the ignorant form of yesteryear.

Indeed, the battles the current generation of young blacks on college campuses are fighting--the battle of the old racism of being called a “nigger” and perhaps having a cross burned on the front lawn, is hardly the most important battle confronting them or the black community. This is one battle that diverts attention from the realization that this pattern of behavior has been going on within the university for years, but minorities did not know it, because they were not a part of it.

Now that they are a part of it, they and their apparent supporters attack the most ugly and ignorant parts of it. Their supporters forget that the racism that remains and the racism that grows and prospers--the new style racism--is precisely what appears to be not the ugly and ignorant, but the beautiful and the intelligent.

The new racism, the racism of the 1990s, is the racism of holding the beliefs and attitudes of the inherent inferiority of a racial group, but not directly acting them out in obviously bigoted ways. Thus, the new racist might genuinely believe that historically black colleges are fundamentally deficient and that black students--both those who graduate from black colleges and those who attend prestigious white ones--are less qualified than whites. When some few token blacks are admitted--even those who are fully "qualified," as evidenced by their high GRE scores, high grade-point averages, and graduation from institutions rated in the top tier by Peterson’s Guide--they often leave in disgust, citing what they call a hostile environment; a chilly atmosphere. For want of a better term, they face what they call “racism.”

The new racism, like the old racism, does not require deeds or words to translate the beliefs into harmful actions or hurting utterances. With the new racism, victims can "feel" the unwantedness, they can sense the rejection, they can suffer the humiliation and stigma of being looked down upon.

But they probably cannot sue for damages, since there are no real words or deeds to expose. In a sense, then, the new racism of the 1990s is a suppressed form of the older racism, where the offender or the institution within which the offender operates instinctively assigns an inferior status to the victimized group.

The legal analysis of the remedies to racism in words or deeds suggests that we cannot legislate against racism. But can we reduce it through the marketplace? Are there
incentives or strategic behaviors that can reduce racism?

To answer this question, we need to know what motivates racists. What are the motives behind the old-style racist that the now unconstitutional rules and regulations were designed to curb? What could the motive possibly have been for the aging Chief Judge of the Florida Fourth Judicial Circuit to say blacks are more criminal than whites because of their mamas and daddies and their ancestors and because we have been too good to them? What could the motive possibly be of one Arthur Morris Miller, 3rd, whose conviction in a cross-burning case led the U.S. Supreme Court to overturn the hate-crime ordinance in St. Paul, Minnesota?

The judge lost his job; Miller ended up with a conviction of conspiracy.

These sorts of racists are easy to target and easy to punish with or without hate-crime or hate-speech codes. Remedies that seek to sanction this type of behavior provide the right answer to the wrong question.

What sort of incentives or disincentives exist to deal with quite another sort of racism: a senior, respected, tenured faculty member instinctively indicates that the African American candidate for a coveted faculty position cannot possibly be as qualified as the white candidate, because his publications are fewer and his orientation more historical than quantitative? Does an incentive scheme work that permits the department to hire both candidates—the nonminority, or best-qualified candidate through the regular recruitment funds, the minority through affirmative action funds? Not in the new racism of the 1990s. The distinguished faculty member, with his liberal roots and support for racial equality during the Civil Rights Era, even with his commitment to sending his children to racially integrated schools, is firmly convinced that the minority candidate is unqualified. With not a thread of evidence and with even less indication that he had read both candidates’ files he rejects the mere idea of using affirmative action funds to hire the minority candidate. This would violate even higher moral principles of fairness to nonminority candidates who are better qualified.

Is this distinguished professor an old-style racist? Absolutely not! Is this respected academic a 1990s racist, who believes that blacks are innately inferior? And where were all the associate deans, deans, and associate vice presidents when this behavior was reported?

But what about the new racist’s actions and his deeds? Do black students, for example, get lower grades than white students in his class? What if those same black students get lower grades in the black professor’s class? The defining characteristic of the new-age racist is the unstated beliefs of inferiority; not the actions and deeds.

Put differently, the objective, outward evidence that would expose an old-style racist does not exist here. What we have here are remedies—presumably for the old-style racism—
that are rejected by persons who putatively reject old-style racism. What we have here is a new breed that often supports hate-crimes legislation and that apparently finds hateful speech repugnant and out-of-place within the serene walls of the academy. But, at the same time, when given the opportunity to act on behalf of the redress of prior wrongs against the oppressed group, when given the market incentives to advance the interests of minorities or when confronted with pecuniary disincentives to hold these groups behind, choose not to act.

The point is that economic incentives and disincentives may be valuable in adjusting market imperfections or dealing with racial discrimination. We can correct outcome differences using these market tools. One can offer to reward managers for hiring and promoting blacks and women. One can increase the chances that minorities get loans, are treated fairly in applying for apartments, are given equal chances to compete. Incentives and disincentives can all do that. What one cannot do through the incentive structures of market allocation schemes is assure that people believe that these persons are equal and deserving of the remedies enticed by these market incentives.

Attitudes and beliefs are not easily changed. Indeed, efforts to combat racism may well deepen the hatred for members of oppressed groups. Antiracism efforts might contribute to new-aged racism.

Traditional civil rights approaches to remedying racial discrimination cannot remedy racism. One of the unfortunate aspects of vigorous incentive and disincentive schemes designed to create equal treatment of persons the dominant group thinks are inherently inferior is that it feeds upon prior racist beliefs.

The old-style racist loses when he acts out the rage and frustration of this apparently unfair treatment. He loses, because he is subject to being exposed as a bigot in an era when bigotry is socially sanctioned. The new-style racist just goes underground. And if someone accuses him of bigotry, the accuser is condemned.

The new-style racist may take the promotion and the salary bonus by successfully recruiting and retaining more minority faculty or students. But the new-style racist may have difficulty concealing the contempt and disgust he harbors toward the beneficiaries of the racial discrimination remedy.

The victim of this racism has three choices:

1) Do nothing and be glad new-style racism does not require that there also be actions and deeds of racial discrimination;

2) Work hard to be a super-achiever; to excel and surpass even the most disbelieving racist’s estimation of our capacity, our energy, our sheer talent and ability. We may die young, have heart attacks with greater frequency, but at least we will know that we proved them
3) Call the racist a racist, become the angry black man and shout and scream about the unfairness of it all.

**The ‘Angry Black Man’ Phenomenon**

In his commentary on the crisis of black leadership, Cornel West contends that "present-day black political leaders appear too hungry for status to be angry, too eager for acceptance to be bold, too self-invested in advancement to be defiant." He ranks among these race-effacing managerial leaders Thomas Bradley and Wilson Goode.  

West fondly reminisces about the angry, bold, yet humble leadership of Martin Luther King and Malcolm X. He forgets, I think, that the nature of racism that generated the anger cum humility of King and Malcolm X has long since been transformed to the new-era racism faced by Mayors Sharon Sayles Belton or Kurt Lydell Schmoke. West misunderstands the transformation of the managerial society that makes it impossible for the black managerial elite to utter the ugly words of racism in the presence of their managerial supporters.

When black leaders were outsiders, as certainly Malcolm X and Martin Luther King were, they could be angry at every turn about what is wrong and unjust about race relations in America. When Belton and Schmoke became insiders--with the help of the Civil Rights Movement that thrust them to Macalester College and Yale University--they were forced to turn their anger inward.

And such is the case of angry black managers in corporate America. And such is the case of angry tenured black faculty in major research universities and prestigious Ivy-League colleges. They are just as angry now as Malcolm X and Martin Luther King were three decades ago. The difference is that they are no longer outsiders. They are partly inside. And being partly inside means that one loses all legitimacy by being openly angry. Being an angry foe of racism, shouting off at any and every uncorrectable flaw in our mightily flawed society is synonymous with being a loose cannon.

The "angry black man" problem is not one for blacks alone. Consider the case of Victor Kimura, budget director at the University of California at Santa Cruz in the 1980s. Don Vandenberg, then an official of the college, canceled a campus Filipino function which was to be held on December 7, 1988, "after complaints were made over serving Asian food on the anniversary of the Japanese attack on Pearl Harbor." Victor Kimura wrote an angry letter openly accusing Vandenberg and his boss, Peggy Musgrave, of being racist. He contended that these two were impeding affirmative action on campus and that the result was a racist atmosphere on campus. Vandenberg sued Kimura and the University "alleging defamation and intentional infliction of emotional distress". The California Court of Appeals concluded, however, that "this unreasonable, emotional and angry letter cannot reasonably be understood
as implying any facts, that it is more opinion than fact." In other words, calling a person a bigot is an expression of opinion and is protected against a libel suit.

Now, let's not get too carried away with this apparent victory by the defendant in this libel case. Is angry Victor the victor here? Is his anger over the perceived bigotry and racism vindicated? Has he sent a message to anyone at all about the racial sensitivities of Filipinos and Japanese Americans in California? Has he won the battle to have the evening celebration conducted with Asian fare? No, and now poor Don Vandenberg, who had to take a leave of absence as a result of the emotional turmoil of being labeled a racist, and Peggy Musgrave, who had to quit her job, may well have been driven below ground.

We will never know whether these two were really sincere bureaucrats attempting to balance competing interests of the majority and the minority or whether they were bumbling old-style racists. What is known is that the angry letter from Kimura labeled him as nothing more than a loose cannon who writes unreasonable and emotional letters that "cannot reasonably be understood as implying any facts."

If there is any winner at all, it must be the new racists--hidden from scrutiny and public evaluation--who can at once protect the right of Mr. Kimura to "shout racism in a crowded room" and at the same time so decisively devalue Mr. Kimura's claim of racism.

A more telling instance of "shouting racism in a crowded room" stems from an episode involving the president of the National Association for Equal Opportunity in Higher Education, the lobbying group for the 107 historically black colleges and universities in America. This episode began when the leadership of the majority colleges sought to meet in private--out of sight of the black college leadership--to discuss strategies for dealing with proposition 48 and race-based scholarships. The meeting of the six major education lobbying groups under the umbrella of the American Council of Education deliberately and consciously excluded the leadership of the historically black colleges.

The president of NAFEO wrote a confidential letter to the presidents of the member institutions warning of the "persistence of racism at the American Council of Education" and accusing the president of ACE of being deceptively affable and personable, while systematically opposing the interests of historically black colleges.41

This angry letter, leaked to the press by unknown persons, was quickly denounced by blacks and whites alike. Black college presidents responded by attesting to the fact that the white president of ACE was not a racist and that the letter was "irresponsible." Some predicted that many colleges would rebel in light of continuing dissatisfaction with the leadership of NAFEO. Whites wondered aloud how an effective leader, a Harvard Ph.D. and distinguished economist could write such an ill-conceived letter? Perhaps this aging black leader ought to retire.
These events were reported in titillating detail on the front pages of the *Chronicle of Higher Education* for several weeks. Little noticed were the letters written by black college presidents claiming they were quoted falsely. Little noticed were the rousing testimonials to the righteousness of the NAFEO's president's bold, but risky, effort to tell the truth: that the meeting of the six white association presidents was a direct attempt to disenfranchise a black group considered inferior.

The NAFEO episode reveals this painful lesson about shouting racism in a crowded room: Don't expect those in the room who agree with you to defend you. If they defend you at all, the defense will be of your First Amendment right to hold an opinion, no matter how irrational, unreasonable, or unsubstantiated that opinion may be.

NAFEO's claim that the leadership of ACE was racist marginalized NAFEO and NAFEO's leadership in the eyes of whites. Many donors and funding agencies withdrew promised support in the millions of dollars in the aftermath of the *Chronicle* episode.

In a word, then, shouting racism in a crowded room causes the shouter to lose legitimacy in the new era of racism. That means new racism is even more difficult to dislodge because there is a reduced incentive for those who hope to work within elite institutions to expose racism for fear of losing standing.42

**Conclusion**

The revolution that has resulted in the dismantling of the formal apparatus of the civil rights victories is also one that has made it more difficult to clearly identify who the enemy is: (old) racism or at least explicit racial language is now forbidden.

Whites, even racist whites, will support diversity programs and other good-looking covers for inaction, and will survive challenges to the other parts of the revolution by saying, No, the elimination of affirmative action and race-based remedies is not racism. It is simply fairness.

For those who see through this different type of smoke screen, the agenda requires a united people of color, working tirelessly to develop strategies for improving each group's well-being. Otherwise, people of color will be tricked into believing that the advantage of one nonwhite group must necessarily come at the expense of another. Put simply, the revolution must now be matched by a counterrevolution uniting people of color and their supporters. If diversity is to be an ally of equality, then diverse peoples will have to work together to fight racism and to eradicate racial inequality.

In the mean time, there will be great anger. Justifiable anger. Understandable and meaningful anger. This private anger, however, cannot eradicate racism; nor can it lessen the burden of racial inequality. Although the disciplinary letter against the African American
professor in our fable was removed when administrators were apprised of its illegality, the tarnish of the action will remain forever. While First Amendment rights remain supreme, privilege protects those who temporarily trample on those rights and then retreat. The effects are decisive: other minority faculty—particularly untenured ones—will not dare challenge the decision makers ever again. While affirmative action is being dismantled, diversity is celebrated. Any attempt to equate the dismantling of race-based remedies with racism risks retaliation.

What alternatives are there to private actions to combat new-age racism in elite institutions hiding under the guise of diversity? Public actions such as restriction of words and deeds, even if constitutionally constructed, do not address the new-age racism identified. There is a trend in some places towards the creation of dialogues, sensitivity training and cultural awareness. Can we just get along together? These initiatives play upon the guilt of liberals who are offended by old-style racist words and deeds, but who believe that such words and deeds arise from ignorance or from unintentional, irrational or ill-informed behaviors of otherwise good people. The major stumbling block of these initiatives that focus on improving multicultural awareness is that they do little to narrow the gap in earnings, to improve homeownership, to eliminate guns and violence from our inner-city neighborhoods or to redistribute educational opportunities. In short, diversity training is all talk and no play.

Many blacks and substantial numbers of American Indian leaders are taking quite another route. Their focus is on power and wealth. They seek direct redistribution of resources and/or internal means for enhancing the wealth and power of their communities. Witness the appeal of reparations among young African American college students. Witness the growth of casino gambling on American Indian reservations. The adherents of these policies accept racism of the new age as inevitable, and seek not a bit of love from their oppressor. They seem to be saying, "I do not need you to love me; just give me my share."

There is a healthy self-determinism that undergirds these efforts. These are within-group initiated efforts that translate the private anger into public goods. These are not feel-good diversity efforts. These are the marching tunes for the next millennium. They cut through the smoke screens of diversity and urge their followers to become captains of their ships and masters of their fates. The task is to assure such self-determination, while also acknowledging the diversity of the whole of which we are parts.
1. Pollster Louis Harris points out that although support for affirmative action has declined and political leaders are vocally opposed to it, there still is -- at least at the time of his article -- a slight majority that favors affirmative action. Louis Harris, “The Power of Opinion,” *Emerg* March, 1996, pp. 49-52. The wording of the question, however, is “favor or oppose affirmative action -- without strict quotas.” As Joe Feagin details in his essay in *Civil Rights and Race Relations in the Post Reagan-Bush Era* (S. L. Myers, Jr., editor), these opinions change when the option to exclude “strict quotas” is not offered. The reason political leaders are so reluctant to embrace affirmative action in the 1990s is that these dominant opinions of opposition to affirmative action overwhelm the landscape.


4. In the O. J. Simpson murder trial, Los Angeles Police Detective Mark Fuhrman is recorded stating various disparaging remarks: “If I’m wrestling around with some nigger, and he gets me in my back, and he gets his hand on my gun, it’s over,” and “... some nigger’d get in their face, they just spin ‘em around, choke ‘em out until they dropped.” See Loud and Clear: Mark Fuhrman’s Racial Remarks Played in Court,” *Newsday*, August 30, 1995.


7. Podberesky v Kirwan 38 F. #d 147 (4th Cir. 1994).


20. Note to Come - from USA Today


25. Or, did the faculty agree *not* to have goals?


33. Note to Come - New York Times

34. A report done by the Midwestern Higher Education Commission found that a majority of the faculty interview participants uniformly felt the University environment is unwelcoming to minorities. Some comments include: “The college was very chilly. There’s the typical thing that happens when people don’t feel you came through the ranks. They thought that it was a top-down move to get in this campus. . . “ and “. . . It is not an environment that’s nurturing for me.” See Midwestern Higher Education Commission Minority Faculty Development Project Prepublication Report, Minneapolis, MN, May 1995.


40. Ibid.


42. See Derrick Bell’s Voice at the Bottom of the Well, “Rules of Racial Standing.”