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Headscarves, Hairstyles and Culture as a Civil Right: a critique

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Abstract:

The headscarves controversy in France and elsewhere has captured world-wide attention and provoked a great deal of criticism from defenders of religious liberty. Many American commentators insist that European nations—France in particular—should adopt an American approach to religious liberty and accommodate distinctive religious practices as a matter of civil rights. These criticisms overstate the extent to which American law requires the accommodation of religious practices and unfairly dismiss the concerns that underlay rules prohibiting conspicuous religious symbols. Indeed, the American experience with civil rights requiring the accommodation of distinctive group practices and cultural affections largely vindicates the concerns of the French. Often the supposedly authentic practices of a minority group are in fact imposed by more powerful members of the group on others who prefer a less conspicuous or less traditional way of expressing their racial, ethnic or religious identifications—here, a right to accommodation reinforces the power of these dominant group members. Legal rights to accommodation can also encourage the most divisive and illiberal aspects of a minority group's culture, since these are precisely the aspects of any group culture that would be subject to censure in the absence of rights to accommodation.

Those who support civil rights to cultural and religious accommodation claim that accommodation of group difference is the only way to address subtle and systemic discrimination. But a better way to fight inequality is to adopt policies designed to speed the successful integration of minority groups into mainstream institutions. A more promising approach involves the careful and judicious use of ethnic, racial and religious statistics to develop integrationist policies and root out the discrimination that prevents minority groups from succeeding in the mainstream. The use of such statistics—if done with due attention to the risks of invasion of privacy and reification of group difference—would be a powerful tool in service of equality of opportunity and the successful integration of minority groups.

Headscarves, Hairstyles and Culture as a Civil Right: a critique.[1]

Introduction

For decades African-Americans have looked to France as a bastion of equality, an example from which the United States—the home of chattel slavery, Jim Crow discrimination and segregated black ghettos—could profit and in contrast to which the putative "land of the free" should feel enduring shame. Such prominent African-Americans as Josephine Baker and Richard Wright made Paris their adopted home and they and many others expressed little desire to return to the nation of their birth, where they would face the daily humiliations and deprivations of life as members of a despised racial minority.

But in the decades since the passage of the American Civil Rights Act the United States has made dramatic—if uneven—progress towards racial equality, developing civil rights laws that have become models for much of the world. In fact, it's now a commonplace conceit among American lawyers and politicians that American civil rights are markedly more advanced than those of "old Europe"—and France in particular. Race riots in the *banlieues* beyond the Parisian *périphérique* and the seemingly endless *affaire du foulard* contribute to a largely unwarranted sense of superiority among Americans with respect to race relations—for some an especially delicious reversal after a long history of unfavorable comparisons. Consider, for example, this treatment of the headscarves question by American law professor Martha Nussbaum:

> In Spain earlier this month, the Catalonian assembly narrowly rejected a proposed ban on the Muslim burqa in all public places — reversing a vote the week before in the country's upper house of parliament supporting a ban. Similar proposals may soon become national law in France and Belgium….In France, girls may not wear [the headscarf] in school….

Nussbaum then describes an American civil rights tradition that would condemn such laws:

> In cases in which…laws burden liberty of conscience--for example by requiring people to testify in court on their holy day, or to perform military service that their religion forbids, or to abstain from the use of a drug required in their sacred ceremony…a

> special exemption, called an "accommodation," should be given to the minority believer….. On the whole, the accommodationist position has been dominant in U. S. law and public culture…the accommodationist principle…reaches subtle forms of discrimination that are ubiquitous in majoritarian democratic life…the recent European cases…involve [such] discriminatory laws…Let's focus on the burqa…[2]

Of course, shortly after Professor Nussbaum published these words, France passed a law banning the burqa and other face coverings in any public place.[3] Nussbaum is hardly alone in her condemnation. Amnesty International has insisted that the ban violates human rights laws and American historian Joan Wallach Scott calls it "part of a campaign to purify and protect [French] national identity, purging so-called foreign elements…from membership in the nation."[4]

There are non-discriminatory justifications for the law—the need to identify individuals for security purposes and the public's interest in the communicative functions of facial expression-- but there's no doubt that the ban was inspired by the Islamic burqa and the most common defenses of it involve the symbolic meaning of the burqa in particular—not facial covering in general. For instance, President Sarkozy argued that the burqa "runs counter to women's dignity" and the sponsors of the ban insisted that "given the damage it produces on those rules which allow the life in community and ensure the dignity of the person and equality between the sexes, this practice…cannot be tolerated in any public place."[5]

Does this prove the law is discriminatory? Typical anti-discrimination protections are premised on the idea that laws and policies that target a specific social group are rarely justified because there are few morally relevant distinctions between groups as such, and valid laws can target any relevant distinctions directly, rather than through the proxy of group membership. Suppose, for instance, that lawmakers knew or suspected that an objectionable practice was disproportionately prevalent among members of a particular racial group. This would not be a valid justification for a law that singled out that group for special regulation because, of course, the law could simply prohibit the practice instead. But the headscarves law singles out the objectionable practice itself. Hence the debate must shift ground to ask whether or not the practice is sufficiently objectionable to justify its disproportionate effect on the group. Opponents of the ban insist that the headscarf is not a symbol of women's oppression and

highlight its importance to Muslims: for instance, Professor Scott insists that "ethnographers and historians tell us it [the headscarf] has multiple meanings, and… some women who wear it insist that they have chosen it because it positively signifies their femininity and their devotion to God."[6] Here absolute principles are not applicable: instead we have a tricky policy question that requires controversial judgments about the social harm caused by the practice and its importance to those who engage in it.

That policy question has many respectable answers. Professor Nussbaum's discussion implies that those who would ban the headscarf are unfamiliar with the American civil rights tradition of accommodation and would profit from considering it. But the French have considered an accommodationist approach to civil rights questions in the past. According to political scientist Erik Bleich some French ethnic groups began to call for "rights to difference" in the 1980s: "second generation immigrants of North African heritage—known in France as *beurs*—began to organize around their ethnic identity … This new cluster of French citizens, self-defined by ethnicity and placing demands on government, prompted several observers to wonder if France was veering down an American path toward ethnic identification and lobbying." Many French antiracist activists rejected rights to difference. In stark contrast to American legal scholars who embraced accommodation, French intellectuals publicly worried that "'the recognition of the Other can only be hierarchical' and that any "right to difference' could lead to a 'differences of rights'… the leaders of SOS-Racisme began to publicly condemn the 'community logic' of multiculturalism, further marking the declining fortunes of the 'right to be different."[7]

Of Western democracies with mature civil rights traditions, France has been perhaps the most hostile to accommodation claims. French republicanism condemns formal distinctions between citizens. Even the collection of raw statistics on racial and ethnic identity—relatively uncontroversial in the United States despite our own commitment to "colorblindness"—is virtually forbidden in France. Accommodations are worse than the mere collection of statistics because they require the state to not only make such distinctions among citizens, but also to give those distinctions substantive content. If accommodation is to follow from religious affiliation, the category "Muslim" will come with a distinctive set of legal entitlements, based on a substantive account of the defining commitments of its members. There is good reason to be

wary of such an enterprise: as I will argue, the American experience with claims for accommodation and rights to difference largely vindicate the French hostility to such claims.

Accommodations are an especially tricky and controversial area of American civil rights law. Nussbaum oversimplifies when she writes that the accommodationist position has been dominant—in fact accommodations are a small and problematic part of civil rights law, always highly contested and typically quite severely limited in scope and effect. For instance, although Title VII of the Civil Rights Act of 1964 requires employers to accommodate the religious practices of their employees, the requirement is limited to those circumstances in which the burden of accommodation to the employer is *de minimis*—in other words, quite trivial. American federal courts have held that even relatively minor inconveniences are sufficient to exceed a *de minimis* burden and thereby relieve the employer of the obligation to accommodate a religious practice. Typically employers need not allow employees to wear religious head covering if it will interfere with a standard uniform or safety helmet. Indeed, an American police department's no headscarf policy was upheld against a civil rights challenge based on a rationale remarkably similar to that French schools advance for the ban on conspicuous religious symbols: "it is critically important to promote the image of a disciplined, identifiable and impartial police force by maintaining the Philadelphia Police Department uniform as a symbol of neutral government authority, free from expressions of personal religion, bent or bias."[8] Of course, the most visible controversy in France involves a headscarf ban for *students*, not employees of the state. But the rationale—that state institutions should avoid conspicuous displays of religious affiliations—is the same in both cases. Employers can require religious employees to remove religiously motivated messages from their clothing: for example when a Catholic employee insisted that her faith required her to wear an anti-abortion button that depicted an aborted fetus, a federal court held that her employer was entitled to insist that she cover the button while at work.[9] Similarly American Constitutional law in the context of religion has taken a quite sharp turn away from the accommodationist position that Nussbaum describes as dominant and toward more limited protection that prohibits only laws that single out a religious group for unequal treatment or are motivated by discriminatory intent. Hence, a neutral and even handedly applied law prohibiting the use of hallucinogenic drugs is constitutionally permissible even when it effectively prohibits a religious ritual.[10]

American courts are inconsistent and ambivalent about accommodation, but many American legal scholars are adamant that our civil rights tradition requires accommodation of not only religion but also of cultural difference. During the 1980s and 1990s multiculturalists picked up on the accommodationist strand of American civil rights law and argued that refusal to accommodate the distinctive practices, clothing and affections of an ethnic or racial group is a form of discrimination against members of the group.

But the accommodationist position often puts civil rights at odds with efforts to create common identifications, cultural norms and practices that cut across group divisions. Such efforts help business and other organizations create the *esprit de corps* that inspires hard work and cooperation. And of course a common national culture and identity is indispensable to the success of any nation-state. That's why even in the United States, where the national culture has always been a cosmopolitan polyglot, the accommodationist position often proves to be unworkable.

Less obviously, accommodation might be bad for the very groups that were its supposed beneficiaries. The proponents of accommodation assume that the practices and affections that would enjoy accommodation are those freely chosen by members of the minority groups. Hence Professor Nussbaum urges France to accommodate the headscarf because Muslim women choose to wear it. But suppose the decision to wear the headscarf was the result of psychological conditioning, indoctrination or even violent coercion ? Then, the decision to accommodate the headscarf would not leave women free to choose; instead it might tip the balance of influences in favor of fundamentalist and patriarchal religious norms and against more modern or cosmopolitan approaches to the Muslim faith. In the name of accommodating group practices, the law may well inadvertently influence them. Ironically, legal accommodation is likely to reinforce the practices least compatible with republican norms and integration into modern cosmopolitan society. In the United States, proposals for accommodation of racial and culture difference typically favored traditional and often regressive practices at the expense of more modern, enlightened and cosmopolitan expressions of racial identity.

Nussbaum insists that accommodation is necessary to attack the more subtle forms of discrimination that hinder the progress and full citizenship of minority groups. She is right to draw attention to subtle forms of discrimination, which both European and American civil rights have largely failed to address. But subtle discrimination persists in the United States despite our

embrace of accommodationism. The response of those who advocate accommodation as a response to subtle discrimination has been to insist on a more aggressive and comprehensive accommodation of group difference. But the social costs of accommodation often outweigh the benefits; as a result, American courts have been reluctant to extend accommodations to new group or to require them in new circumstances.

I would urge that we think of civil rights law less in terms of individual rights than as a policy designed to speed the integration of minority groups into the prosperous mainstream of society, and adopt a utilitarian approach to questions of accommodation. Then we would not focus—as for instance Nussbaum does — on whether a given practice reflect the conscientious commitments of an individual—rather we would ask whether accommodating the practice will speed or retard the integration of the group.

At times accommodation may be necessary, but there are other ways of attacking subtle forms of discrimination, which avoid the many pitfalls of accommodationism. The law can attack bigotry and discrimination without attempting to define and safeguard the cultural practices of minority groups. In this respect, instead of pressing the French to embrace an accommodationist approach to civil rights, I would urge a reconsideration of the longstanding hostility to the use of racial and ethnic statistics. A judicious use of racial statistics could measure and respond to subtle discrimination without reifying group differences. The law should focus, not on the cultural practices of minority groups, but instead on the discriminatory practices that prevent minority groups from succeeding in the prosperous mainstream of society.

Such a focus would require the state to classify its citizens according to race, religion and other salient group identification, and of course this would come with risks. But the state should use such group classifications only in order to analyze the effects of bigotry. To do so it must ask only which characteristics are likely to make an individual a target of bigotry; it need not and should not inquire about individual commitments, beliefs or identifications. The approach to civil rights that I propose is in this sense just the opposite of that that the proponents of accommodation advocate. Accommodation seeks to safeguard practices that are important to or associated with members of minority groups—as a consequence it must legitimate those practices, and give them a legal imprimatur marking them as the defining practices of the group. By contrast, I would limit legal recognition of group membership to those characteristics that make an individual especially vulnerable to discrimination. Here nothing is given added weight

or legitimacy by the state; instead the goal is only to accurately identify and counteract illegitimate impediments to full participation in the market and civil society.

Accommodation in the United States: a cautionary example

Consider the following case, which became a *cause célèbre* for American multiculturalists in the legal academy. Like the question of the headscarf this case also involved what women wear on their heads:

> Plaintiff is a black woman who seeks $ 10,000 damages, injunctive, and declaratory relief against enforcement of a grooming policy of the defendant American Airlines that prohibits employees in certain employment categories from wearing an all-braided hairstyle…. She alleges that the policy…discriminates against her as a woman, and more specifically as a black woman… plaintiff assert[s] that the "corn row" style has a special significance for black women. She contends that it has been, historically, [and continues to be] a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society...".[11]

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

But the theory of racial discrimination and civil rights underlying Rogers's claim raises tough questions for civil rights law. Suppose some Black women employed by American Airlines wished to wear cornrows and advance the political message they ostensibly embody but others thought corn rows damaged the interests of black women in particular and reflected badly on the race as a whole (given the cultural politics of black America in the mid to late 1970s there almost certainly were such black women employed by American Airlines and even more certainly there were such black women among its customers.) Rogers's claim is no longer plausibly described as a claim on behalf of black women. Instead it is a claim on behalf of some black women over the possible objections of other black women.

Of course no one would have been forced to wear braids if Rogers had won her lawsuit. But the proffered rationale for conceiving of the hairstyle as a legal right was that cornrows are the "cultural essence," not of one black woman but of black *women*. If this claim is to be taken seriously then cornrows cannot be the cultural essence of only those black women who choose to wear them—they must be the cultural essence of *all* black women. And in this case *all* black women have a stake in the claim and the message about them that it will necessarily send—not only those who support the political and cultural statement conveyed by cornrows but also those who oppose that statement.

Even for the black women who prefer the cornrow hairstyle and the message about black women that Rogers claim would have advanced, accommodation would come with hidden costs. The ideas underlying such a right-to-difference can easily take on a life of its own and have unintended side effects. The rationale could set precedent that might apply in other cases. If *braids* are the immutable cultural essence of black women, what else might be? There are a great many possible answers to this question—some disturbing-- that many people will find as intuitively plausible Rogers's assertion regarding braids. Consider another case in which an employer's policy implicates a theory of racial difference:

> TPG [The Parker Group] is a telephone marketing corporation, often hired to perform work for political candidates. The conduct at issue in this case involves TPG's work making "get-out-the-vote" calls for various political candidates…. Approximately 10% of such calling is race-matched, such that black voters are called by black TPG employees who use the "black" script, while white voters are called by white TPG employees who use a different "white" script….. TPG employees doing the race matched calling in 1994 were assigned separate calling areas and separate scripts according to race…. TPG also physically segregated employees who worked at race matched calling. Black callers were segregated into one room and white callers segregated into another.[12]

If Renee Rogers's cultural essence as a black woman gives her an intrinsic relationship to a hairstyle, mightn't even a good faith employer conclude that her cultural essence would also enable her to better persuade other blacks and disable her from connecting with whites? Is

TPG's policy, as the court held, racially discriminatory because it is "based on a racial stereotype that blacks would respond to blacks and that …race was directly related to …ability to do the job."? Or is the policy the natural outgrowth of the recognition of cultural differences between the races and therefore justifiable, perhaps even laudable?

The move from antidiscrimination to accommodation of difference is fraught with unacknowledged perils. The accommodationist position encourages members of minority groups to define themselves in terms of group stereotypes. Accommodationism treats discrimination on the basis of voluntary behavior like discrimination on the basis of ascribed status or identity: a rule that prohibits braids becomes discrimination against black women; a rule that prohibits headscarves discriminates against Muslim women. The resulting rights claims are a bad way of dealing with the conflicts that arise due to real cultural and social difference—conflicts that involve objective social costs, which must be allocated pragmatically. Perhaps worst of all, the focus on cultural difference misleadingly suggests that social hierarchy is primarily the result of objective and intrinsic difference between natural racial groups: on this view racial minorities suffer because of their distinctive cultural practices rather than because of institutions, practices and ideas that unfairly exclude and disadvantage them. It thereby diverts attention from social practices that create and reinforce status hierarchy and from ideologies that justify that hierarchy.

Accommodation and the "Repressive Hypothesis"

The effort to expand the accommodationist strand of American civil rights law to cover "racial culture" was motivated by the fear that, if left unchecked, the state and mainstream institutions will destroy cultural diversity, and coerce minority groups to adopt a bland and uniform dominant culture. Consider the following excerpt from an article by law professor Dorothy Roberts:

> In the past whites in the United States used the law brutally to suppress other peoples' cultures…. Most of the time, however, the law promotes the dominant culture in much more subtle ways… whites, as a result of their dominant political position, have been able to incorporate their own cultural perspective into legal

> principles; they have labeled these legal principles as universal despite their one-sided pedigree; then judges claim to be impartial when they impose these principles without regard to… people from minority cultures….[13]

Similarly law professor Alex Johnson argues that minorities need "a *safe harbor*:"

> for the preservation of the idiopathic rules, customs, and norms that developed in our community while we were kept separate from whites by law. This safe harbor also allows those who choose not to fully embrace the norms of white society to retain a place in an African-American *community in which confrontation between African-American norms and conflicting white norms never takes place.* Moreover, this safe harbor protects African-American culture, because when the assimilationist version of integration occurs *African-American culture is typically not merged into majoritarian culture but obliterated by it* - leaving no trace of what was once a unique cultural vehicle.[14]

This is a familiar story. Ever since the limited but decisive victory of the American civil rights movement, racism--daunted, but not defeated—has sought a new front from which to attack. We have it on good authority that one of the most potent of its new weapons is a covert form of discrimination that functions by misdirection. Bigotry will target, not natural groups but their distinctive practices. The law will not countenance discrimination against blacks, but racists can stigmatize Ebonics; one wouldn't dare discriminate against women, but chauvinists can repress the "different voice" in which women speak. The result: a new bigotry, not against types of people but of ways of being. To be clear the goal now is not to surreptitiously exclude the previously stigmatized people through the underhanded use of proxies—instead the goal is to absorb and transform the previously stigmatized groups, to remake them in the image of the *Übermenchen.* This ultimate goal is arguably more vicious, more comprehensive, than simple exclusion. It is a bloodless extermination: cultural genocide.

This story is familiar, not only because it has been told so often, but also because it is a type of story that has an archetype. The story of the new bigotry is a story of repression; it is a reiteration of what Michel Foucault in *The History of Sexuality, Volume One* called a "repressive

hypothesis." The "repressive hypothesis" that Foucault attacked began with the Victorians and involves dark powers of sexuality, while ours begins with the American bourgeoisie and involves the sexy cultures of the dark-skinned. But the parallels are striking.

Foucault argued against the familiar story in which the institutions of bourgeois society from the Victorian era to the present have operated to repress the natural and authentic sexuality of individuals (the "repressive hypothesis.") Instead, Foucault argued, the Victorians were (as we, their legatees, are still today) obsessed with sexuality, they saw it everywhere, they constantly discussed it, insisted on its relevance and deployed it as a description of many forms of human behavior. They *produced* sexuality by defining human behavior in terms of sexuality, defining individuals as possessed of sexualities and cataloguing and constructing sexual typologies. This *production* of sexuality, according to Foucault, defines today's social control of eroticism, "bodies and pleasure." The production of sexuality was (and is) a technology that defined the individual according to its sexuality, and thereby kept individuals under a type of sexual surveillance. If anything undermined authentic eroticism (a term whose ontological status is, for Foucault, questionable at best) it was this incessant production of sexuality that limited the possibilities of erotic expression by imposing upon individual eroticism a narrow range of canonical sexual types.

Moreover, for Foucault, *the very idea that sexuality is repressed* might be a part of the apparatus of sexual production and social control:

> The question I would like to pose is not, Why are we repressed? but rather, Why do we say, with so much passion and so much resentment against our most recent past, against our present, and against ourselves, that we are repressed?… What led us to show, ostentatiously, that sex is something we hide…and…do all this by formulating the matter in the most explicit terms, by trying to reveal it in its most naked reality… ? [W[e must also ask why we burden ourselves today with so much guilt for having made sex a sin….How to account for the displacement which, while claiming to free us from the sinful nature of sex, taxes us with a great historical wrong which consists precisely in imagining that nature to be blameworthy…?[15]

Now let's turn to culture. The implicit presumption underlying the accommodationist account of discrimination is that group cultural differences are natural and authentic expressions of individual conscience and identity and that failure to accommodate these differences is a form of tyranny. Here, as in Foucault's account of sexuality, we find a "repressive hypothesis": power is exercised through censorship and repression, justice entails nothing more than the absence of repression, a willingness to let human nature take its course and embrace the mysterious and beautiful forces that already surround and define us.

But what if our era is defined less by the *repression* of group difference, than by its *production*? And what if—as in Foucault's analysis—the repressive hypothesis itself is one of the mechanisms by which this production of group difference is accomplished? Is there evidence for such a counter-hypothesis? In American society human beings are sorted (and sort themselves) with remarkable comprehensiveness, precision and efficiency, into a number of almost canonical social groups. You know what they are (and more importantly, you know *who you* are.) Think about the neighborhood magazine kiosk, where ethnic niche marketing has given us *Ebony* magazine, which competes for space with *Essence* (for black women) *Latina*, *Yolk* (Asian-Americans, get it?) and *Out* (gay and lesbian). American student organizations in colleges (and many high schools), are an "alphabet soup" of race, ethnicity and sexual orientation (in law school we have BLSA (Black Law Students Association) joined by SALSA (South American and Latino Students Organization), APALSA (Asian and Pacific…) and winning the award for both cleverness and for bucking the trend of initials, OUTLAW (out gay and lesbian law students). And, as I will discuss below, in the new, check-every-box-that-applies U.S. Census racial data acquires simultaneously the aura of objective science and the patina of subjective self-affirmation. If there is a plot to repress group differences, it has numerous and powerful enemies in the media, industry, politics and higher education.

Consider, for example, the American approach to race conscious affirmative action, which relies on an implicit theory of group difference. The Supreme Court in *U.C. Regents v. Bakke*[16], held that American colleges and universities could engage in affirmative action only in order to remedy specific instances of discrimination or to promote racial "diversity." As a result, American colleges and universities have sought to establish that racial minorities have distinctive norms, perspectives, voices and cultural practices that might contribute to "diversity" and they

have downplayed other, more compelling and straightforward reasons for integrating their student bodies.

Bakke's diversity rationale pushed institutions that wished to engage in affirmative action *and* minority groups themselves to *emphasize* cultural difference. Only by highlighting the stark differences in perspectives, norms and experiences marked by race could universities justify affirmative action post-Bakke. The diversity rationale effectively requires universities to incorporate a substantive theory of racial difference into their admission processes—the post *Bakke* universities and their minority applicants needed not only to assert that racial minorities would bring distinctive ideas and perspectives to the seminar table, they also needed at least a sketchy working account of the distinctive perspectives that racial minorities would bring. And a much more pernicious implication hovered over post-*Bakke* university life: *only* by highlighting their own distinctiveness could minority students justify their presence in the universities that had admitted or might admit them.

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

> The U.S. Supreme Court ruled in *Bakke* that race can be a factor in striving for a diverse student body. Therefore…if you participated in a minority students organization, list it in your application… if there is something unique or of special interest as regards your race or ethnicity, whether it relates to your personal or professional development or illustrates how you would add a unique or different perspective to the student body, include it in your personal statement.[17]

These instructions were not lost on applicants to selective universities and professional schools. Here's a small sample of personal statements penned by successful applicants to Harvard Law School: "My primary motivation for receiving a law degree surfaces from my

personal experiences with the struggles of the Latin American immigrant…"[18] "My experience with other cultures give me sensitivity to the voices of today's international America." [19] "[W]hen I supported funding for the Carolina Gay and Lesbian Association…"[20] "My curiosity about foreign cultures… began early." [21] "As the child of Paraguayan immigrants, I too occupy a borderland."[22] "I studied American Sign Language and was introduced to Deaf culture…"[23] "By the time I entered college, I had mastered the language of three communities: the Paraguyan Spanish spoken by my mother at home; the profanity-laden slang of our poor, all-Black Washington D.C. neighborhood; and the textbook English enforced in the private schools I attended…"[24] "I am a fourth generation Mexican-American with Cajun ancestry…" [25] "[A]s an expatriate I developed a keen awareness of cultural diversity by actually being a part of different cultures"[26] "I want to get involved with the law here to preserve a state wealthy with culture and diversity."[27] And, making up in directness for what it lacks in supporting detail: "If accepted, I will bring to Harvard Law School a very rich and diverse background"[28]

Here students are encouraged to emphasize their race and ethnicity—a performance that can easily become habitual. Worse yet, the idea that race comes with a distinctive set of practices suggests that those who do not adopt the practices commonly associated with their group are somehow inauthentic or have betrayed the group. Hence we find the "Oreo"—a person who is black on the outside but because he doesn't "act black" is said to be white "on the inside. And quickly enough other racial groups acquired similar figures (for some odd reason all refer to food): the Asian "banana", Latino "coconut," Native American "apple." These epithets imply that there is a particular type of behavior that is appropriate to a given race and censure deviation from it—an orthodoxy as powerful and coercive, if not as comprehensive or pervasive, as the social mores of Victorian England.

Such descriptions of group difference are exercises of power: attempts to legitimate a particular and controversial account of group culture over the objection of those who would reject or challenge that account. In today's United States the idea that minorities should hew to "their" cultural traditions is arguably as hegemonic as the idea that they should assimilate to a white-bread mainstream. As a result, accommodation of cultural difference will not simply leave people free from repression; instead it will install a specific set of ideas about what it means to be a member of whichever group accommodation purportedly "protects".

Finally, notice that the idea that minority cultures are embattled, subject to repression and in danger of extinction is part of the mechanism that ensures their perpetuation in their canonical form. The idea that minority cultures are repressed justifies extraordinary legal protection in the form of special accommodations for those practices deemed to be part of the group's culture. And the repressive hypothesis also reinforces the pressure on members of the minority group to exhibit the distinctive group practices. According to the repressive hypothesis, carrying on the traditional group culture is not just an option; it is a moral obligation to close ranks against a hostile and repressive majority.

Identity as Collective Performance: accommodation as social control

> As a *Black lesbian feminist* comfortable with the many different ingredients of my identity… I find I am constantly being asked to pluck out some one aspect of myself and present this as the meaningful whole, eclipsing of denying the other parts of myself. But…[m]y fullest concentration of energy is available to me only when I integrate all of the parts of who I am… *without the restrictions of externally imposed definition.*[29]

This quotation from Audre Lorde is typical of the sentiments animating claims for cultural accommodation. It's easy to see how we'd get from here to support for a legal right designed to protect against "externally imposed definition" so that we could all have our fullest concentration of energy available to us. But is it possible to comprehend, much less embrace or be "comfortable with," identity categories such as "black," "lesbian" or "feminist", "without the restrictions of externally imposed definition"? Or are these identity categories (as opposed to their supposed referents: dark skin, female same sex eroticism, a commitment to certain practice of gender) the *product* of those restrictions? These are crucial questions for those who would insist that the accommodation of difference is a civil right.

Note that here status as a member of a social group ("black, lesbian") becomes an aspect of the self ("one aspect of myself… all the parts of who I am") that can occupy a position evacuated of social power ("without the restrictions of externally imposed definition.") Through this prestidigitation, group identities that are the *effects* of externally imposed social discourses—

racism, homophobia—are magically transformed into aspects of an autonomous self that can then integrate them "without the restrictions of externally imposed definition."

This conception of identity is motivated by the conceit that social identities are natural things in the world and or reflections of things that can be taken note of as a matter of fact. By contrast, the conception of identity that will inform this essay is that social identities are social practices that are never "formed" but always in a process of formation and reformation that is never complete. Social critics have called this the "performative" conception of identity. It's an evocative term. But it is too easy to leap from the idea that social identities are performances to the figure of an actor on a stage that "performs" a role. On this account, the individual who "has" the identity does all of the work: the rest of society merely demands a particular performance and punishes others. If we must use the theatrical metaphor, let's remember that the actors "perform" each other's roles. If an ugly man is playing the role of a beautiful woman in a Shakespearean comedy, the other actors "perform" his role by treating him as we would expect people to treat a beautiful woman. By the same token when a department store detective looks at me and decides to shadow my every move until I leave the premises, *he* is performing *my* identity. When a well-meaning but misguided white liberal shakes the hand of my white friend in the same way he would shake the hand of Fortune 500 CEO but then holds out an open palm to me in order to "give me five" or awkwardly tries to give me the "soul" handshake, he is performing my identity. And by the same token, when a black man gives me the "soul" handshake, he also is performing my identity. This is true even if the soul handshake strikes me as the most natural gesture in the world—in fact that is perhaps when it is most true.

I would loosely associate this kind of "performance" with what the philosopher Louis Althusser called "interpellation." Althusser used the example of a policeman who shouts "Hey, you there!" to illustrate the concept. The person in a crowd with a guilty conscience may stop and turn around, thereby "answering" the call. When one recognizes the call as addressing her ("uh, oh, I'm busted") she becomes a subject of an ideology—in this case the ideology of the criminal law. By this we mean that she acknowledges an ideology of criminality and her position in that ideology as a criminal. Similarly, the narrative of group culture that justifies legal accommodation shouts "Hey, you there!" to members of the group under examination. The black woman is told that braids are part of her cultural essences; the Muslim school girl is told that the headscarf is an integral part of her faith. And, as the figure of the policeman

suggests, we are not free simply to ignore this address and its implications. Legal accommodation does not simply give individuals freedom of choice; it also interpellates members of the minority group in question, defining a norm for their group as a matter of law.

Coercion in Supposedly Free Time

We often think of our lives as divided between time at work and "free time." The social performance associated with our "free time" therefore becomes the model of freedom; if we're pressured to do something different while at work or at school the natural conclusion is that the expectations of work or school are "externally imposed." But a moment of sober reflection is enough to undermine this idea. External definition comes from everywhere: our families, friends, spouses and romantic partners have expectations that are as powerful and prescriptive as those of any boss or co-worker. This isn't a critique of these "free time" relationships but it is a critique of the idea that they are "free" in any strong sense of the word. Indeed the pleasure and eroticism of our various human relationships derives from the varying expectations each relationship provides. I – and I think most people—enjoy the movement between varying social roles: serious professional, laid back drinking buddy, intense intellectual, exuberant bon vivant, intimate friend, devoted son, loving husband, enraptured lover. The reason I enjoy these roles is not because any of them let me express my identity "without the restrictions of externally imposed definition," whatever that would mean. Each of these roles—indeed any position that involves other people—comes with elaborate expectations and the relationships depend entirely on everyone holding up his or her end of the implicit bargain. So we can't assume that the identity that an individual brings from home is a product of freedom; in fact we can be pretty sure that it isn't. Our self-conceptions and identifications develop in a social milieu saturated with power, top to bottom.

The idea that the modes of self-presentation and interaction that take place in or derive from the private spheres of home, neighborhood and leisure are freely chosen reflects a "top down" notion of social power: regulation and coercion come only from the state and other conspicuously empowered institutions such as schools and employers. According to this account some actors have power and others are impotent and at the mercy of the powerful; social control is imposed by the powerful on the powerless.

In contrast to this simple model of power Foucault advanced a more sophisticated conception that takes the power of informal groups, practices and ideas seriously. Foucault argued that all social actors have power and social control is a result of the interaction of a host of institutions and actors. In Foucault's understanding, the state does not occupy a privileged position in the distribution of power, instead it works with and negotiates with other institutions and participates in the production of knowledge, the formation of norms and the development of prescribed modes of behavior along with other social actors—including individuals and informal groups. Hence the social norms of appropriate behavior for various social groups are produced and enforced by a host of different institutions and individuals—the state, business corporations and schools to be sure, but also churches, neighborhood social clubs, street gangs, friends and family members. Social life is defined by power relationships in even the most intimate and seemingly private sphere—indeed, as feminists have long insisted, the intimate and private sphere may be where social power is most potent and insidious. There is no place from which pure identities, identities forged free of "the restrictions of externally imposed definition," could come.

This doesn't mean that we always experience the "free time" identities as oppressive, but sometimes we do. Indeed it is likely that many people use the institutional rules that rights-to-accommodation would prohibit as a convenient excuse to avoid social roles that are obligatory at home, or find that unfamiliar institutional norms provide valuable perspective on the norms that prevail in their "free time." Some individuals might consciously wish to reconsider their inherited norms while others might discover over time that customs and norms that were once second nature have gradually yielded to new ideas. Hence the black woman who faces a workplace dress code that excludes cornrow braids might come to accept or even appreciate a different coif; the Muslim girl who is forbidden to wear the headscarf at school might come to enjoy letting her hair down.

Institutional Cultures: how accommodation undermines true diversity

Proponents of accommodation often ignore entirely the effect of their proposals on the cultures of the institutions that will have the duty to suspend their normal policies in order to accommodate. But institutions have cultures just as much as less formally organized social groups and individuals do. These institutional cultures make up much of the cultural diversity in any society. Institutions affect the lives of everyone they come in contact with. Their various cultural styles, as much as and perhaps more than those of individuals and informal groups, are what give most of everyday life its richness and texture. Given their insistence on the salience of groups, it is ironic that advocates of strong accommodationism largely ignore these specific institutional manifestations of group allegiance and culture.

If an institution is required to accommodate the cultural styles and norms of all of its employees or enrollees, it is effectively prohibited from making adherence to an institutional style or norm a requirement of membership. Sometimes, a right to accommodation will conflict with the goal of promoting an institutional culture that is valuable and praiseworthy. In these circumstances, accommodation will have significant institutional costs that traditional civil rights, by and large, do not have.

Consider the conflict surrounding the policy of a prestigious American university:

> One of the most popular innovations on college campuses across the country a generation ago was the introduction of coeducational dormitories and the elimination of rules that tried to keep young men and women apart. So it may provide an insight into current college life, as classes begin here at Yale this fall, that one of the most-discussed topics is the claim by five Orthodox Jewish students that those unrestricted living arrangements have established a free-for-all that they compare to Sodom and Gomorrah….The Orthodox students have demanded that they be excused from Yale's requirement that all freshmen and sophomores live on campus. They say their religion's rules of modesty, privacy and sexual abstinence until marriage forbid them to live in residences where condoms, alcohol and shared bathrooms are common.
>
> Yale has refused….Experts on higher education say that Yale's dilemma is a common one on campuses in the 1990's, as administrators grapple with

> demands from interest groups of all types, including increasingly vocal conservative religious groups, for accommodations, food and academic offerings that meet their special needs….Some students and faculty members on campus here say the debate raises fundamental questions about how much universities should channel people into shared experiences and how much they should encourage students to maintain their own group identities.[30]

Yale's policy of coeducational dormitories is itself the outcome of intense cultural struggle over gender relations and the requirement of campus residency is a policy designed to promote acculturation to new and unfamiliar environment. Yale has an institutional culture that most of its students, graduates and employees are proud of and wish to promote. Yale undergraduates maintain a connection with their freshmen residential "college" throughout their college years and many alumni still identify with their residential college long after their years at Yale are over.

Moreover, Yale's residential education program is deliberately designed to prevent the self-segregation that the "Yale Five" insist on:

> Richard H. Brodhead, the dean of Yale College, said in an interview that part of Yale's offering was the chance for students to learn about other outlooks by living in that community. "If you allow all groups based on affiliation or conviction to separate themselves from the whole university community," Dean Brodhead said, "you open the door to all kinds of self-segregation that this place has worked very hard against."[31]

A similar conflict emerged at Cornell University in 1996 over a proposal to bar freshmen from living in ethnic theme houses. Much like Yale's Dean Broadhead, Cornell's President Rawlings defended the policy as providing a common college experience and as foiling self-segregation: "New students arriving at Cornell should have an experience that demonstrates that they are entering an academic community, first and foremost." The Cornell controversy came to a head when the Reverend Al Sharpton equated the university's attempt to provide a common

freshmen year experience with racism. Sharpton mocked: "We want more blacks and Latinos on campus; we just want them to merge in with everyone else so we don't know they're here."[32]

Cornell was caught in a double bind: a year earlier Cornell was accused of discrimination for establishing and maintaining the very ethnic theme houses that Reverend Sharpton insisted it must not tamper with. We can imagine those opposed to the theme houses mocking Sharpton: "We want more blacks and Latinos on campus; we just want them to keep to themselves so we don't know they're here." Does social justice demand that minorities be segregated in order to accommodate their distinctive cultures and social norms or does it demand that they be integrated into the common institutional arrangements and modes of socialization that account for much of the prestige and social capital attached to an elite university education? Both the disgruntled Cornell students and the Yale Five complained that integrated dormitories might undermine their group specific identity by exposing them to more seductive alternatives. In a sense this is exactly what the universities intend. Part of the program of liberal education is designed to ensure that university graduates have been exposed to a variety of norms, ideals and lifestyles and thereby have been forced to consider their inherited cultures in the light of multiple alternatives. Yale and Cornell University have adopted a very self-conscious policy designed to promote a specific institutional culture. The university is not and does not claim to be neutral in this regard—its policy is to actively foster socially and culturally integrated living arrangements and to make them a part of the educational program. This objective requires them to forbid opting out of the shared university life. Proponents of accommodation might object that Yale and Cornell should confine their educational agenda to the classroom: on this account the point of college is classroom education, not acculturation in residential settings. But this narrow definition of a university's institutional mission is at best questionable; certainly the administrations of most universities do not define their mission so narrowly. Indeed, the crabbed conception of the mission of universities is directly at odds with the most basic precepts of liberal education, which emphasize growth as a whole person rather than the narrow acquisition of technical skills.

Yale and Cornell's insistence on integrated dorms is itself a profound and potentially fragile cultural intervention—America today is only two generations removed from the era in which segregation by sex and race was the norm. Why should the schools' embattled norm yield to that of its separatist students? And even if the institutional culture in question is durable

and hegemonic, that does not necessarily mean it should yield—many cultural practices are hegemonic because they are better suited to a given environment or set of legitimate institutional goals.

Similar concerns seem to animate the French resistance to demands that public schools should accommodate religious grab. A commonly voiced defense of the ban is that religious symbols divide students according to religion and ethnicity when they should be joined together in a common civic endeavor. Ideally school provides a political and social education as well as training in more technical skills: free public education socializes children in the common norms of citizenship in a republic. This integrationist goal may be unwelcome to minority groups with separatist aspirations, but it is indispensable to some of the most profound civil rights traditions—indeed it was one of the central reasons offered by the American Supreme Court in 1954 for invalidating racial segregation in *Brown v. Board of Education:*

> education …. is required in the performance of our most basic public responsibilities…It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[33]

Those who defend banning the veil argue that veiling retards the civic integrationist functions of public education. The veil conspicuously marks its wearer as a member of an exotic minority. It is an aggressive symbol of distinctiveness, a rejection of a common national identity. Worst of all, because it is worn exclusively by women, it is a symbol of women's inferior social status—radically at odds with republican values of equality.

These concerns provide an answer to those critics who dismiss the headscarves ban as little more than veiled anti-Muslim bigotry. They also answer critics such as Professor Nussbaum who believe that respect for religious liberty requires rejecting a ban on headscarves. Indeed Nussbaum admits that "[w]hen Turkey banned the veil long ago, there was a good reason in that specific context: because women who went unveiled were being subjected to harassment and violence. The ban protected a space for the choice to be unveiled, and was legitimate so long as women did not have that choice." But she insists that "in today's Europe women can dress more or less as they please; there is no reason for the burden to religious liberty that the

ban involves." This may be true in the central districts of the cosmopolitan European capitals that Americans are likely to visit, but apparently it is not true in some of the more isolated neighborhoods, suburbs and smaller towns where women face precisely the type of harassment that Nussbaum admits might justify a ban. Moreover, coercion takes many forms—even women who are "free" to dress as they please may well face social pressure to conform to patriarchal religious norms from their communities and families. And of course school age girls are especially vulnerable to pressure from family and peers.

Supporters of the law banning religious symbols insist that "it is a question of preserving the republic and its democratic and secular tradition."
One school principal argued, poignantly:

> A French state school is supposed to be a place of liberty where critical reason can be exercised. It is supposed to be a free zone where adolescents forge their minds, without being constrained by belonging to an identifying religious community. It is meant to be a haven where girls can evolve free of prohibitions based on gender, such as the wearing of a headscarf that separates them from the rest of humanity. The school should ultimately be a place that permits everyone, regardless of their specific community and the legitimate expression of their diversity, to move forward to the universality of the human condition. Secularism allows us to build on the attributes that unite us, and not those that separate us, and to advance universal concerns while allowing beliefs to remain private and individual.[34]

This is not a culturally neutral or universally accepted ideal, but it is a profound and compelling one—one that an institution or a society is entitled to adopt and promote. As the American historian Arthur Schlesinger Jr. once put it, liberalism is a fighting faith. France is right to imagine that the republican ideals of secularism and critical reason need defending—they may be hegemonic in France but, sadly, they are not dominant worldwide.

Here context matters: the costs of accommodation will vary depending on the size and social posture of the group demanding accommodation. Nussbaum's assertion of America's superior tolerance might reflect a blindness to the kinds of conspicuous attire Americans are

most sensitive to. For the most part, conspicuous religious minorities are not a significant presence in American society; by contrast, one supporter of France's law banning conspicuous religious symbols reported that in her school "about a quarter of the students are of North African origin and another quarter are Jewish."[35] If even half of each group chose to wear a conspicuous religious symbol, the effect on the classroom environment and the mission to instill a civic ideal of secularism could be profoundly undermined. As a result, it is easier for Americans to accept accommodation of religious garb than it is for Europeans who have experienced very high rates of immigration from countries with distinctive religious traditions. But Americans tend to resist claims for accommodation of the types of behavior that threatens significant and pervasive social division. For instance, many private and parochial schools require school uniforms to counteract peer influences and cliquishness surrounding fashion. Many American schools prohibit clothing associated with youth gangs and even some American towns have outlawed "gangster rap" fashions such as pants worn so low as to reveal the undergarments.[36] Many see such laws as a violation of individual rights, but others insist that "the hip-hop style itself…is worn as a badge of delinquency, with its distinctive walk conveying thuggish swagger and a disrespect for authority." American courts have given schools especially broad authority to ban divisive and distracting styles of dress, including sexually provocative clothing, gang related colors and styles, hats, jewelry and logos with unacceptable messages or implications. Similar concerns might justify prohibiting conspicuous religious garb in a context in which religious divisions threaten to undermine the educational mission.

Moreover, the United States and France have different social priorities and, consequently, different approaches to social equality. The United States has always been a conspicuously pluralistic society and American national identity is in large part defined by this pluralism. France, by contrast, has long put a high priority on national unity and enjoys a more distinctive cultural heritage. As a result, American civil rights have been more accepting of ascribed social differences. For much of American history this has had notoriously unjust results.

The French approach to social equity, which entails a refusal to accept racial and ethnic categories, has its virtues. Of course, France has not eliminated unjust social stratification, but neither has the United States, despite its greater willingness to accommodate minority group practices. Both traditions are in need for reform and amendment. Even if accommodation is a civil rights imperative in the United States, it does not follow that it must also be one in France.

Indeed, it seems odd for anyone truly concerned with cultural diversity to insist that all nations—the most obvious repositories of "culture"—adopt the same approach to social justice, especially when, as here, that approach has important ramifications for other deeply held social values.

In some instances rights to accommodation might make institutions more interesting, more vibrant and more inclusive by requiring them to incorporate the cultural styles of their employees and patrons. But in other cases cultural rights and mandatory accommodation will have the opposite effect: by requiring a kind of "cultural neutrality" on the part of institutions, rights to accommodation will encourage institutions to adopt the most bland, antiseptic and predictable styles possible. Faced with the risk of liability for failure to accommodate minority culture styles and practices, the risk averse institution would adopt only policies that focused exclusively on objectively defensible goals such as technocratic expertise, efficiency and the bottom line; by way of rights-to-difference we arrive at the epitome of capitalist alienation as described by leftists since Karl Marx. In effect, the rights-to-difference project may encourage the bland institutional monoculture that it posits as a *fait accompli.*

Accommodation as Public Policy, Not an Human Right

The case for accommodation is strongest with respect to religion because any legal protection for religious liberty must include some protection for the associated practices. It would be nonsensical to say, for instance, that no one may discriminate in hiring or promotion on the basis of religion, but then to allow employers to make a recitation of the apostle's creed or a renunciation of the authority of the Pope a condition of employment. A society could of course decide not to guarantee religious freedom at all. But, having decided to guarantee it, there is no way to avoid some degree of accommodation for beliefs, practices and customs because these, in sum, *are* religion.

For the proponents of accommodation, this should settle the question of headscarves. But it's not quite as stark a choice as it might appear. In fact, many religious practices yield to the demands of society. Just as society can sometimes accommodate religious practices, religious groups can also accommodate themselves to society: questions of faith are rarely as absolute and non-negotiable as religious zealots claim that they are—for most people, compromise is possible. Although the right to accommodation is often expressed in absolute terms, it is actually based on a factual presumption that the reasons not to accommodate are very weak in comparison to the

interest of the individual in continuing the practice. For instance, on the eve of parliamentary debate about the headscarf ban, Kenneth Roth, the executive director of Human Rights Watch opined: "The proposed law is an *unwarranted* infringement on the right to religious practice…for many Muslims, wearing a headscarf is not only about religious expression, it is about religious obligation."[37] This implies than some such infringements might be warranted. Similarly, Martha Nussbaum condemned France's headscarf ban because she assumed that women in France are never forced or pressured the wear the headscarf, and she actually supported a ban on headscarves in Turkey when she believed women were being forced to wear it.

If you assume away the legitimate reasons to refuse to accommodate a minority group, then it seems that a legal right to accommodation merely stops powerful institutions from injuring powerless individuals. But many of the disputes that give rise to demands for accommodation aren't well described in terms of powerful bullies and injured victims: instead they involve conflicts between incompatible norms and goals.

Accommodation and the Problem of Joint Costs

The idea that many legal disputes are best understood in terms of incompatible activities and joint costs rather than perpetrators and injured victims has been dominant in private law since the American Legal Realists developed the critique of objective causation in the early 20th century. In tort law, the now-discredited jurisprudence of cause-and-effect, victim-and-perpetrator has given way to the conceptions of "injuries" as problems of joint costs arising from mutually incompatible activities. The central insight of "joint cost" analysis, developed in the mid-20th century by the economist Ronald Coase, is that we can't determine who the "victim" or "perpetrator" in a conflict is until we determine who has the legal entitlement to either continue or enjoin the challenged activity—precisely what is at stake in the dispute.[38]

A classic example: a train that throws off sparks which ignite fires in a wheat field bordering the railroad tracks. The old view was that the railroad was the perpetrator who had *injured* the victimized (and passive) owner of the wheat fields. This was thought to imply that the perpetrator should be forced either to stop causing the harm under the common law doctrine *sic utere tuo ut alienum non laedes* (roughly translated: use your property only so as not to harm

your neighbor) or to "internalize the costs of its activity" by paying money damages to the victim.

Coase rejected this approach to the problem, pointing out that, viewed without preconceptions, we were faced with *two* activities—operating a train *and* growing wheat—not one. The problem was not well described in terms of causation and harm but rather in terms of incompatibility. And the question to be answered was therefore not how to prevent harm or force perpetrators to internalize the costs of their activity but rather which activity to encourage. As Coase noted, this reformulation did not answer that question but it did clear away the metaphysical chaparral that hindered our view of the underlying policy landscape.

We could think of civil rights law in terms of Coasian "joint costs." In an employment dispute, the employer wants to implement a policy that would exclude the potential employee or wants the employee to conform to a particular workplace rule while the plaintiff wants the job without having to conform to the rule. It distorts our analysis to describe the situation in terms of victims and perpetrators or harm and injury ("the employer's policy harms minority applicants.") Instead, the clash of these conflicting desires gives rise to what Coase would call "joint costs." Someone will suffer injury regardless of how the case is decided: if the employer prevails, she will be free to exclude the job applicant from a job the applicant wants. But if the applicant prevails, he will be able to force the employer to suspend a policy that the employer wants to implement. Either way someone suffers an "injury," or, in Coase's terms, is forced to bear the cost of the clash of incompatible activities. In this sense civil rights law does not prevent injuries from occurring; instead it shifts the costs of incompatibility from one group of actors to another.

This isn't a critique: in fact one could argue that this type of cost shifting is the *goal* of antidiscrimination law. Take the paradigm case of a racist employer who simply doesn't want to work with blacks. A Coasian analysis suggests that antidiscrimination law doesn't simply prevent the racist from harming blacks; it requires the racist to bear the cost of an incompatibility between his desire to exclude blacks and the desire of blacks for gainful employment. Framing it in this way does not, I hope, change anyone's mind about how the case should be decided. We *should* require the racist to bear this cost. We should do so because social justice demands that resources be distributed to help a long suffering group get a foothold in the economy rather than to support its oppressors, because the cause of racial exclusion should be starved of resources

and because the desire of an individual to earn a living deserves respect while the desire of a racist to avoid contact with blacks deserves contempt.

But the Coasian insight might make a difference in the case of claims for accommodation. If a policy prohibits a voluntarily adopted style, behavior or trait, the joint cost analysis changes in two potentially significant ways. One, the contested behavior might be *objectively* costly to the employer—take for example a bilingual employee's decision to speak a foreign language that makes monitoring of employee behavior on the job objectively more difficult, thereby requiring the assignment of extra supervisors. Two, the plaintiff could avoid the conflict by changing his behavior while at work. While the typical civil rights formulation casts one party as an active perpetrator and the other as a helpless victim, the Coasian analysis reminds us that both parties can affect the outcome.

If there are real costs to the employer that are not a function of bias then the relevant normative balance is between the cost to the plaintiff of changing the behavior and the cost to employer of accommodating it. The costs borne by the person forced to comply with a formally neutral but "culturally discriminatory" policy may be hard to distinguish in principle from the costs that the institution would bear if required to change the policy.

Of course if the employer's aversion to a group correlated behavior is simply a manifestation of aversion to the group the employer should bear the cost of accommodation for social justice reasons. But if the aversion to the behavior is truly the result of *cultural* difference – a clash of norms, aesthetic preferences or beliefs – it is not obvious that the cultural norms of the employer or those that dominate in the market should yield to those held by the employee.

Joint costs analysis suggests that issues of cultural difference and assimilation involve conflicting goals, the allocation of social costs and inevitable trade-offs. Assuming a central goal of antidiscrimination law is to promote the social and economic integration of stigmatized groups, cultural accommodation raises thorny factual and normative questions. In the face of social and economic pressure to assimilate, when will cultural minorities do so, when will they retreat to isolated enclaves and when will they suffer the cost of retaining difference in mainstream institutions? Is cultural diversity desirable in and of itself, or only as a means to the end of social integration that might otherwise be difficult to achieve? How should the costs of accommodating insular cultural minorities or of achieving a more unified culture be borne? If cultural assimilation could be achieved at some significant emotional and psychological cost to

one generation of minorities, but at dramatically and constantly lessening costs to each successive generation until "full assimilation" had been achieved (and future costs were zero), would such a policy be morally acceptable? Would it affect our evaluation of such a policy if we knew that the alternative was an intractable social fragmentation with high and enduring costs for both cultural minorities and the majority?

How might we think about such questions with respect to the headscarves controversy? A law or policy that forbids the headscarf *should* be controversial: it is not obvious at first blush whether or not such a policy is justified. There's no abstract principle, such as "religious liberty" or "freedom of conscience" that can determine whether or not such a ban is justified: the answer depends on the context. Even Professor Nussbaum, who insisted that respect for religious freedom required accommodation of the headscarf, also admitted that her position would change if she believed a lot of women were being forced to wear the headscarf. That admission demonstrates that no strict or inviolable principle requires the accommodation of religious practices—instead accommodation is a policy choice, the wisdom of which depends on context and on educated guesses about its likely consequences.

I would suggest that this and many of the issues that fall under the heading "multiculturalism" should be evaluated according to whether a given approach to a social conflict is likely to promote or impede the smooth integration of disadvantaged minority groups into the more prosperous mainstream. This is, of course, a difficult prediction to make. But it is at least a question that one might answer, or at least make an educated guess about. By contrast, there is no way to even begin to decide whether the religious liberty of Muslims who want to wear the headscarf, veil or burqa outweighs the interests of those who may be forced to wear it or conditioned to desire it by patriarchal upbringing, or the interests of French feminists who find the veil an offensive symbol of women's oppression, or the interests of French citizens in a more socially integrated and less religiously charged society.

Accommodationists insist that a just society must make special allowances for the sincere and conscientious commitments of individuals—of which religious practices are exemplary—regardless of the consequences for society or for the groups themselves. By contrast, I propose that a just society should seek to speed the integration of disadvantaged and socially isolated groups, regardless of whether that requires the accommodation or the suppression the distinctive practices of minority groups. In other words, while the accommodationist position makes

respect for distinctive minority group practices its primary goal, I suggest that a just society could be indifferent to such practices: not deliberately hostile to them, but not unusually deferential to them either. Instead of accommodation, I would argue that civil rights require *integration*: the elimination of both formal and informal barriers that keep disadvantaged groups from entering the job market and the mainstream of the society. If accommodating a practice will speed the integration of an isolated and disadvantaged minority group (and is not overly costly in other respects) society should accommodate it; if repressing the practice will speed the integration of the group, society should repress it.

The typical liberal analysis of religious liberty takes the expressed preference of individuals as the autonomous expression of an authentic self. But individual preferences are not formed autonomously—they are in large part a reaction to external constraints and influences. Even those women who sincerely want to veil themselves value the veil for its symbolic importance—for what it means to others. Like all symbolic meaning, the meaning of the veil is the result of its relationship to other symbols in a system or structure. The veil acquires meaning in a society in which most women do not wear it, as a reaction to the secular and cosmopolitan West, to modern and "loose" Western women who entice men with their exposed flesh and come hither glances, to secularized Muslim women who emulate Westerners, demonstrating their lack of self-respect and the weakness of their faith. In part, the veil symbolizes resistance to Western values and mores—including both sexual liberation and equality of the sexes. And it's fair to suspect that it is, in part, a defiant and defensive response to a social mainstream that has rejected Muslim immigrants, just as African-American "gangster" styles are in part a defensive rejection of an American mainstream that holds blacks in contempt. In this respect it is instructive to note that most Muslim religious authorities insist that the Islamic faith does not require women to veil themselves: the elevation of the veil to the defining symbol of religious adherence is most likely a consequence of its very incompatibility with Western, cosmopolitan aesthetics. In this sense the headscarves affair does not involve the clash between French culture and a distinct and autonomous foreign culture—it is an indigenous conflict borne of a cosmopolitan encounter between a majority and a minority group.

Greater acceptance by and integration into mainstream French society might make the veil less appealing as a symbol of defiant resistance. Women who once saw the veil as an important statement of self-respect might come to see it as a pointless and counterproductive

gesture or a holdover from a less happy era. Women who wore the veil in order to gain acceptance and respect in the traditional Muslim communities that were their only option might reject it in favor of new opportunities in cosmopolitan society. The norms of traditional Muslim communities might soften as Muslim women and men became integrated into the French mainstream, adopting some its norms and having less cause to resent it.

It's possible that the ban will *impede* republican and integrationist goals. Many Muslims will see in the ban a confirmation of their worst suspicions of French anti-Muslim bigotry. This may well harden resistance, inspiring more women to adopt the headscarf in defiance and inspiring men to insist that women wear it as a sign of social solidarity. One French teacher worried that a ban would be counterproductive, even for girls being forced to wear a headscarf: "If the student's family is able to impose the head scarf, why should they back down when faced with the threat of exclusion? On the contrary, they would be delighted to get hold of the excluded student in order to marry her off or send her to a religious school."[39] Ironically it's possible that accommodating the headscarf may be a necessary step on the way to diminishing its importance. Accepting the veil may signal a broader acceptance of Muslims and ease their integration into mainstream institutions. It might soften its symbolic importance. Deprived of its symbolic meaning as a marker of self-respect and solidarity, the headscarf might simply become one of many expressive choices that people must weigh in terms of its costs and benefits with respect to social acceptance—like pierced eyebrows or conspicuous tattoos.

Nothing I've argued here proves, or even suggests, that banning the headscarf is a good idea. In fact, my own belief is that the headscarf ban is likely to do more harm than good, and I find it somewhat heavy-handed. But this may be in part because I come to the issue with American sensibilities. Unlike the many partisans on both sides of this debate, I don't pretend to have a definitive answer. I've only offered a different way to think about the question. Attacking the idea that minority groups have an inviolable *right* to some specific set of cultural practices doesn't suggest that the state and other powerful actors should not accommodate the practices—it simply allows for that *possibility*. If we look at accommodations as optional public policies, rather than as inviolable civil rights, then we can get a better sense of the practical stakes involved and we'll have a better chance of making decisions that advance both collective goals and social justice.

I have argued that the appropriate goal of civil rights is the integration of isolated minorities into mainstream French society. Accommodation is, at best, simply a means to this end. And at worst it is a hindrance to it. When it is a hindrance, it should be abandoned as a policy without qualms or misgivings. Accommodation is not an end in and of itself. Moreover, if the minority groups are successfully integrated, the question of accommodation will be largely moot because many of the now controversial practices will either become mainstream and accepted or the largely assimilated minorities will no longer insist on them.

An example from France's past might be instructive. In the classic historical study *Peasants into Frenchmen*, Eugen Weber notes that until the early twentieth century, efforts to assimilate the various provinces of France into a unified national identity were a failure despite fairly aggressive measures taken by authorities. Small towns were bastions of religious superstition where modern advances in science were largely unknown. Regional dialects fractured the nation; French was not widely spoken. Parents did not send their children to school regularly, peasant farmers were not literate and did not value literacy in French. Although "inhabitants of the hexagon in 1870 generally knew themselves to be French subjects… to many this status was no more than an abstraction. The people of whole regions felt little identity with the state or with people of other regions… Before this changed… they had to share significant experiences with each other."

How did it change? Weber's analysis is striking: "We are talking about the process of acculturation…the disintegration of local cultures by modernity and their absorption into the dominant civilization of Paris and the schools…What happened was akin to colonization…"[40] Provocatively, Weber does not mean to condemn the transformation that he compares to colonialism:

> Change is always awkward, but the changes modernity brought were often emancipations, and were frequently recognized as such. Old ways died unlamented…. New ways that had once seemed objectionable were now deliberately pursued and assimilated—not by a fawning "bourgeoisie" or self-indulgent "intellectuals" as in [Franz] Fanon's account [of the colonial encounter] but by people of all sorts who had been exposed to such ways and acquired a taste for them. Perhaps this should make us think twice about "colonialism" in

> underdeveloped countries, which also reflects regional inequalities in development….[41]

Weber wades somewhat recklessly into choppy waters here and of course what he neglects is the real evil of colonialism: bigotry, exploitation and exclusion. But there is truth in Weber's assertion precisely because cultural assimilation was not what made colonialism evil. Who knows how things might have turned out had France taken seriously from the beginning the idea that the colonial subjects were to be equal citizens of the nation? We must distinguish between policies that encourage or even require assimilation and those that impose a hierarchy based on status: the former sometimes can be justified; the latter never can.

To move briefly to the American case, we can identify with precision practices whose unambiguous purpose was to create and enforce a racial hierarchy and we can identify with only slightly less confidence the contemporary manifestations and consequences of those practices. People of African descent were enslaved and after emancipation they were subject to peonage through neo-feudal sharecropping arrangements that kept them tied to the land and to landowners almost as firmly as when they were enslaved (and often with even fewer material rewards). Jim Crow segregation denied blacks basic human dignity while discriminatorily applied poll taxes and literacy tests transformed the formal extension of the franchise into a cruel joke. Discriminatory practices on the part of employers and labor unions ensured that blacks occupied the least remunerative, least desirable and least secure forms of employment in the industrialized Northern cities when they migrated to escape the cruelties of the post reconstruction South. Racism in the forms of overt discrimination and systematic violence forced blacks into segregated and overcrowded ghettos, different from the ethnic slums occupied by white ethnic immigrants in both the comprehensiveness of their segregation and the impoverishment of their conditions.

Cultural difference was neither a necessary nor a sufficient condition for the emergence of this system of status hierarchy. In the late 19th century many immigrants to the United States from Southern and Eastern Europe differed *culturally* as much from the American mainstream as did black migrants from the American south in the early 20th century. Indeed, culturally both groups shared many common characteristics and challenges: acculturation from a rural, agrarian lifestyle to an urban milieu and to the norms of an industrialized economy. As historians D.R.

Fusfield and Timothy Bates note, "black migrants… exhibited the traits that peasants throughout the centuries have displayed when first exposed to urban existence."[42] What distinguished the successfully integrated and upwardly mobile European immigrant from the segregated and economically trapped black migrant was the ideology and practices of race, not cultural difference. Some multiculturalist and anti-colonialist literature has done a great disservice in confusing these two. As a result, any attempt to change or effect the distinctive practices of minority groups—some of which are, frankly, the unfortunate consequence of deprivation, social isolation and counterproductive *ressentiment*—is now reflexively condemned by many as bigoted and a violation of civil rights.

To return to Weber and to France: residents of Bretagne or Languedoc do not seek liberation from France or compare their situation to that of the dark-skinned descendants of North Africa or the Antilles who now populate the depressed *banlieues* of France. Why was the "colonization" of the hexagon and the assimilation of its people successful while the integration of more recent immigrants, many from France's former colonies, has not been? According to Weber what eventually led the residents of the provinces to accept standard French and the culture of urban France was not so much state imposed sanctions but private self-interest: the availability of jobs in an industrializing France for those with language skills, the comforts and seductions of the big city, the availability of new ways of making sense of world that could replace old superstitions. Similarly, better job opportunities for Muslims and French citizens of North-African descent may well lead them to shed conspicuous markers of group difference in order to succeed in the cosmopolitan workplace. This suggests a policy that guarantees opportunities for those minorities willing to assimilate: aggressive and comprehensive enforcement of antidiscrimination law with respect to race, ethnicity and religious faith, but not necessarily with respect to conspicuous expressive practices.

Targeting Racism Without Reifying Race: less is more.

Unjust social hierarchies are a result of status distinctions—not cultural differences between groups. Hence the goal must be to eliminate discriminatory practices and bigotry—not to make exceptions for differences in behavior among groups. Law and policy must acknowledge the harm done by formal and informal status hierarchies and implement targeted

and effective solutions. Civil rights should focus on eliminating status hierarchies, leaving questions of cultural difference to the more fluid institutions of popular politics and the market. What follows are a few tentative thoughts about how this might be done.

Careful Use of Statistics as an Alternative to Accommodation

Longstanding political consensus and constitutional principle in France effectively forbids the collection of racial data by the state. By contrast, in the United States, the collection of racial data is, while at times controversial, routine. The difference in approaches is attributable to differences in national history and temperament. It's widely asserted in France that resistance to the collection of racial data stems from the national experience during World War Two with the use of racial statistics by the Nazi and Vichy regimes. Although the United States has obviously had its own ugly history of official, state sponsored racism, nothing in American history provides such a notorious example of the perils of racial statistics. In fact, although formal racial classification was an important part of American racial hierarchy, for the most part the use of statistics per se was not. The one notable exception is the internment of the Japanese during World War Two, in which state records were used to identify citizens of Japanese descent, but few Americans associate this contemptible episode with statistics.[43] In the United States, the collection of racial data has long been an important part of the effort to *combat* racism and reverse its deleterious effects; consequently, opposition to the use of statistics has typically come from conservatives who oppose such ameliorative measures, not from civil rights advocates.

Differences in national temperament may also play a role. Most Americans accept racial difference as natural or at least inevitable and see the collection of racial data as an ideologically neutral, scientific endeavor the record those differences. By contrast, many in France reject the notion of natural races and therefore see the collection of racial data as unavoidably political—involving the creation and assignment of races to individuals who could and should be apprehended only as fellow citizens**.** For instance, law professor Gwénaële Calvès, a prominent opponent of the use of ethnic statistics, worries that introducing such categories into the census in France would entail "a huge pedagogical effort…to make people familiar with the [racial and ethnic] labels… so they understand in which category they're supposed to fit and so that, when

push comes to shove, they agree to check off the right box."[44] Sounding a similar theme, Dominique Sopo, President of SOS Racisme, points out that "in this country [France] an individual's identity can be defined in many ways….So, for ethno-racial categories to have any kind of utility, one would be forced to consolidate these answers into a smaller number of labels. But this would leave us with a statistical apparatus that wouldn't allow people to decide for themselves who they are, and which could eventually harden into a normative, or even a prescriptive set of requirements. There's a very real danger in allowing statistics to create and impose identities…"[45] In this article I've warned of the dangers of naïvely accepting of group differences as natural, intrinsic or the authentic expressions of individual conscience. Resistance to the collection of racial statistics reflects the same reasonable concerns that underlay resistance to accommodationism.

This leaves us with a dilemma: how can we confront the subtle types of discrimination and unjust disadvantage that keep many members of minority groups from succeeding in the cosmopolitan mainstream without reinforcing or reifying group statuses? I will suggest that the state can collect and use racial and ethnic data without running the same risks that accompany rights to accommodation. Appropriately administered, racial data offers a way to identify the prejudiced attitudes and discriminatory practices that produce racial divisions without accepting the validity of those divisions. Of course racial statistics can be misused and misunderstood to reflect the idea race marks objective and morally relevant differences between citizens. Therefore it is important to take care to avoid collecting or using the statistics in a way that reinforces such beliefs. But used appropriately, ethnic and racial statistics can be an invaluable tool for combating discrimination.

Consider the problem of subtle discrimination. Professor Nussbaum suggests that a right to accommodation will help root out such discrimination, but that's unlikely. A law or workplace rule that bans conspicuous religious attire may reflect anti-Muslim bias, but it may also reflect legitimate values such as a commitment to *laïcité* or to a common institutional culture or image. Moreover, a requirement that employers accommodate distinctive religious or ethnic attire and practices is unlikely to prevent discrimination against members of the protected groups at the hiring stage—in fact, it might give employers an added reason to discriminate because only member of minorities groups will be able to demand the special accommodations. It's easy for employers to conceal discriminatory motives in hiring, especially when job criteria

involve inherently subjective considerations such as attitude, poise and demeanor—"soft skills" that are increasingly important in many jobs in the modern economy. Because applicants are not yet attached to the job and because they don't have much information about other applicants or about the people making the hiring decision, few job applicants have sufficient incentive or information to sue over the job that got away. That's why, in the United States, lawsuits by current employees for discriminatory firing and lost promotions are seven times more numerous than those for discrimination in hiring.[46]

By contrast, we *can* identify subtle discrimination with statistics. By comparing the pool of qualified job applicants to the applicants actually hired, we can smoke out discrimination that might otherwise go undetected. This does not mean that every workforce would be required to have a specific proportion or "balance" of employees from particular groups—a commonly voiced objection to the use of the statistics. Sophisticated statistical methods can take legitimate differences between groups into account, so statistical analysis need not lead to quotas or proportional representation. Instead the goal should be to use statistical analysis to rule out (or "control for" in the language of statisticians) legitimate reasons for a disparity, thereby determining the extent to which discrimination is affecting a given labor market or workforce.

Similarly, the problem of "indirect" or what American lawyers call "disparate impact" discrimination—requires the use of statistics. Here the law condemns a practice—such as the use of a standardized exam for hiring or promotion—that eliminates a disproportionate number of minority group members and is not justified by a legitimate job-related reason. But of course there is no way to determine whether a practice eliminates minority group members disproportionately without accurate data on the number of such people in the pool of applicants and in the group of people hired or promoted.

Professor Calvès points out that French law allows for the use of racial statistics when required by a legal action. But by the time a lawsuit is filed it may be too late to collect the needed data. For example, proof that an employer has engaged in a pattern of discrimination in hiring typically requires statistical data about the relevant labor market as well of about the workforce of the employer. Once a lawsuit has been filed, it may be too late to collect information about the time period of the alleged discrimination if the labor market or the employer's workforce has changed significantly in the interim. It is difficult enough to prove

discrimination even when accurate and comprehensive data is available—without such data it is inevitable that a great deal of discrimination will not be detected.

Statistics also give employers a clear and verifiable way to monitor their own compliance with anti-discrimination laws. A large business may find it difficult to monitor discrimination by its managers, especially because those managers have an incentive to conceal discriminatory motives. As a result, businesses find themselves faced with liability for discrimination that they, as businesses, can do little to prevent. Statistics allow employers who want to comply with the law to adopt a proactive approach and take steps to identify and root out discrimination before they are sued. Civil rights laws that encourage such voluntary compliance are much more successful than those they rely exclusively on post-hoc detection and sanctions. In this respect, it's encouraging that French employers support the use of ethnic and racial statistics. Professor Calvès is skeptical of the motives of employers in this regard: "Employers want a way of classifying their employees and job applicants by ethnic and racial groups such that, should a legal action take place, they can demonstrate that their workforce contains an 'appropriate proportion' of people from a given category."[47] But if by "appropriate proportion" we mean the proportion that one would expect a non-discriminatory employer to have then such a demonstration *should* be a defense to complaints that rely on statistical disparities as evidence of discrimination. Why make an employer wait until a lawsuit is filed before it can gather the statistical data needed to determine whether or not it has a problem with discrimination? Why not offer a relatively straightforward way of complying with the law, especially when the alternative is widespread non-compliance combined with a legal regime that makes enforcement difficult?

Finally, statistics are relevant to more than litigation and law enforcement—they can also help to shape more proactive public policies. Without accurate statistics, government will not know how pervasive various types of discrimination are. Audit studies only a partial substitute for comprehensive statistics. For instance, my Stanford colleague David Laitin conducted audit studies which suggested that employers strongly preferred an applicant with a conventional French name to one with a identifiably Senegalese Muslim name, but showed little preference for the applicant with the French name over an identifiably Senegalese Christian name.[48] This suggests that discrimination is a greater problem with respect to religion than race and national origin, (although it may be more accurate to say that employers discriminate on the basis of

acculturation, since a recognizably Muslim name might indicate a conscious decision to emphasize a distinctive religious identity.) But Laitin points out that the sample size in the audit study was too small to yield conclusive data with respect to the latter comparison: he suspects that employers would prefer the applicant with the conventional French name to the one with the Christian Senegalese name, but the study is inconclusive. This shows that audit studies, while valuable, are not a substitute for general statistics: it's often impractical to acquire a large enough sample in a targeted audit to yield reliable conclusions.

Admittedly, the United States has been less than successful in this respect. American law and policy has careened between extremes. Sometimes we accept racial and other group categories as natural or at least inevitable and other times we reject them as inconsistent with principles of justice; sometimes we reinforce group differences by accommodating distinctive group practices, based on the unexamined presumption that the practices are authentic expressions of identity and conscience and at other times we demand color blindness even when doing so ensures that long standing injustices will go unremedied. Again, the American experience is in many ways a cautionary story that vindicates the reluctance of French anti-racists to accept the use of racial statistics. Yet the American experience does offer some promising approaches to the problem—tragically, most often in the form of roads not taken or prematurely abandoned.

The debate surrounding reforms to the U.S. Census in 2000 revealed an appropriate and modest approach to racial statistics, which the United States unfortunately abandoned, in favor of a quixotic attempt to make racial categories reflect the "real" heritage and identity of individuals. Before 2000, the federal census required that individuals and families choose one of a list of racial categories. In 2000, for the first time, respondents to the 2000 U.S. census could identify themselves as members of more than one racial group, checking as many boxes as they deemed necessary to reflect their racial identity. This reform was adopted in response to agitation by individuals of mixed racial backgrounds and their parents who complained that the old census did not recognize or allow those of mixed racial parentage to express their full identity. As the organization Project RACE (Reclassify All Children Equally) complained:

> Being forced to choose only one race forces us [biracial and multiracial people] to deny one of our parents. It also requires us to do something

> illegal, since we are defining ourselves as something we are not. Multiracial people should have the option of recognizing *all* of their heritage. "Multiracial" is important so that children have an identity, a correct terminology for who they are.[49]

Another multiracialism advocate opined more forcefully:

> Forcing a Multiracial child to define herself only as Black perpetuates the myth that Multiracial people do not exist… Since it is not acceptable to acknowledge one's Multiracial status, the Multiracial person suffers in silence . . . . [A]lthough society has told Multiracial people to choose, in actuality, society makes the choice for them. The rich diversity literally embodied by Multiracial people remains hidden from view, hidden from discourse, hidden from recognition and thus, invisible.[50]

Sounding a similar theme, the Op Ed page of the San Francisco Chronicle insisted that the census should "reflect the changing face of America and…answer statistical queries that go the heart of the question, "Who am I?"[51] The ostensible goal of the reform was to reflect racial identity accurately, implying that racial identity is an attribute of a person and the census simply had too few categories to capture all of its nuances. The goal was to use the "correct terminology" in the words of Project RACE. But what exactly should the census measure; what should it be correct about?

The clear intention of the census bureau was that people would answer the census based on generally accepted folk ideas of racial ancestry: Accordingly, Roderick Harrison—former head of the Census Bureau Department of Racial Statistics —chided a person who suggested that someone with two African American parents might identify as multiracial because "Practically all African Americans—practically the whole planet—have multiracial backgrounds." "This isn't an academic exercise," he insisted. "The question was intended for those who have serious commitments to multiracial identity."[52]But what is a "serious commitment" to a racial identity? The organization Project RACE believes that the census can offer our children "correct terminology for who they are." That's a serious commitment. The Op Ed page of the San

Francisco Chronicle declares, the census should "go to the heart of the question 'Who am I?'" *That's* a serious commitment. On this view the census, if we take it seriously, should do no less than capture the elusive truth of our identities in the terse geometry of its racially identifying boxes and return it to us with a government stamp of approval. Here the new and "improved" 2000 census encourages respondents to internalize the folklore of objective, biological race. The racial categorization of the census is one of the most pure manifestations of state power in the service of the idea of intrinsic racial difference.

To be sure, the U.S government disclaims any belief in natural races. For instance, the U.S. Office of Management and Budget's revised *Race and Ethnic Standards for Federal Statistics and Administrative Reporting* insists, "The [race] categories represent a social-political construct designed for collecting data on the race and ethnicity of broad population groups in this country, and are not anthropologically or scientifically based. (…) [They] should not be interpreted as being primarily biological or genetic in reference"[53] But such nuances are offered in technical guidelines intended for experts; they do little to ameliorate the racial interpellation of the census itself, which every American household is required to answer. Indeed, its telling that the 2000 census race question, which suggested a degree of subjectivity in racial identification ("What is this Person 1's race? *Mark one or more races to indicate what this person considers himself/herself to be*"), has been replaced by one that assumes that the answer is a statement of fact ("What is Person 1's race. Mark one or more boxes"). Perhaps the move to allow for multiple racial affiliations—increasing the "accuracy" of the racial survey—has made the Census Bureau more comfortable with the implication that race is a matter of objective fact.

The risk of this kind of reification of racial distinctions and intrusiveness underlies the widespread resistance in France to any use of racial statistics. Collection and use of racial data by the state bears an uncomfortable resemblance to the policies of the Nazi Germany and the Vichy government. And even though no one expects the government of the Fifth Republic to reprise the odious practices of Vichy, current anti-immigrant sentiments and policies raise valid concerns about how ethnic statistics might be misused: the risks that racial and ethnic statistics pose to individual privacy have convinced many to unequivocally reject the use of such statistics.

But suppose the census did not try to catalogue the intrinsic characteristics or biological heritage of citizens? Suppose it could instead record only their socially ascribed identities? On this account, the ultimate goal would be to know the *society*, not by knowing its individuals in

their intrinsic individuality, but by mapping its social practices, its collective identifications, its popular hierarchies. The pre-2000 U.S. census racial categories were crude, because they reflected the crude social categorization that racial ideologies have produced. They did not—and did not attempt to—reflect the essence or the nuanced and complex ways in which individuals think of and describe themselves. Instead, the racial questions on the census were designed to produce necessarily stylized statistical data in order to further a specific set of governmental objectives, such as electoral reapportionment and the tracking of employment and educational opportunities for historically disadvantaged minorities. As William Spriggs, Research and Policy Director of the Urban League asserts: " The data… is not used in some biological sense, and it's not used in some sort of touchy-feely sense of who are your parents and who do you want to recognize. It's related to the persistence of gaps born of legal segregation."[54] Given these objectives, the *old* census appropriately asked individuals to check the one box that "best described" their race.

By allowing individuals to mark multiple boxes, the census may now *less* accurately reflect the social practices that produce racial identity even as it reinforces unfortunate ideas about race-as-ancestry. It may be less useful in informing governmental policies such as civil rights enforcement. That is why a host of civil rights and racial advocacy groups, including the NAACP, the National Council of La Raza, the National Congress of American Indians and the National Asian Pacific American Legal Consortium opposed the reform. In California, civil rights organizations mounted a public education campaign, urging respondents who might be tempted to tick off multiple races to "check the black box" —and only the black box—in order to insure that African-American political influence was not diluted. The NAACP and Asian Pacific Legal Consortium mounted similar, nationwide campaigns.[55]

I would argue that the older census, with its relatively crude racial categorization, was preferable to the reformed census precisely because the categories failed so miserably to capture the nuances of self-perception and identification. The crude and obviously inauthentic nature of the census categories was a strength. It was preferable because its categories did not come close to offering "correct terminology" for who we are.

The census bureau's new-found sensitivity to the nuances of ancestry and subjective identification looks like an improvement over the old, pick-one-box census, only if one assumes that the racial identities to which we should have a "serious commitment," are somehow pure

and uncorrupted by social power. But if, as I have argued, racial identities are necessarily a product of social power, then the subject of the new census—the individual's "sincere" or intrinsic racial identity-- is an *effect* of the racial discourse the older census sought to map and understand. The reformed census replaces an admittedly crude but pragmatic science designed to monitor racial practices and their social consequences with a more subtle and more insidious Foucaldian discipline that records and reinforces the subjective identifications that results from racial practices. The effort to make the census' racial categories more "accurate" in positivistic terms serves to reinforce the belief in racial identity as an attribute of the self that *could* be accurately recognized and measured.

The older census was unobtrusive: it asked its simple questions and then got the hell out of your house. No one could mistake the old census for a sincere attempt at self-identification: it was a crude but necessary categorization for limited statistical purposes. One could check the "black" box on the old census without having a "serious commitment" to it, it was a cheap date, a one-night stand, a marriage of convenience at most. The new census, with its sincerity and its politically "correct terminology," wants intimacy. It wants to know you for who you really are. It wants to meet your parents and leave a toothbrush in your bathroom.

Wouldn't it be better if we were all just honest about the potential of the relationship from the start? Werner Sollors offers a prescription for a census that knows when to get dressed and call a taxi. It would ask about only five races and would come with the following disclaimer:

> The Attorney General has determined that the United States government had discriminated against people based on what were once believed to be black, red, yellow, and brown "race." Though there is no scientific basis for this belief, it is important to collect information about the following five categories in order to protect citizens' rights and to enforce antidiscrimination legislation today. These data are used only for these specific purposes and do not reflect the belief of the U. S. government or the Census Bureau that such races actually exist. Which of the following "races" might have been used to describe you?[56]

Patrick Simon, a senior researcher at *the Institut national d'études démographiques* advocates a similar approach to the use of racial statistics:

> Data regarding ethnicity and "race"—when left without an institutional definition—are by nature subjective and changing. The corresponding categories are thus potentially unstable, likely as they may be to evolve under the effect of identity claims or changes in equality policies. It is, however, precisely from these limitations that the singular value of "ethnic and racial" categories derives; these are categories that constitute in reality—to cut against the grain of a hackneyed argument—the paradigmatic example of a non-essentialist classification system, since subjectivity is incorporated in their very definition. In this sense, they represent a new generation of quantitative data where "authenticity" is less important… Because they claim to be subjective and fragile, because they assume their inscription into a history made up of slavery, colonization, xenophobia, exploitation and domination… "ethnic and racial" statistics have the power of revealing historically crystallized relationships of power.[57]

This approach to racial statistics allows us to use them in order to facilitate anti-discrimination law without reifying racial difference. Perhaps the risk that these categories will harden over time, as Mr. Sopo worries, can be ameliorated if the contingent and subjective nature of the categories is emphasized. And, as Mr. Sopo points out in defending the use of similar categories in the development of audit studies, "there is an unavoidable element of categorization in the effort to counter racism…. we… could not ignore… the fact that people of African extraction, for example, are the targets of racial discrimination in this country." In this respect, a census that collected ethnic and racial data would simply ask respondents to acknowledge what is already an unavoidable feature of their daily lives, in terms already in wide circulation in society. Of course the state would have to decide which categories are most salient and this would inevitably require some controversial judgments. But it is an exaggeration to say that the state would create the categories from whole cloth or impose them against the will of individuals.

Concerns about the misuse of such information for nefarious purposes such as ethnic internment or deportation can be addressed by strict rules about *how* racial and ethnic data are

recorded. Statistical records need not tie racial or ethnic data to specific individuals or addresses—for anti-discrimination purposes it's typically enough that the data can be sorted according to impersonal factors such as neighborhood, age, occupation and income. In this respect it bears emphasis that the most notorious misuses of racial and ethnic information involved detailed population registries—not national census data.

Finally, while it is true that a fixed set of racial and ethnic categories would not allow individuals to define their own identities, that should not be the point of a national census. Instead, ethnic and racial data should be nothing more than a way to track social practices of ascription and subordination. Moreover, census respondents need not be required to select a racial or ethnic group—they could "decline to state. " Hence the census could reflect not only how, but also the *extent to which* citizens identify as members of stigmatized groups and feel that discrimination affects their lives.

In short, although there are risks involved in the use of ethnic and racial statistics, those risks can be managed through a careful and nuanced explanation of the significance of the categories and judicious use of the resulting information. And I suspect that the costs of what Mr. Simon calls "the choice of ignorance" are greater than those associated with a limited and careful use of statistical analysis. At the very least, the question should remain open, to be informed by an assessment of the costs and benefits—not decided by a rigid categorical rule against any use of racial and ethnic statistics. The approach I would tentatively urge allows for racial categories, but insists on their extrinsic, ascribed character. It is informed by the conviction that the only reason government should inquire about race or ethnicity is to counteract the effects of its involuntary ascription. When it comes to race and other status identities, the choice is not between all or nothing. Instead, we should adopt the credo of architectural modernism: less is more.

Conclusion

Using examples from American law and legal theory, I've tried to cast doubt on the wisdom of an accommodationist approach to civil rights and, by implication, to present the French approach to the headscarves question in a different light than that in which its detractors see it. It's striking that many of the concerns I first raised about rights to accommodation of

cultural difference---concerns that were not widely acknowledged in the United States—were articulated by many anti-racists in France. Because of France's strong tradition of republican citizenship and *laïcité*, many of the risks and downsides of accommodationism were more readily obvious to French observers than to Americans. And it's my sense that France is more comfortable with (and more honest about) the aspiration that all citizens assimilate to a common civic culture than is the United States.

But in order to promote assimilation, a society must provide all of its citizens a reasonable chance at successfully entering the mainstream on dignified terms. Widespread discrimination and pervasive structural impediments to the success of minority groups undermine any integrative effort and fuel a reasonable suspicion that the failure to accommodate cultural difference reflects prejudice and contempt rather than a truly even-handed commitment to civic ideals. It's unlikely that such subtle biases and structural impediments can be identified, much less eliminated, without reliable statistical data. The traditional French resistance to the use of such data reflects understandable concerns about privacy, equity and republican values, but the continued isolation of a significant minority of French citizens does greater damage to equity and republican values.

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[1] This article is based on arguments I first made in *Racial Culture: A Critique*, Princeton, Princeton University Press, 2005.

[2] Martha Nussbaum, "Veiled Threats", July 11, 2010, http://opinionator.blogs.nytimes.com/2010/07/11/veiled-threats/

[3] LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=3BD24764132BE8C86D9EB03E484B7359.tpdjo15v_3?cidTexte=JORFTEXT000022911670&dateTexte=20110331

[4] Joan Wallach Scott, "France's ban on the Islamic veil has little to do with female emancipation," *The Guardian*, August 26, 2010, http://www.guardian.co.uk/law/2010/aug/26/france-ban-islamic-veil.

[5] "France's burqa ban in effect next month," CNN, March 4 2011.

[6] Joan Wallach Scott, "France's Ban on the Islamic Veil has little to do with female emancipation," art cité.

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