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Making All the Difference

INCLUSION, EXCLUSION, AND AMERICAN LAW

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To Burton Minow

Contents

CHAPTER 2

Sources of Difference

> Is my understanding only blindness to my own lack of understanding?
>
> —Ludwig Wittgenstein, *On Certainty*

> When you presume, you are not treating me as the person I am; when you do not presume, you are treating me as the person I am in a minimal sense; when you recognize and respond to the person I am, you are treating me as the person I am in a maximal sense.
>
> —Elizabeth V. Spelman, "On Treating Persons as Persons"

Dilemmas of difference appear unresolvable. The risk of nonneutrality—the risk of discrimination—accompanies efforts both to ignore and to recognize difference in equal treatment and special treatment. Difference can be recreated in color or gender blindness and in affirmative action;[1] in governmental neutrality and in governmental preferences; and in discretionary decisions and in formal constraints on discretion. Why does difference seem to pose choices each of which undesirably revives difference or the stigma or disadvantage associated with it?

First epigraph: Reprinted by permission of Basil Blackwell, Inc., from *On Certainty,* by Ludwig Wittgenstein. Second epigraph: Reprinted by permission of University of Chicago Press from "On Treating Persons as Persons," by Elizabeth V. Spelman, *Ethics* 88 (1978).

[1]Affirmative action programs seek to aid disadvantaged groups by giving them special treatment. Some plans are voluntary, adopted by schools and employers to alter the composition of their communities to better reflect the larger population. Some are imposed by courts or agencies as remedies for demonstrated past discriminatory practices. A dilemma of difference may arise if the special treatment highlights the historic differences and reintroduces stigma for those who participate in the program; thus, minority members or white women may become stigmatized as merely affirmative action hires, presumed unqualified without the special treatment. This result may reflect misunderstanding of the program and a faulty view that the prior selection procedures were themselves free from bias, yet the risk of aggravating stigma persists. See, e.g., William Van Alstyne, "Rites of Passage: Race, the Supreme Court, and the Constitution," *U. Chi. L. Rev.* 46 (1978), 775, 778: affirmative action plans fail to alleviate discrimination and instead contribute to "racism, racial spoils systems, racial competition and racial odium."

In this last question lies a clue to the problem. The possibility of reiterating difference, whether by acknowledgment or nonacknowledgment, arises as long as difference itself carries stigma and precludes equality. Buried in the questions about difference are assumptions that difference is linked to stigma or deviance and that sameness is a prerequisite for equality. Perhaps these assumptions themselves must be identified and assessed if we are to escape or transcend the dilemmas of difference.

If to be equal one must be the same, then to be different is to be unequal or even deviant.[2] But any assignment of deviance must be made from the vantage point of some claimed normality: a position of equality implies a contrasting position used to draw the relationship—and it is a relationship not of equality and inequality but of superiority and inferiority.[3] To be different is to be different in relationship to someone or something else—and this point of comparison must be so taken for granted, so much the "norm," that it need not even be stated.

At least five closely related but unstated assumptions underlie difference dilemmas. Once articulated and examined, these assumptions can take their proper place among other choices about how to treat difference, and we can consider what we might do to challenge or renovate them.

Five Unstated Assumptions

First, we often assume that "differences" are intrinsic, rather than viewing them as expressions of comparisons between people on the basis of particular traits. Each of us is different from everyone else in innumerable ways. Each of these differences is an implicit comparison we draw. And the comparisons themselves depend upon and reconfirm the selection of particular traits as the ones that assume importance in the comparison process. An

[2]See Carol Gilligan, "In a Different Voice: Women's Conceptions of Self and Morality," *Harvard Education Review* 47 (1977), 418, 482 (1977); Audre Lorde, "Age, Race, Class and Sex: Women Redefining Difference," in *Sister Outsider: Essays and Speeches* (Trumansburg, N.Y.: Crossing Press, 1984), pp. 114, 116.

[3]See Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987); and Ruth Colker, "Anti-Subordination above All: Sex, Race, and Equal Protection," *N.Y.U. L. Rev.* 61 (1986), 1003, both criticizing equal rights debates for failing to focus on issues of superiority and subordination. MacKinnon charges the debates with focusing on women's similarities and their differences from men, while treating maleness as the unquestioned norm. "Why should you have to be the same as a man to get what a man gets simply because he is one? Why does maleness provide an entitlement . . . so that it is women . . . who have to show in effect that they are men in every relevant respect?" (p. 37). MacKinnon urges instead what she calls the "dominance approach"—which presumes that "the question of equality . . . is at root a question of hierarchy"—and then equal distribution of power (p. 40). Colker similarly views hierarchy, not difference, as the root problem: "Facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy" (pp. 1007–8). Both MacKinnon and Colker maintain that talk of "sameness" or "neutrality" obscures the hierarchy that is already in place; therefore, eliminating the hierarchy is the ultimate goal for movements for equality.

assessment of difference selects out some traits and makes them matter; indeed, it treats people as subject to categorization rather than as manifesting multitudes of characteristics.[4]

Second, we typically adopt an unstated point of reference when assessing others. It is from the point of reference of this norm that we determine who is different and who is normal. The hearing-impaired student is different in comparison to the norm of the hearing student—yet the hearing student differs from the hearing-impaired student as much as she differs from him, and the hearing student undoubtedly has other traits that distinguish him from other students. Unstated points of reference may express the experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others. Women are different in relation to the unstated male norm. Blacks, Mormons, Jews, and Arabs are different in relation to the unstated white Christian norm. Handicapped persons are different in relation to the unstated norm of able-bodiedness or, as some have described it, the vantage point of "Temporarily Able Persons."[5]

The unstated point of comparison is not general but particular, and not inevitable but only seemingly so when left unstated.[6] The unstated reference point promotes the interests of some but not others; it can remain unstated because those who do not fit have less power to select the norm than those who fit comfortably within the one that prevails.

A reference point for comparison purposes is central to a notion of equality. Equality asks, equal compared with whom? A notion of equality that demands disregarding a "difference" calls for assimilation to an unstated norm. To strip away difference, then, is often to remove or ignore a feature distinguishing an individual from a presumed norm—such as that of a white, able-bodied, Christian man—but leaving that norm in place as the measure for equal treatment. The white person's supposed compliment to a black friend, "I don't even think of you as black," marks a failure to see the implicit racism in ignoring a "difference" and adopting an unstated and potentially demeaning point of comparison.[7] As historian J. R. Pole has explained, constitutional notions of equality in the United States rest on the idea that people are equal because they could all take one another's places in work, intellectual exchange, or political power if they were disassociated from their

[4]See Gordon W. Allport, *The Nature of Prejudice* (1954; Cambridge, Mass.: Addison-Wesley, 1958), pp. 19–27: prejudice is founded on categorical thinking and overgeneralization.

[5]See Nancy Mairs, "Hers," *New York Times,* July 9, 1987, p. C2.

[6]Whites tend to cite the race of an individual only if that person is not white, since the unstated race is understood to be white. Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory* (Trumansburg, N.Y.: Crossing Press, 1983), p. 117, comments: "As feminists we are very familiar with the male version of this: the men write and speak and presumably, therefore, also think as though whatever is true of them is true of everybody. White people also speak in universals. . . . For the most part, it never occurred to us to modify our nouns accordingly; to our minds the people we were writing about were *people.* We don't think of ourselves as *white.*"

[7]See Karen Russell, "Growing Up with Privilege and Prejudice," *New York Times Magazine,* June 14, 1987, pp. 22, 24.

contexts of family, religion, class, or race and if they had the same opportunities and experiences.[8] This concept of equality makes the recognition of differences a basis for denying equal treatment. In view of the risk that difference will mean deviance or inequality, stigmatization from difference, once identified, is not surprising.

Third, we treat the person doing the seeing or judging as without a perspective, rather than as inevitably seeing and judging from a particular situated perspective. Although a person's perspective does not collapse into his or her demographic characteristics, no one is free from perspective, and no one can see fully from another's point of view.[9]

Fourth, we assume that the perspectives of those being judged are either irrelevant or are already taken into account through the perspective of the judge. This assumption is a luxury of those with more power or authority, for those with less power often have to consider the views of people unlike themselves. As a novelist has wryly observed, horses "have always understood a great deal more than they let on. It is difficult to be sat on all day, every day, by some other creature, without forming an opinion about them. On the other hand, it is perfectly possible to sit all day, every day, on top of another creature and not have the slightest thought about them whatsoever."[10] Moreover, this assumption treats a person's self-conception or world view as unrelated to how others treat him or her.

Finally, there is an assumption that the existing social and economic arrangements are natural and neutral. If workplaces and living arrangements are natural, they are inevitable. It follows, then, that differences in the work and home lives of particular individuals arise because of personal choice. We presume that individuals are free, unhampered by the status quo, when they form their own preferences and act upon them.[11] From this view, any departure from the status quo risks nonneutrality and interference with free choice.[12]

These interrelated assumptions, once made explicit, can be countered with some contrary ones. Consider these alternative starting points. Difference is relational, not intrinsic. Who or what should be taken as the point of reference for defining differences is debatable. There is no single, superior

[8]J. R. Pole, *The Pursuit of Equality in American History* (Berkeley: University of California Press, 1978), pp. 293–94.

[9]See Kenneth L. Karst, "The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment," *Harv. L. Rev.* 91 (1977), 54 n.304, commenting on the effects of the absence of a woman justice on the Supreme Court that decided that pregnancy is sex-neutral.

[10]Douglas Adams, *Dirk Gently's Holistic Detective Agency* (New York: Simon & Schuster, 1987), p. 4.

[11]For critiques of this view, see John Elster, *Sour Grapes* (Cambridge: Cambridge University Press, 1983); Cass R. Sunstein, "Legal Interference with Private Preferences," *U. Chi. L. Rev.* 51 (1986), 1129.

[12]See, e.g., Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970). But J. Skelly Wright, "Professor Bickel, the Scholarly Tradition, and the Supreme Court," *Harv. L. Rev.* 84 (1971), 769, criticized the value-neutrality approach for its insensitivity to the powerless.

perspective for judging questions of difference. No perspective asserted to produce "the truth" is without a situated perspective, because any statement is made by a person who has a perspective. Assertions of a difference as "the truth" may indeed obscure the power of the person attributing a difference while excluding important competing perspectives. Difference is a clue to the social arrangements that make some people less accepted and less integrated while expressing the needs and interests of others who constitute the presumed model. And social arrangements can be changed. Arrangements that assign the burden of "differences" to some people while making others comfortable are historical artifacts. Maintaining these historical patterns embedded in the status quo is not neutral and cannot be justified by the claim that everyone has freely chosen to do so.

Let us consider the usual assumptions and these alternatives in the context of contested legal treatments of difference. Making the usually unstated assumptions explicit can open up debate about them and also reveal the many occasions when lawyers and judges have mustered alternative views.

Assumption 1: Difference Is Intrinsic, Not a Comparison

Can and should questions about who is different be resolved by a process of discovering intrinsic differences? Is difference something intrinsic to the different person or something constructed by social attitudes? By posing legal claims through the difference dilemma, litigants and judges treat the problem of difference as what society or a given decision-maker should do about the "different person"—a formulation that implicitly assigns the label of difference to that person.

The difference inquiry functions by pigeonholing people in sharply distinguished categories based on selected facts and features. Categorization helps people to cope with complexity and to understand one another.[13] Devising categories to simplify a complicated world may well be an inevitable feature of human cognition.[14]

When lawyers and judges analyze difference and use categories to do so, they import a basic method of legal analysis. Legal analysis, cast in a judicial mode, typically asks whether a given situation "fits" in a category defined by a legal rule or, instead, belongs outside it. Questions presented for review by the Supreme Court, for example, often take the form "Is this a that?"[15] For

[13]George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (Chicago: University of Chicago Press, 1987), p. xi.

[14]See Jerome S. Bruner, "Art as a Mode of Knowing," in *On Knowing: Essays for the Left Hand,* ed. Jerome S. Bruner (Cambridge, Mass.: Belknap Press of Harvard University Press, 1979), pp. 59, 69: "There is, perhaps, one universal truth about all forms of human cognition: the ability to deal with knowledge is hugely exceeded by the potential knowledge contained in man's environment. To cope with this diversity, man's perception, his memory, and his thought processes early become governed by strategies for protecting his limited capacities from the confusion of overloading. We tend to perceive things schematically, for example, rather than in detail, or we represent a class of diverse things by some sort of averaged 'typical instance.'"

[15]See Martin P. Golding, *Legal Reasoning* (New York: Knopf, 1984), p. 104.

example, are Jews a race? Is a contagious disease a handicap? Other questions take the form "Is doing *x* really doing *y*?" For example, is offering a statutory guarantee of job reinstatement after maternity leave really engaging in gender discrimination? Is denying unemployment benefits to someone who left work because of pregnancy also really discriminating on the basis of gender? As Martin Golding has explained, these may appear to be simple factual questions with clear answers, but they are also "questions about the application of a name, to which any answer is arbitrary."[16] Edward Levi, a leading expositor of the nature of legal reasoning, has explained the three steps involved: "Similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. . . . The finding of similarity or difference is the key step in the legal process."[17]

Again, as critics have noted for nearly a century, these patterns of legal analysis imply that legal reasoning yields results of its own accord, beyond human control.[18] But differences between people and between problems and between legal concepts or precedents are statements of relationships; they express a comparison with another person, problem, concept, or precedent. A difference cannot be understood except as a contrast between instances, or between a norm and an example.[19] Assessing similarities and differences is a basic cognitive process in organizing the world; it depends on comparing a new example with an older one. Legal analysis depends on the process of comparing this case with other cases, a process of drawing similarities and differences. Ann Scales has noted: "To characterize similarities and differences among situations is a key step in legal judgments. That step, however, is not a mechanistic manipulation of essences. Rather, that step always has a

[16]Ibid. See also Charles Taylor, "Overcoming Epistemology," in *After Philosophy: End or Transformation?* ed. Kenneth Barnes, James Bohman, and Thomas McCarthy (Cambridge, Mass.: MIT Press, 1987). Taylor compares theories of knowledge that treat language as a violent interference with reality and an obstacle to truth, and theories of knowledge that conceive of emphatically self-critical reason as capable of reaching more and more correct insights about the world.

[17]Edward Hirsch Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949), p. 2. But Levi also emphasizes that the rules are not fixed, and "the classification changes as the classification is made. The rules change as the rules are applied" (pp. 3–4). Analysis of sameness and difference characterizes both reasoning by analogy and precedential reasoning. Other modes of contemporary legal reasoning include policy analysis, weighing costs and benefits, and evaluating proposed action in terms of consequences.

[18]See Grant Gilmore, *The Ages of American Law* (New Haven, Conn.: Yale University Press, 1977), discussing Cardozo and uncertainty; Felix Cohen, "Field Theory and Judicial Logic," *Yale L.J.* 59 (1950), 238, 244–49; Joseph William Singer, "Legal Realism Now: Review of Laura Kalman, Legal Realism at Yale: 1917–1960," *Calif. L. Rev.* 76 (1988), 467; Joseph William Singer, "The Player and the Cards: Nihilism and Legal Theory," *Yale L.J.* 94 (1984), 1.

[19]See Mary Douglas, *How Institutions Think* (Syracuse, N.Y.: Syracuse University Press, 1986), pp. 58–59: "It is naive to treat the quality of sameness, which characterizes members of a class, as if it were a quality inherent in things or as a power of recognition inherent in the mind. . . . Sameness is not a quality that can be recognized in things themselves; it is conferred upon elements within a coherent scheme."

moral crux."[20] The very act of classification remakes the boundaries of the class, moving the line to include rather than exclude this instance. Indeed, many categories used to describe people's differences are invented only at the moment when summoned into the service of defining someone.[21] Acknowledging this means acknowledging that difference is not discovered but humanly invented.

Sometimes, courts have made such acknowledgments. For example, when asked whether Jews and Arabs are distinct races for the purposes of civil rights statutes, the Supreme Court in 1987 reasoned that objective, scientific sources could not resolve this question, essentially acknowledging that racial identity is socially constructed.[22] Yet, oddly, the justices then turned to middle and late nineteenth-century notions of racial identity, prevalent when the remedial statutes were adopted, rather than examining contemporary assumptions and current prejudices. The problem for the litigants was whether to invoke categories that had been used to denigrate them in order to obtain legal protection. As these cases illustrate, groups that seek to challenge assigned categories and stigma run into this dilemma: "How do you protest a socially imposed categorization, except by organizing around the category?"[23] Moreover, a label of difference accentuates one over all other characteristics and may well carry a web of negative associations. Perceptions and assessments of difference pick out the traits that do not fit comfortably within dominant social arrangements, even when those traits could easily be made irrelevant by different social arrangements or different rules about what traits should be allowed to matter.

Legislatures on occasion demonstrate an understanding of the labeling process that assigns some people to categories based on traits that may be only imagined by others. The federal Rehabilitation Act forbids discrimination against handicapped persons—and also against persons perceived by others to be handicapped.[24]

Some have argued that the assignment of differences in Western thought entails not just relationships and comparisons but also the imposition of

[20]Ann C. Scales, "The Emergence of Feminist Jurisprudence: An Essay," *Yale L.J.* 95 (1986), 1373, 1386–87. See Douglas, *How Institutions Think*, p. 63: "Institutions bestow sameness. Socially based analogies assign disparate items to classes and load them with moral and political content."

[21]See Ian Hacking, "Making Up People," in *Reconstructing Individualism: Autonomy, Individuality and Self in Western Thought*, ed. Thomas C. Heller, Morton Sosna, and David E. Wellbery (Stanford, Calif.: Stanford University Press, 1986), pp. 222, 228–29, identifies the process by which categories are invented as persons are assigned to them.

[22]See Shaare Tefila Congregation v. Cobb, 107 S.Ct. 2019 (1987); and Saint Francis College v. Al-Khazraji, 107 S.Ct. 2022 (1987). For a thoughtful exploration of the history of the social construction of racial identity, see Neil Gotanda, "Towards a Critique of Colorblind: Abstract and Concrete Race in American Law" (unpublished draft, 1987).

[23]Steven Epstein, "Gay Politics, Ethnic Identity: The Limits of Social Constructionism," *Socialist Review*, May–Aug. 1987, pp. 9, 19.

[24]See School Board v. Arline, 107 S.Ct. 1123, 1130 (1987) (interpreting 29 U.S.C. sec. 706 [7][B]ii, 794).

hierarchies.[25] To explore this idea, we need the next unstated assumption: the implicit norm or reference point for the comparison through which difference is assigned.

Assumption 2: The Norm Need Not Be Stated

To treat someone as different means to accord him treatment that is different from the treatment of someone else; to describe someone as "the same" implies "the same as" someone else. When differences are discussed without explicit reference to the person or trait on the other side of the comparison, an unstated norm remains. Usually, this default reference point is so powerful and well established that specifying it is not thought necessary.[26]

When women argue for rights, the implicit reference point used in discussions of sameness and difference is the privilege accorded some men—typically, white men who are well established in the society. It is misleading to treat the implicit norm as consisting of all men, as rhetoric for women's rights tends to do, for that obscures historical racial and class differences in the treatment of men themselves. But the reference point of privileged men can present powerful arguments for overcoming the exclusion of women from activities and opportunities. Reform efforts on behalf of women during the nineteenth and twentieth centuries asserted women's fundamental similarities to the men who were allowed to vote, sit on juries, engage in business, and participate in essential political and economic institutions. Declarations of rights in the federal Constitution and other basic legal documents used universal terms, and advocates for women's rights argued that women fit those terms as well as privileged men did.[27] Unfortunately for the reformers, embracing the theory of "sameness" meant that any sign of

[25]This has been a theme emphasized in the work of deconstructive critics. See, e.g., Jacques Derrida, "Différance," in *Speech and Phenomena and Other Essays on Husserl's Theory of Signs*, trans. David Allison (Evanston, Ill.: Northwestern University Press, 1973), pp. 129–60; Collette Guillaumin, "The Question of Difference," trans. Helene Wenzel, in *Feminist Issues* 2 (1982), 33–52; Barbara Johnson, Translator's Foreword to Jacques Derrida, *Dissemination*s, trans. Barbara Johnson (Chicago: University of Chicago Press, 1981), p. viii. For feminist works, see Alice Jardine, "Prelude: The Future of Difference," in *The Future of Difference*, ed. Hester Eisenstein and Alice Jardine (Boston: G. K. Hall, 1980), pp. xxv, xxvi; Frances Olsen, "The Sex of Law" (unpublished manuscript, 1984); Patricia Collins, "Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought," *Social Problems* 33 (Dec. 1986), S14. On critical legal theory, see Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harv. L. Rev.* 89 (1976), 1685; Pierre Schlag, "Cannibalistic Moves: An Essay on the Metamorphasis of the Legal Distinction," *Stan. L. Rev.* 40 (1988), 929.

[26]Donald A. Schon, *The Reflective Practitioner: How Professionals Think in Action* (New York: Basic Books, 1983), p. 53, quotes Geoffrey Vickers: "We can recognize and describe deviations from a norm very much more clearly than we can describe the norm itself."

[27]E.g., Bradwell v. State, 83 U.S. 130 (1872) (Myra Bradwell arguing unsuccessfully that the privileges and immunities clause protected her from gender bias in rules governing admission to the bar); and United States v. Susan B. Anthony, transcript of 1872 argument following Anthony's arrest for illegally voting, reprinted in *Feminism: The Essential Historical Writings*, ed. Miriam Schneir (New York: Vintage Books, 1972), pp. 132–36.

difference between women and the men used for comparison could be used to justify treating women differently from those men.

A prominent "difference" assigned to women, by implicit comparison with men, is pregnancy—especially pregnancy experienced by women working for pay outside their homes. The Supreme Court's treatment of issues concerning pregnancy and the workplace highlights the power of the unstated norm in analyses of problems of difference. In 1975 the Court accepted an appeal to a male norm in striking down a Utah statute that disqualified a woman from receiving unemployment compensation for a specified period surrounding childbirth, even if her reasons for leaving work were unrelated to the pregnancy.[28] Although the capacity to become pregnant is a difference between women and men, this fact alone did not justify treating women and men differently on matters unrelated to pregnancy. Using men as the norm, the Court reasoned that any woman who can perform like a man can be treated like a man. A woman could not be denied unemployment compensation for different reasons than a man would.

What, however, is equal treatment for the woman who is correctly identified within the group of pregnant persons, not simply stereotyped as such, and temporarily unable to work outside the home for that reason? The Court first grappled with these issues in two cases that posed the question of whether discrimination on the basis of pregnancy—that is, employers' denial of health benefits—amounted to discrimination on the basis of sex. In both instances the Court answered negatively, reasoning that the employers drew a distinction not on the forbidden basis of sex but only on the basis of pregnancy; and since women could be both pregnant and nonpregnant, these were not instances of sex discrimination.[29] Only from a point of view that regards pregnancy as a strange occurrence, rather than an ongoing bodily potential, would its relationship to female experience be made so tenuous; and only from a vantage point that regards men as the norm would the exclusion of pregnancy from health insurance coverage seem unproblematic and free from gender discrimination.

Congress responded by enacting the Pregnancy Discrimination Act, which amended Title VII (the federal law forbidding gender discrimination in employment) to include discrimination on the basis of pregnancy within the range of impermissible sex discrimination.[30] Yet even under these new statutory terms, the power of the unstated male norm persists in debates over the definition of discrimination. Indeed, a new question arose under the Pregnancy Discrimination Act: if differential treatment on the basis of pregnancy is forbidden, does the statute also forbid any state requirement for pregnancy

[28]The case was decided on due process grounds. See Turner v. Department of Employment, 423 U.S. 44 (1975) (per curiam); see also Cleveland Board of Educ. v. LaFleur, 414 U.S. 632 (1974) (invalidating a local school board rule requiring pregnant teachers to take unpaid maternity leaves as a violation of due process).

[29]See General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (Title VII); Geduldig v. Aiello, 417 U.S. 484 (1974) (equal protection).

[30]Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. sec. 2000e [k][1982]).

or maternity leaves—which are, after all, distinctions drawn on the basis of pregnancy, even though drawn to help women?

A collection of employers launched a lawsuit in the 1980s arguing that even favorable treatment on the basis of pregnancy violated the Pregnancy Discrimination Act. The employers challenged a California statute that mandated a limited right to resume a prior job following an unpaid pregnancy disability leave.[31] The case—California Federal Savings & Loan Association v. Guerra, which became known as "Cal/Fed"[32]—in a real and painful sense divided the community of advocates for women's rights. Writing briefs on opposing sides, women's rights groups went public with the division. Some maintained that any distinction on the basis of pregnancy—any distinction on the basis of sex—would perpetuate the negative stereotypes long used to demean and exclude women. Others argued that denying the facts of pregnancy and the needs of new mothers could only hurt women; treating women like men in the workplace violated the demands of equality. What does equality demand—treating women like men, or treating women specially?

What became clear in these arguments was that a deeper problem had produced this conundrum: a work world that treats as the model worker the traditional male employee who has a full-time wife and mother to care for his home and children. The very phrase "special treatment," when used to describe pregnancy or maternity leave, posits men as the norm and women as different or deviant from that norm. The problem was not women, or pregnancy, but the effort to fit women's experiences and needs into categories forged with men in mind.[33]

The case reached the Supreme Court. Over a strenuous dissent, a majority of the justices reconceived the problem and rejected the presumption of the male norm which had made the case seem like a choice between "equal treatment" and "special treatment." Instead, Justice Marshall's opinion for the majority shifted from a narrow workplace comparison to a broader comparison of men and women in their dual roles as workers and as family members. The Court found no conflict between the Pregnancy Discrimination Act and the challenged state law that required qualified reinstatement of women following maternity leaves, because "California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs." The Court therefore construed the federal law to permit states to require that employers remove barriers in the workplace that would

[31]California Fair Employment and Housing Act, Cal. Gov't Code Ann. sec. 12945 (b)(2)(West 1980).

[32]107 S.Ct. 683 (1987).

[33]See generally Lucinda M. Finley, "Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate," *Colum. L. Rev.* 86 (1986), 1118; Nadine Taub and Wendy W. Williams, "Will Equality Require More than Assimilation, Accommodation, or Separation from the Existing Social Structure?" *Rutgers L. Rev./Civ. Rts. Devs.* 37 (1985), 825. Several scholars have demonstrated the pull of unstated norms in the context of employment and public regulation. See Jack M. Beermann and Joseph William Singer, "Baseline Questions in Legal Reasoning: The Example of Property in Jobs," *Ga. L. Rev.* 23 (1989), 911; Cass Sunstein, "Lochner's Legacy," *Colum. L. Rev.* 87 (1987), 873.

disadvantage pregnant people compared with others. Moreover, reasoned the majority, if there remains a conflict between a federal ban against sex-based discrimination and a state law requiring accommodation for women who take maternity leaves, that conflict should be resolved by the extension to men of benefits comparable to those available to women following maternity or pregnancy leaves.[34] Here, the Court used women's experiences as the benchmark and called for treating men equally in reference to women, thus reversing the usual practice. The dissenters, however, remained convinced that the federal law prohibited preferential treatment on the basis of pregnancy; they persisted in using the male norm as the measure for equal treatment in the workplace.[35]

There remains a risk of using the child-rearing couple as a new unstated reference point and failing then to recognize the burdens of workers who need accommodation to care for a dependent parent or to take care of some other private need. A new norm may produce new exclusions and assign the status of "difference" to still someone else. Unstated references appear in many other contexts. The assumption of able-bodiedness as the norm is manifested in architecture that is inaccessible to people who use wheelchairs, canes, or crutches to get around. Implicit norms often work subtly, through categories manifested in language. Reasoning processes tend to treat categories as clear, bounded, and sharp edged; a given item either fits within the category or it does not. Instead of considering the entire individual, we often select one characteristic as representative of the whole. George Lakoff has illustrated this phenomenon with the term "mother." Although "mother" appears to be a general category, with subcategories such as "working mother" and "unwed mother," the very need for modifying adjectives demonstrates an implicit prototype that structures expectations about and valuations of members of the general category, yet treats these expectations and valuations as mere reflections of reality.[36] If the general category is religion but the unstated prototype is Christianity, a court may have trouble recognizing as a religion a group lacking, for example, a minister.[37]

Psychologist Jerome Bruner wrote, "There is no seeing without looking, no hearing without listening, and both looking and listening are shaped by expectancy, stance, and intention."[38] Unstated reference points lie hidden in

[34]107 S.Ct. at 694, 695.

[35]See 107 S.Ct. at 698 (White, J., dissenting).

[36]See Lakoff, *Women, Fire, and Dangerous Things*, pp. 39–84.

[37]We tend to think metaphorically, allowing one concept to stand for another, or synecdochically, letting a part stand for a whole. These ways of thinking often obscure understanding either because they keep us from focusing on aspects of a thing that are inconsistent with the metaphor we choose, or because we fail to remember that we have made the substitution. See Howard Gardner, *The Mind's New Science: A History of the Cognitive Revolution* (New York: Basic Books, 1985), pp. 372–73; George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980), pp. 10–13, 35–40; *Judgment under Uncertainty: Heuristics and Biases*, ed. Daniel Kahneman, Paul Slovic, and Amos Tversky (New York: Cambridge University Press, 1982), pp. 23–98.

[38]Jerome S. Bruner, *Actual Minds, Possible Worlds* (Cambridge, Mass.: Harvard University Press, 1986), p. 110, paraphrasing Robert Woodworth. Similarly, Albert Einstein said, "It is the

legal discourse, which is full of the language of abstract universalism. The U.S. Constitution, for example, included general language to describe persons protected by it, even when it excluded black slaves and white women from its intended reach.[39] Legal language seeks universal applicability, regardless of the particular traits of an individual, yet abstract universalism often "takes the part for the whole, the particular for the universal and essential, the present for the eternal."[40] Legal reasoning feels rational, according to one theorist, when "particular metaphors for categorizing likeness and difference in the world have become frozen, or institutionalized as common sense."[41] Making explicit the unstated points of reference is the first step in addressing this problem; the next is challenging the presumed neutrality of the observer, who in fact sees inevitably from a situated perspective.

Assumption 3: The Observer Can See without a Perspective

This assumption builds on the others. Differences are intrinsic, and anyone can see them; there is one true reality, and impartial observers can make judgments unaffected and untainted by their own perspective or experience.[42] The facts of the world, including facts about people's traits, are knowable truly only by someone uninfluenced by social or cultural situations. Once legal rules are selected, regardless of prior disputes over the rules themselves, society may direct legal officials to apply them evenhandedly and to use them to discover and categorize events, motives, and culpability as they exist in the world. This aspiration to impartiality in legal judgments, however, is just that—an aspiration, not a description. The aspiration even risks obscuring the inevitable perspective of any given legal official, or of anyone else, and thereby makes it harder to challenge the impact of perspective on the selection of traits used to judge legal consequences.

The ideal of objectivity itself suppresses the coincidence between the viewpoints of the majority and what is commonly understood to be objective or unbiased. For example, in an employment discrimination case the defendant, a law firm, sought to disqualify Judge Constance Baker Motley from sitting on the case because she, as a black woman who had once represented plaintiffs in discrimination cases, would identify with those who suffer race

theory which decides what we can observe" (quoted in Daniel Bell, *The Coming of Post-Industrial Society: A Venture in Social Forecasting* [New York: Basic Books, 1973], p. 9).

[39]Nancy Cott, "Women and the Constitution" (unpublished paper). Cott notes that only the post–Civil War amendments introduce the particularizing language of race and gender, attempting to secure actual universal reach where the previous universal language of the Constitution had not intended to do so.

[40]Carol C. Gould, "The Woman Question: Philosophy of Liberation and the Liberation of Philosophy," in *Women and Philosophy: Toward a Theory of Liberation,* ed. Carol C. Gould and Marx Wartofsky (New York: Putnam, 1976).

[41]Gary Pellar, "The Metaphysics of American Law," *Calif. L. Rev.* 73 (1985), 1151, 1156.

[42]See Alison Jaggar, *Feminist Politics and Human Nature* (Totowa, N.J.: Rowman & Allenheld, 1983), p. 356.

or sex discrimination. The defendant assumed that Judge Motley's personal identity and her past political work had made her different, lacking the ability to perceive without a perspective. Judge Motley declined, however, to recuse herself and explained: "If background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds."[43]

Because of the aspiration to impartiality and the prevalence of universalist language in law, most observers of law have been reluctant to confront the arguments of philosophers and psychologists who challenge the idea that observers can see without a perspective.[44] Philosophers such as A. J. Ayer and W. V. Quine note that although we can alter the theory we use to frame our perceptions of the world, we cannot see the world unclouded by preconceptions.[45] What interests us, given who we are and where we stand, affects our ability to perceive.[46]

[43]Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D. N.Y. 1975); accord Commonwealth v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 115 (E.D. Pa. 1974) (Higginbotham, J.) (denying defendant's motion to disqualify the judge from a race discrimination case because of the judge's racial identity as a black person). Judge Higginbotham noted that "black lawyers have litigated in federal courts almost exclusively before white judges, yet they have not urged the white judges should be disqualified on matters of race relations (id. at 177).

[44]Science shares both this aspiration of impartiality and the preference for universalist language. See, e.g., Karl Popper, *Realism and the Aim of Science,* ed. W. W. Bartley III (Totowa, N.J.: Rowman and Littlefield, 1983). Popper stated his view of the aspiration frankly: "It is the aim of science to find satisfactory explanations," and such explanations should be "in terms of testable and falsifiable universal laws and initial conditions" (pp. 132, 134). However, considerable critical attention has focused on the aim of science to derive impartial universal laws from objective observations. For instance, Paul Feyerabend, *Against Method,* rev. ed. (London: Verso, 1988), challenges the notion of *objective* observations, arguing that all facts are value-laden or "contaminated." And Thomas Kuhn's seminal book *The Structure of Scientific Revolutions,* 2d ed. (Chicago: University of Chicago Press, 1970), calls into question the impartiality of scientific endeavors. Kuhn demonstrates that competing scientific theories are usually incommensurable; therefore, there is often no logical or objective basis for choosing between them. This suggests that something other than logic plays a significant part in charting the course science pursues. Bringing a different angle to the critique of science, Evelyn Fox Keller, *Reflections on Gender and Science* (New Haven, Conn.: Yale University Press, 1985), argues that the aspiration of science to generate universal laws in an impartial fashion reflects not merely a search for truth. She maintains that the quest for objectivity and universality is largely a projection onto science of a need to dominate and control the world.

[45]A. J. Ayer, *Philosophy in the Twentieth Century* (New York: Random House, 1982), p. 157; W. V. Quine, *Ontological Relativity and Other Essays* (New York: Columbia University Press, 1969). See also Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986); Hilary Putnam, *Reason, Truth, and History* (New York: Cambridge University Press, 1981); William James, *Psychology* (New York: Holt, 1892). The idea is even more pronounced in Kuhn, *Structure of Scientific Revolutions,* pp. 23–25; Kuhn argues that scientific inquiry has pursued truth within a paradigm of rational organization of fact gathering that is so taken for granted that it restricts the scientists' vision according to its own premises.

[46]William James, *On Some of Life's Ideals: A Certain Blindness in Human Beings* (New York: Holt, 1900; rpt. Folcroft, Pa.: Folcroft Library Editions, 1974); Luce Irigaray, *Ethique de la différence sexuelle* (Rotterdam: Erasmus Universiteit Rotterdam, 1987), pp. 19–20, quoted in Stephen Heath, "Male Feminism," in *Men in Feminism,* ed. Alice Jardine and Paul Smith (New York: Methuen, 1987): "I will never be in a man's place, a man will never be in mine. Whatever

The impact of the observer's unacknowledged perspective may be crudely oppressive. When a municipality includes a nativity creche in its annual Christmas display, the majority of the community may perceive no offense to non-Christians in the community. If the practice is challenged in court as a violation of the Constitution's ban against establishment of religion, a judge who is Christian may also fail to see the offense to anyone and merely conclude, as the Supreme Court did in 1984, that Christmas is a national holiday.[47] Judges may be peculiarly disabled from perceiving the state's message about a dominant religious practice because judges are themselves often members of the dominant group and therefore have the luxury of seeing their perspectives mirrored and reinforced in major social and political institutions. Similarly, members of a racial majority may miss the impact of their own race on their perspective about the race of others.[48]

The power of unacknowledged perspectives permeated a recent Supreme Court analysis of the question of whether a federal statute exempting religious organizations from rules against religious discrimination in employment decisions violates the establishment clause of the First Amendment. A majority for the Court endorsed this legislative grant of discretion to religious organizations, and rejected a discharged employee's claims that such accommodation of religion unconstitutionally promotes religious organizations at the price of individual religious liberty. The majority reasoned that the preference for religion was exercised not by the government but rather by the church.[49] Here, the justices suggested that the government could remain neutral even while exempting religious organizations from otherwise universal prohibitions against discriminating on the basis of religion in employment decisions.

Justice Sandra Day O'Connor pointed out in her concurring opinion that allowing a private decision-maker to use religion in employment decisions inevitably engaged the government in that discrimination. For her, the question for the Court was how an "objective observer" would perceive a government policy of approving such religion-based employment decisions. She challenged the justices in the majority to admit that the law was not neutral and to explore the meaning of this nonneutrality to someone not involved in the dispute. The aspiration to impartiality infuses her analysis, yet the meaning of objectivity almost dissolves in application: "To ascertain whether the statute [exempting religious organizations from the ban against religious discrimination in employment] conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute."[50]

the possible identifications, one will never exactly occupy the place of the other—they are irreducible the one to the other."

[47]Lynch v. Donnelley, 465 U.S. 668 (1984). Subsequently, the Court has emphasized that context matters in the assessment of establishment clause challenges to public displays of a crèche. See County of Allegheny v. American Civil Liberties Union, 109 S.Ct. 3086 (1989).

[48]See Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," *Stan. L. Rev.* 39 (1987), 317, 380.

[49]See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S.Ct. 2862, 2869 n.15 (1987). The case arose in the context of nonprofit religious activities.

What could "objective" mean here? First, it acknowledges the limited perspective of the government representatives. Second, it rejects the viewpoint of the religious group as too biased or embedded in the problem.[51] So at a minimum, "objective" means "free from the biases of the litigating parties." But is there anyone who has no perspective on this issue? Justice O'Connor described a judge as someone capable of filling the shoes of the "objective observer," yet she acknowledged that she was answering from her own perspective: "*In my view* the objective observer should perceive the government action as an accommodation of the exercise of religion rather than as a government endorsement of religion."[52] Although at other times, Justice O'Connor has indicated a sensitive awareness of perspectives other than her own, here she failed to consider that no one can achieve a perspective free from a particular viewpoint. Her conclusion in this case—like her rejection of a religious-freedom challenge to a military regulation punishing servicemen for the wearing of religious headgear[53]—did not consider the possibility that her own perspective matches the perspective of a majority group and neglects the perspective of a minority. The comfort of finding one's perspective widely shared does not make it any less a perspective, especially in the face of evidence that other people perceive the world from a different perspective.

Justice Antonin Scalia's dissenting opinion in an affirmative action case reveals both considerable shrewdness about the effect of the observer's hidden perspective and surprising unawareness about the impact of his own perspective. He predicted that the majority's approval of an affirmative action employment plan would lead many employers to engage in voluntary affirmative action plans that employ only minimally capable employees rather than risk litigation challenging their employment practices as discriminatory: "This situation is more likely to obtain, of course, with respect to the least skilled jobs—perversely creating an incentive to discriminate against precisely those members of the nonfavored groups *least* likely to have profited from societal discrimination in the past."[54] Justice Scalia thus implied,

[50]See id. at 2874 (O'Connor, J., concurring).

[51]Cf. William James (*On Some of Life's Ideals*, p. 6): "The subject judged knows a part of the world of reality which the judging spectator fails to see, knows more while the spectator knows less; and, wherever there is conflict of opinion and difference of vision, we are bound to believe that the truer side is the side that feels the more, and not the side that feels the less."

[52]107 S.Ct. at 2875 (O'Connor, J., concurring) (emphasis added).

[53]See Goldman v. Weinberger, 106 S.Ct. 1310 (1986) (rejecting claim by an Orthodox Jew, serving as military psychologist, of a religious exemption from Air Force dress regulations to permit him to wear a yarmulke); Frank I. Michelman, "The Supreme Court, 1985 Term—Foreword: Traces of Self-Governance," *Harv. L. Rev.* 100 (1986), 1.

[54]Johnson v. Transportation Agency, 107 S.Ct. 1442, 1475 (1987) (Scalia, J., dissenting) (original emphasis).

without quite saying, that the perspective of the justices had influenced their development of a rule promoting affirmative action plans in a setting that could never touch members of the Court or people like them.[55]

Yet in another respect his opinion manifests, rather than exposes, the impact of the observer's perspective on the observed. He provided a generous and sympathetic view of the male plaintiff, Johnson, but demonstrated no comparable understanding of Joyce, the woman promoted ahead of him; his description of the facts of the case offered more details about Johnson's desires and efforts to advance his career. In effect, Justice Scalia tried to convey Johnson's point of view that the promotion of Joyce represented discrimination against Johnson.[56] Unlike the majority of the court, Justice Scalia provided no description of Joyce's career aspirations and her efforts to fulfill them; he thus betrayed a critical lack of sympathy for those most injured by social discrimination in the past.[57] Most curious was his apparent inability to imagine that Joyce and other women working in relatively unskilled jobs are, even more so than Johnson, people "*least* likely to have profited from societal discrimination in the past."[58] Operating under the apparent assumption that people fall into one of two groups—women and blacks on the one hand; white, unorganized, unaffluent, and unknown persons on the other[59]—Justice Scalia neglected the women who have been politically powerless and in need of the Court's protection. Although his opinion reveals that the Court may neglect the way it protects professional jobs from the affirmative action it prescribes for nonprofessionals, he himself remained apparently unaware of the effects of his own perspective on his ability to sympathize with some persons but not others.

A classic instance of unselfconscious immersion in a perspective that harms others appears in the Supreme Court's majority opinion in Plessy v. Ferguson,[60] which upheld the rationale of "separate but equal" in rejecting a challenge to legislated racial segregation in public railway cars. This is the decision ultimately overturned by the Court in Brown v. Board of Education.[61] A majority of the Court reasoned in *Plessy* that if any black people felt that segregation stamped them with a badge of inferiority, "it is not by reason of anything found in the [legislation], but solely because the colored race

[55]Justice Scalia ignored, however, the calls for diversifying the judiciary. See, e.g., Charles Halpern and Ann MacRory, "Choosing Judges," *New York Times*, July 1, 1979, p. E21.

[56]See 107 S.Ct. at 1468 (Scalia, J., dissenting).

[57]Paul Brest, "The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle," *Harv. L. Rev.* 90 (1976), 1, 39–42, 53–54, argues that the claims of those who have suffered because of patterns of discrimination deserve priority over the claims of those who have suffered by the vagaries of fate.

[58]107 S.Ct. at 1475 (Scalia, J., dissenting) (original emphasis).

[59]See id. at 1476: "The irony is that these individuals [the Johnsons of the country]—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent."

[60]163 U.S. 537 (1896).

[61]347 U.S. 483 (1954).

chooses to put that construction upon it."[62]

Homer Plessy's attorney had urged the justices to imagine themselves in the shoes of a black person: "Suppose a member of this court, nay, suppose every member of it, by some mysterious dispensation of providence should wake to-morrow with a black skin and curly hair . . . and in traveling through that portion of the country where the 'Jim Crow Car' abounds, should be ordered into it by the conductor. It is easy to imagine what would be the result. . . . What humiliation, what rage would then fill the judicial mind!"[63] But the justices in the Court's majority in 1896 remained unpersuaded and, indeed, seemed unable to leave the perspective of a dominant group even when they offered their own imagined shift in perspectives. They posed the hypothetical situation of a state legislature dominated by blacks which adopted the same law commanding racial segregation in railway cars that was then before the Court. The justices reasoned that certainly whites "would not acquiesce in [the] assumption" that this law "relegate[d] the white race to an inferior position."[64] Even in their effort to imagine how they would feel if the racial situation were reversed, the justices thereby manifested their viewpoint as members of a dominant and powerful group, which would never feel stigmatized by segregation.

Demonstrating that it was not impossible at that time to imagine a perspective other than that of the majority, however, Justice John Harlan dissented. He declared that the arbitrary separation of the races amounted to "a badge of servitude wholly inconsistent with the civil freedom and the equality before the law." He specifically rebutted the majority's claim about the meaning of segregation: "Everyone knows that the statute in question had its origins in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[65]

Justices to this day often fail to acknowledge their own perspective and its influence in the assignment of difference in relation to some unstated norm. Veiling the standpoint of the observer conceals its impact on our perception of the world.[66] Denying that the observer's perspective influences perception leads to the next assumption: that all other perspectives are either presumptively identical to the observer's own or do not matter.

[62]163 U.S. at 551.

[63]Brief for the Plaintiff, Plessy v. Ferguson, reprinted in *Civil Rights and the American Negro: A Documentary History*, ed. Alpert B. Blaustein and Robert L. Zangrando (New York: Washington Square Press, 1968), pp. 298, 303–4.

[64]163 U.S. at 551.

[65]Id. at 537, 562, 557.

[66]Another instance of this assumption in Supreme Court jurisprudence appears in its treatment of the Fourth Amendment, where the perspectives of police officers and victims of crime provide the presumed starting point in assessing alleged violations of the guarantee against unwarranted searches or seizures. See Tracey Maclin, "Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?" *Amer. Crim. L. Rev.* 25 (1988), 669.

Assumption 4: Other Perspectives Are Irrelevant

In her short story "Meditations on History," Sherley Ann Williams illustrates how people can assume that their perspective is the truth, ignore other perspectives, and thereby miss much of what is going on. In the story a pregnant slave woman waits to be hanged for running away from her master and killing a white man. The owner has confined her in detention until her baby is born; then he will take the baby, to make up for the loss of his grown slave. A white man who is writing a book about managing slaves interviews the slave woman and seems satisfied that he is able to understand her. He concludes that she is basically stupid and confused; he grows especially irritated as she hums and sings during their interview, never considering that she is in this way communicating with other slaves about a rescue plan. When she escapes, with the help of her friends, the writer is baffled; he never comes to understand how incomplete was his understanding of her.[67]

Many people who judge differences in the world reject as irrelevant or relatively unimportant the experience of "different people." William James put it this way: "We have seen the blindness and deadness to each other which are our natural inheritance."[68] People often use stereotypes as though they were real and complete, thereby failing to see the complex humanity of others. Stereotyped thinking is one form of the failure to imagine the perspective of another. Glimpsing contrasting perspectives may alter assumptions about the world, as well as about the meaning of difference.

When judges consider the situation of someone they think is very much unlike themselves, there is a risk that they will not only view that person's plight from their own vantage point but also fail to imagine that there might be another vantage point. When a criminal defendant charged racial discrimination in the administration of the death penalty in Georgia's criminal justice system, the Supreme Court split between those justices who treated alternative perspectives as irrelevant and those who tried to imagine them. The defendant's lawyer submitted a statistical study of over 2,000 murder cases in Georgia during the 1970s, and the Court assumed it to be valid. According to the study, a defendant's likelihood of receiving the death sentence correlated with the victim's race and, to a lesser extent, with the defendant's race: black defendants convicted of killing white victims had the greatest likelihood of receiving the death penalty, and defendants of either race who killed black victims had considerably less chance of being sentenced to death. A majority of the Court concluded that even taking this evidence as true, the defendant had failed to show that the decision-makers in his case had acted with a discriminatory purpose.[69]

[67]Sherley Ann Williams, "Meditations on History," in *Midnight Birds: Stories by Contemporary Black Women Writers,* ed. Mary Helen Washington (Garden City, N.Y.: Anchor Books, 1980), p. 200.

[68]James, "What Makes a Life Significant," in *On Some of Life's Ideals,* pp. 49, 81. I want to acknowledge here that "blindness" as a metaphoric concept risks stigmatizing people who are visually impaired.

[69]McCleskey v. Kemp, 107 S.Ct. 1756, 1766 n.7 (1987). The Court noted that it had permitted statistical evidence of discrimination in the contexts of jury venire selection and Title VII violations because "in those cases, the statistics relate to fewer and fewer entities, and fewer variables are relevant to the challenged decisions" (id. at 1768).

Moreover, reasoned Justice Lewis Powell for the majority, recognizing the defendant's claim would open the door "to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender" or physical appearance. This argument, perhaps meant in part to trivialize the charge of race discrimination by linking it with physical appearance,[70] implied that discrepancies in criminal sentences are random and too numerous to control. This formulation took the vantage point of such decision-makers as the reviewing court and the jury but not the perspective of the criminal defendant. Scholars of discrimination law have argued that the effect of discrimination on minorities is the same whether or not the majority group members intended it.[71]

What would happen if the Court in a case like this considered an alternative perspective? Justice William Brennan explored this possibility in his dissent. Perhaps knowing that neither he nor many of his readers could fully grasp the defendant's perspective, he tried to look through the eyes of the defense attorney who is asked by Warren McCleskey, the black defendant in the case, about the chances of a death sentence. Adopting that viewpoint, Justice Brennan concluded that "counsel would feel bound to tell McCleskey, that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks . . . [and] there was a significant chance that race would play a prominent role in determining if he lived or died." Moreover, he wrote, "enhanced willingness to impose the death sentence on black defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons." Under these circumstances, he concluded, the judicial system had, in fact, considered race and produced judgments "completely at odds with [the] concern that an individual be evaluated as a unique human being."[72]

To the majority's fear of widespread challenges to all aspects of criminal sentence Justice Brennan responded: "Taken at its face, such a statement seems to suggest a fear of too much justice. . . . The prospect that there may be more widespread abuse than McCleskey documents may be dismaying,

[70]Appearance discrimination may not, in fact, be trivial; for it may disguise racial, ethnic, or gender discrimination, or it may encode other forms of stereotypic and prejudicial thinking. See Note, "Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance," *Harv. L. Rev.* 100 (1987), 2035, 2051.

[71]See Lawrence, "The Id, the Ego, and Equal Protection," pp. 352–53; and Alan D. Freeman, "Antidiscrimination Law: A Critical Review," in *The Politics of Law: A Progressive Critique,* ed. David Kairys (New York: Pantheon Books, 1982), pp. 96–116.

[72]107 S.Ct. at 1782 (Brennan, J., dissenting); id. at 1790; accord at 1806 (Stevens, J., dissenting). Justice Blackmun argued that overt discrimination is especially pernicious in the criminal justice system because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others" (id. at 1795, Blackmun, J., dissenting) (quoting Strauder v. Western Virginia, 100 U.S. 303, 308 [1880]); id. at 1790.

but it does not justify complete abdication of our judicial role."[73] To the majority of the Court, acknowledging discrimination in this case looked like a management problem for the courts rather than a means of reducing potential injustices suffered by defendants.[74]

Randall Kennedy has emphasized still another perspective deflected by the majority, the perspective of the black communities "whose welfare is slighted by criminal justice systems that respond more forcefully to the killing of whites than the killing of blacks." In this view, black communities are denied equal access to a public good: punishment of those who injure members of that community. Taken seriously, this perspective could lead to the execution of more black defendants who have killed black victims. Kennedy concludes that "race-based devaluations of human life constitute simply one instance of a universal phenomenon: the propensity for persons to sympathize more fully with those with whom they can identify."[75]

It may be impossible to take the perspective of another completely, but the effort to do so can help us recognize that our own perspective is partial. Searching especially for the viewpoint of minorities not only helps those in the majority shake free of their unstated assumptions but also helps them develop a better normative sense in light of the experience of those with less power.[76] Members of minority groups have often had to become conversant with the world view of the majority while also trying to preserve their own. W. E. B. Du Bois's famous statement in his *Souls of Black Folk* describes that effort: "It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of the world that looks on in amused contempt and pity. One ever feels his twoness—an American, a Negro."[77] More recently, Bell Hooks explained her perception of how she and other women of color came to understand the world: "Living as we did—on the edge—we developed a particular way of seeing reality. We looked both from the outside in and from the inside out. We focused our attention on the center as well as on the margin. We understood both."[78] Works of fiction have often powerfully evoked the multiple worlds inhabited by members of minorities and thereby helped to convey the partiality of even a majority world view that presents itself as the one reality.[79]

[73]Id. at 1791.

[74]The courts tended to take the perspective of law enforcement officials rather than defendants in criminal cases. See Maclin, "Constructing Fourth Amendment Principles."

[75]Randall Kennedy, "*McCleskey v. Kemp:* Race, Capital Punishment, and the Supreme Court," *Harv. L. Rev.* 101 (1988), 1388–95.

[76]See Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations," 22 *Harv. C.R.–C.L. L. Rev.* 323 (1987), urging individuals seeking justice to look to the perspectives of minorities for normative insights.

[77]W. E. B. Du Bois, *The Souls of Black Folk: Essays and Sketches* (New York: Dodd, Mead, 1979), p. 3.

[78]Bell Hooks, *Feminist Theory: From Margin to Center* (Boston: South End Press, 1984), p. ix.

[79]See, e.g., James Baldwin, "Sonny's Blues," in *The Norton Anthology of Short Fiction,* 2d ed., ed. R. V. Cassill (New York: Norton, 1981) (a black ex-convict's middle-class brother comes to understand and appreciate the ex-convict's world of jazz music); Robin Becker, "In the Badlands," in *The Things That Divide Us,* ed. Faith Conlon, Rachel da Silva, and Barbara Wilson (1985) (a disapproving mother learns to accept and appreciate her daughter's lesbian lover); Alice Walker, "Advancing Luna and Ida B. Wells," in Washington, *Midnight Birds* (perspectives shift between a white woman and a black woman on the possible rape of the white woman by a black man). See also Ralph Ellison, *Invisible Man* (New York: Vintage Press, 1972); Richard Wright, *Native Son* (New York: Harper & Row, 1940).

Judges have sometimes demonstrated an acute awareness of the perspective of religious persons or groups, contrasted with the view of a secular employer or the government. In Sherbert v. Verner,[80] the Supreme Court considered the claims of a member of the Seventh-Day Adventists who had been discharged by her employer because she would not work on Saturday—the Sabbath observed by her church—and was unable to find other work that allowed her to observe her Sabbath. When she applied for state unemployment compensation, the state commission rejected her claim on the ground that she had refused to accept suitable work. The commission argued that it employed a neutral rule, denying benefits to anyone who failed without good cause to accept suitable work when offered. The Supreme Court reasoned that this rule was not neutral; that from the woman's point of view it burdened her religious beliefs. Indeed, reasoned the Court, the government's failure to accommodate religion, within reasonable limits, amounted to hostility toward religion.[81]

Similarly, in Wisconsin v. Yoder, a majority of the Supreme Court refused enforcement of compulsory school laws against members of an Amish community who claimed that their religious way of life would be burdened if their adolescent children had to attend school beyond the eighth grade. Even though compulsory school laws serve widely supported public purposes, and even though the Amish way of life seemed unfamiliar to the Court, the justices were able to imagine the intrusion represented by compulsory schooling. Yet Justice William O. Douglas, in partial dissent, reminded the Court of another perspective often ignored: the viewpoint of the children, who might have preferred the chance to continue their formal education.[82]

A perspective may go unstated because it is so unknown to those in charge that they do not recognize it as a perspective. Judges in particular often presume that the perspective they adopt is either universal or superior to others. Indeed, a perspective may go unstated because it is so powerful and

[80]374 U.S. 398 (1963).

[81]Subsequent cases, following the precedent of *Sherbert,* include Thomas v. Review Board, 450 U.S. 707 (1981) (state cannot deny unemployment benefits to a Jehovah's Witness who quit his job for religious reasons when transferred to making military equipment); Hobbie v. Unemployment Appeals Commission, 107 S.Ct. 1046 (1987) (state cannot deny unemployment benefits to individual who was fired when she refused, after religious conversion, to work on Saturdays).

[82]406 U.S. 205 (1972); id. at 205, 241–43 (Douglas, J., concurring in part and dissenting in part). Justice Douglas reasoned: "The Court's analysis assumes that the only interests at stake in this case are those of the Amish parents on the one hand, and those of the State on the other," and "if the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notion of religious duty upon their children." Yet "the views of the child whose parent is the subject of the suit" are crucial.

pervasive that it may be presumed without defense. It has been said that Aristotle could have checked out—and corrected—his faulty assertion that women have fewer teeth than men. He did not do so, however, because he thought he knew.[83] Presumptions about whose perspective ultimately matters arise from the fifth typically unarticulated assumption, that the status quo is the preferred situation.

Assumption 5: The Status Quo Is Natural, Uncoerced, and Good

Connected with many of the other assumptions is the idea that critical features of the status quo—general social and economic arrangements—are natural and desirable. From this assumption follow three propositions. First, the goal of governmental neutrality demands the status quo because existing societal arrangements are assumed to be neutral. Second, governmental actions that change the status quo have a different status from omissions, or failures to act, that maintain the status quo. Third, prevailing societal arrangements are not forced on anyone. Individuals are free to make choices and to assume responsibility for those choices. These propositions are rarely stated, both because they are deeply entrenched and because they treat the status quo as good, natural, and freely chosen—and thus not in need of discussion.

Difference may seem salient, then, not because of a trait intrinsic to the person but because the dominant institutional arrangements were designed without that trait in mind—designed according to an unstated norm reconfirmed by the view that alternative perspectives are irrelevant or have already been taken into account. The difference between buildings built without considering the needs of people in wheelchairs and buildings that are accessible to people in wheelchairs reveals that institutional arrangements define whose reality is to be the norm and what is to seem natural. Sidewalk curbs are not neutral or natural but humanly constructed obstacles. Interestingly, modifying what has been the status quo often brings unexpected benefits as well. Inserting curb cuts for the disabled turns out to help many others, such as bike riders and parents pushing baby strollers. (They can also be positioned to avoid endangering a visually impaired person who uses a cane to determine where the sidewalk ends.)

Yet the weight of the status quo remains great. Existing institutions and language already shape the world and already express and recreate attitudes about what counts as a difference, and who or what is the relevant point of comparison. Assumptions that the status quo is natural, good, and uncoerced make proposed changes seem to violate the commitment to neutrality, predictability, and freedom.

For example, courts have treated school instruction in evolution as neutral

[83]"Aristotle maintained that women have fewer teeth than men; although he was twice married, it never occurred to him to verify this statement by examining his wives' mouths" (*Bertrand Russell's Best: Silhouettes in Satire*, ed. Robert E. Egner [New York: Mentor Books, New American Library, 1958], p. 67).

toward religion, even though some groups and some states find that instruction corrosive to particular religious beliefs (as in Edwards v. Aguillard). Similarly, many legal observers have viewed affirmative action as nonneutral, compared with the status quo treatments of race and gender in employment and other distributions of societal resources. Proposals to alter rules about gender roles encounter objections, from both men and women, to what is seen as undesirable disruption in the expectations and predictability of social relationships. Suggestions to integrate schools, private clubs, and other social institutions that have been segregated by race or by gender provoke protests that these changes would interfere with freedom—referring, often explicitly, to the freedom of those who do not wish to associate with certain others.[84]

Yet the status quo is often challenged as burdensome—not neutral, not desirable, and not free—for members of minority religious groups. For example, a seemingly neutral rule, limiting unemployment benefits to those who become unemployed through no fault of their own, offended the constitutional protections of religious freedom—according to the Supreme Court—when the rule burdened an individual who lost her job when she refused to work during her religious Sabbath. In Hobbie v. Unemployment Appeals Commission,[85] the Court concluded that the state's unemployment scheme must accommodate religious adherences. The government's rules cannot be neutral in a world that is not neutral.

Despite judgments such as this one, courts on other occasions have not understood how burdensome apparently neutral governmental rules may be, given other dimensions of differences among people. An ostensibly neutral state policy on unemployment compensation figured also in the case of a woman who had taken a pregnancy leave from her job with no guarantee of reinstatement; upon her return the employer told her there were no positions available.[86] Linda Wimberly applied for unemployment benefits but was denied under a state law disqualifying applicants unless their reasons for leaving a job were directly attributable to the work or to the employer. Wimberly argued that a federal statute forbidding discrimination in unem-

[84]See Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harv. L. Rev.* 73 (1959), 1. Judge Skelly Wright's critique of this argument appears in his "Professor Bickel," p. 769. For criticisms of the attempt to use neutral principles, see Mark Tushnet, "Following the Rule Laid Down: A Critique of Interpretive and Neutral Principles," *Harv. L. Rev.* 96 (1983), 781, arguing that neutral principles are incapable of guiding judicial decisions. Also see John Hart Ely, "The Supreme Court's 1977 Term—Foreword: On Discovering Fundamental Values," *Harv. L. Rev.* 92 (1978), p. 5, pointing out that neutral principles tell us nothing about the appropriate *content* of a decision. For a defense of those Supreme Court decisions criticized by Wechsler, see Louis Pollack, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler," *U. Pa. L. Rev.* 108 (1959), 1, arguing that the Supreme Court's decisions not only are correct but also satisfy Wechsler's requirement of following neutral principles. For a thoughtful analysis of the tensions between freedom of association and antidiscrimination, see Deborah Rhode, "Association and Assimilation," *Nw. U. L. Rev.* 81 (1986), 106. This topic has yielded several recent Supreme Court decisions rejecting associational defenses to discriminatory practices. See New York State Club Ass'n v. City of New York, 56 U.S.L.W. 4653 (June 21, 1988); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[85]107 S.Ct. 1046 (1987).

[86]Wimberly v. Labor & Indus. Relations Comm'n of Missouri, 107 S.Ct. 821 (1987).

ployment compensation "solely on the basis of pregnancy or termination of pregnancy" required accommodation for women who leave work because of pregnancy.[87]

The Supreme Court unanimously rejected Wimberly's claim that this denial of benefits contravened the federal statute. The Court found that the state had not singled out pregnancy as the reason for withholding unemployment benefits; instead, pregnancy fell within a broad class of reasons for unemployment unrelated to work or to the employer. The Court interpreted the federal statute to forbid discrimination but not to mandate preferential treatment.[88] In the eyes of the justices, it was neutral to have a general rule denying unemployment benefits to anyone unemployed for reasons unrelated to the workplace or the employer.[89] A state choosing to define its unemployment eligibility to disqualify not just those who leave work because of pregnancy but also those who leave work for good cause, illness, or compelling personal reasons may thus do so without violating federal law.[90]

Similarly, statistical patterns of racial discrepancies in death-penalty sentencing, as presented in McCleskey v. Kemp, cannot be presumed to establish unconstitutional discrimination, because the status quo is deemed neutral, absent more direct proof of intentional discrimination. The appearance of neutrality in law may thus at times defeat claims that the social and political arrangements are not neutral, unfairly distinguishing some people from others.

This pattern of thought is often connected to the view that rules seen as neutral produce different results for different people only because people make free choices that have different consequences.[91] When women choose to become pregnant and then take leave from their paid employment, they do not deserve unemployment benefits, because they left their jobs voluntarily.[92]

[87]26 U.S.C. sec. 3304(a)(12) (1982).

[88]107 S.Ct. at 825, 826.

[89]The Court explained: "Thus, a State could not decide to deny benefits to pregnant women while at the same time allowing benefits to persons who are in other respects similarly situated: the 'sole basis' for such a decision would be on account of pregnancy. On the other hand, if a state adopts a neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of the larger group, the neutral application of that rule cannot readily be characterized as a decision made 'solely on the basis of pregnancy' " (ibid., p. 825).

[90]Further, under the view that governmental actions changing the status quo raise problems not raised by failures to act, the Court reasoned that if Congress had wanted to require special treatment for pregnancy, it would have said so, and even the federal ban against discrimination on the basis of pregnancy in unemployment compensation schemes lacked sufficient specificity to forbid the denial of benefits to a woman in Wimberly's situation. The Court treated this as a problem of congressional silence: Congress did not mean to authorize preferential treatment because it did not say so. To treat silence as denial of special treatment and to treat accommodation of pregnancy as preferential treatment are both signs of the assumption that the status quo is neutral or good.

[91]Similar assumptions underlie the judicial treatment of differences in wealth as unimportant to constitutional rights and protections. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). See generally Laurence Tribe, *American Constitutional Law,* 2d ed. (Mineola, N.Y.: Foundation Press, 1988), pp. 1665–72.

[92]See Finley, "Transcending Equality Theory," pp. 1118, 1136–38.

When a worker chooses to convert to a new religion and then loses a job because of conflict between religious demands and the work schedule, this too may be treated as a personal choice—but the courts have been more solicitous of this kind of choice, given constitutional protections for the free exercise of religion.[93] Courts have traditionally refused to find that a rape occurred, absent proof of force by the defendant and/or resistance by the victim; the victim's silence or lack of sufficient protest has been deemed to constitute consent to sexual relations.[94]

Men and women historically have held different types of jobs. Social attitudes, including attitudes held by women, are the preferred explanation for some who presume that the status quo is natural, good, or chosen. Justice Scalia dissented on this ground when a majority for the Supreme Court approved a voluntary affirmative action plan to improve the positions of white women and minorities in a traditionally segregated workplace. No woman had held the job of road crew dispatcher, but women themselves, explained Justice Scalia, had not sought this job in the past. He acknowledged but rejected the view of some people that "the social attitudes which cause women themselves to avoid certain jobs and to favor others are as nefarious as conscious, exclusionary discrimination."[95] An extensive dispute about the role of women's choices in the gender segregation of the workplace arose in a sex discrimination charge pursued by the federal Equal Employment Opportunity Commission against Sears, Roebuck & Co.[96] Did the absence of women from jobs as commission salespersons result from women's own choices and preferences, or from societal discrimination and employers' refusals to make those jobs available? The legal framework in the case seemed to force the issue into either/or questions: women's work-force participation was due either to their own choices or to forces beyond their control; women's absence from certain jobs was either due to employers' discrimination or not; either women lacked the interest and qualifications for these jobs, or women had the interest and qualifications for the jobs.

Would it be possible to articulate a third view? Consider this one: choices by working women and decisions by their employers were both influenced by larger patterns of economic prosperity and depression and by shifting

[93]In *Hobbie,* the Supreme Court rejected the state's argument that the employee's refusal to work amounted to misconduct related to her work, which rendered her ineligible for unemployment benefits, given a scheme limiting compensation to persons who become "unemployed through no fault of their own." The Court rejected this emphasis on the cause of the conflict because the "salient inquiry" was whether the denial of the unemployment benefits unlawfully burdened Hobbie's free exercise right. The Court also rejected the state's claim that making unemployment benefits available to Hobbie would unconstitutionally establish religion by easing eligibility requirements for religious adherents (107 S.Ct. at 1047–48, 1051 n.11).

[94]Susan Estrich, "Rape," *Yale L. J.* 95 (1986), 1086, 1098–1105, 1130–32.

[95]Johnson v. Transportation Agency, 107 S.Ct. 1442, 1443 (1987).

[96]628 F. Supp. 1264 (N.D. Ill. 1986). See Mary Joe Frug, "On Sears" (New England School of Law, Boston, unpublished manuscript, 1988); Ruth Milkman, "Women's History and the Sears Case," *Feminist Studies* 12 (Summer 1986), 375–400; Nadine Taub, "The Sears Case and Its Relevance for Legal Education," *American Association of Law Schools, Women in Legal Education Newsletter,* Nov. 1986.

social attitudes about appropriate roles for women. These larger patterns became real in people's lives when internalized and experienced as individual choice.[97] Assuming that the way things have been resulted either from people's choices or from nature helps to force legal arguments into these alternatives and to make legal redress of historic differences a treacherous journey through incompatible alternatives.

Sometimes, judges have challenged the assumption that the status quo is natural and good; they have occasionally approved public and private decisions to take difference into account in efforts to alter existing conditions and to remedy their harmful effects.[98] But for the most part, unstated assumptions work in subtle and complex ways. They fill a basic human need to simplify and make our world familiar and unsurprising, yet by their very simplification, assumptions exclude contrasting views. Moreover, they contribute to the dilemma of difference by frustrating legislative and constitutional commitments to change the treatment of differences in race, gender, ethnicity, religion, and handicap.

The Effects of Unstated Assumptions

Unstated assumptions make the difference dilemma seem intractable. If difference is intrinsic, then it will crop up whether noticed or ignored. If difference is knowable by reference to an unstated norm, then the norm itself remains hidden from evaluation. If an observer such as a judge can see differences without a perspective, and already knows whatever is of value in anyone else's perspective, then those who "are different" have no chance to challenge the assignment of difference or its consequences. And if the status quo is natural, good, and chosen, then efforts to alter its differential burdens on people will inevitably seem unnatural, undesirable, and coercive. Noticing difference and ignoring it both recreate difference; both can threaten such goals as neutrality, equality, and freedom.

Moreover, if equality depends on "sameness," then the recurrence of difference undermines chances for equality. The fear of emphasizing difference, whether by acknowledgment or nonacknowledgment, arises as long as difference carries stigma and precludes equality. Jonathan Kozol reported in the 1960s an incident whose dated quality suggests that in some areas, at least, we have learned to disentangle difference from inequality: In an all black urban school one white teacher advised another not to bring up slavery while discussing the cotton gin with her students. The first teacher explained, not with malice but with an expression of intense and honest affection for her class: "I don't want these children to have to think back on this year later on

[97]See Kathy E. Ferguson, *The Feminist Case against Bureaucracy* (Philadelphia: Temple University Press, 1984), p. 177.

[98]See, e.g., Swann v. Charlotte-Mecklenberg Board of Educ., 402 U.S. 1 (1971) (approving the use of racial balance goals in a school desegregation plan). See Kathleen M. Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases," *Harv. L. Rev.* 100 (1986), 78.

and have to remember that we were the ones who told them they were Negro."[99]

If individuals can be meaningfully categorized in terms that carry negative associations, on the basis of a limited number of traits selected to compare them with others who are presumed the norm, then difference assumes a large and immutable significance. Treating the individual as handicapped or deficient in the English language runs the risk of assigning to that individual, as an internal limit, the category of difference that carries the message of inequality. This is not inevitable, for the categories of handicap and proficiency in English are not the sum total of those individuals, nor are they conclusive indications of those individuals' potential or worth.

Stephen Jay Gould, a gifted observer of biology and zoology, put it this way: "Few tragedies can be more extensive than the stunting of life, few injustices deeper than the denial of opportunity to strive or even to hope, by a limit imposed from without, but falsely identified as lying within. . . . We inhabit a world of human differences and predilections, but the extrapolation of these facts to theories of rigid limits is ideology."[100] Ideology becomes a concern here because expressions of power, approval, and disapproval are at work in the links between categories of sameness and difference and the values of equality and inequality. The assumptions that differences lie *within* people obscures the fact that they represent comparisons drawn *between* people, comparisons that use some traits as the norm and confirm some people's perceptions as the truth while devaluing or disregarding the perspectives of others.

In addition, the assumption that the status quo is good, natural, and uncoerced contributes to a riddle of neutrality, another version of the difference dilemma. If the public schools must remain neutral toward religion, do they do so by balancing the teaching of evolution with the teaching of scientific arguments about divine creation—or does this accommodation of a religious view depart from the requisite neutrality? Governmental neutrality may freeze in place the past consequences of differences. Yet any departure from neutrality in governmental standards uses governmental power to

[99]Jonathan Kozol, *Death at an Early Age: The Destruction of the Hearts and Minds of Negro Children in the Boston Public Schools* (Boston: Houghton Mifflin, 1967), p. 68. Kozol continues: "The amount of difficulty involved in telling children they are Negro, of course, is proportional to the degree of ugliness which is attached to that word within a person's mind. . . . What she was afraid of was to be remembered as the one who told them that they were what they *are*. . . . To be taught by a teacher who felt that it would be wrong to let them know it must have left a silent and deeply working scar. The extension to children of the fears and evasions of a teacher is probably not very uncommon, and at times the harm it does is probably trivial. But when it comes to a matter of denying to a class of children the color of their skin and the very word that designates them, then I think that it takes on the proportions of a madness" (pp. 68–69; original emphasis). Yet shielding a minority child from community dislike may disable her from recognizing hostility when it comes her way. See ch. 2 (discussing Audre Lorde).

[100]Stephen Jay Gould, *The Mismeasure of Man* (New York: Norton, 1981), pp. 28–29. Anthony Cohen, *The Symbolic Construction of Community* (London: Tavistock, 1985), p. 110, pushes the point yet another step; he suggests that "the finer the differences between people, the stronger is the commitment people have to them."

make those differences matter and thus symbolically reinforces them. The relationship between means and ends thus becomes so troubled that decision-makers may become paralyzed with inaction. If the goal is to avoid identifying people by a trait of difference, but the institutions and practices make that trait matter, there seems to be no way to remedy the effects of difference without making difference matter yet again.

Debates over affirmative action powerfully depict this dilemma, but the dilemma appears only when the background assumption is that the status quo is neutral and natural rather than part of the discriminating framework that must itself be changed.[101] The dilemma seems especially sharp if the decision-makers assume that the world will continue to make that difference matter.[102] Consider this episode: An instructor in a residential school for blind children points out the mantel of a fireplace to a child who is about to bang his head on it. The child says, "Why don't you put some padding on it? This is a school for the blind; we could hurt ourselves." The instructor replies, "There won't be padding outside the school when you leave here."[103] Deciding not to pad the mantelpiece at the school for the blind may help train the blind students to be wary about such hazards; it may also lead to accidents in the school and contribute to an attitude that the world outside does not need to be renovated to accommodate the needs of people disabled by its current construction.

Finally, the usually unstated assumptions contribute to another form of the difference dilemma. Legal officials often face a choice between using their power to grant broad discretion to others and using their power to articulate formal rules that specify categorical decisions for dispensing public—or private—power. When should courts and legislatures delegate to other public or private decision-makers the discretion to differentiate people, and when should legal institutions instead articulate specific rules restricting such

[101]See, e.g., Van Alstyne, "Rites of Passage," p. 775, arguing that affirmative action itself promotes racism and only neutral rules avoid discrimination. Ruth Colker ("Anti-Subordination above All," pp. 1003, 1013) has responded to similar attacks on affirmative action by noting that "history demonstrates the difficulty of achieving true equality through race- or sex-neutral remedies." She and other defenders of affirmative action argue that the status quo is not neutral, so neutral rules recreate nonneutrality. Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987), has argued that even the goal of "equal opportunity" may entrench an unfair status quo and perpetuate discrimination. The fictional heroine of his eloquent book comments that civil rights reformers found largely illusory the long-sought promise of equal opportunity.

[102]Stephen L. Carter, "When Victims Happen to Be Black," *Yale L.J.* 97 (1988), 420, 435, thoughtfully explores the criticisms of affirmative action which typically deny that all black people are victims in a legal or moral sense while presuming that whites as a group are victimized by racially conscious affirmative action purposes. This insight offers a clue to deep assumptions about what kinds of racial categories are relevant and what social arrangements are the presumed benchmarks.

[103]See James Garfield, *Follow My Leader* (New York: Viking, 1957). See also "Unwanted Help," *New York Times,* Sept. 16, 1984, p. 49: the Association for the Blind opposed an electronic guidance system because it would discourage blind students from developing their own senses.

differentiation? The power to differentiate persists, whether exercised formally or delegated to others.

If legal officials articulate specific rules to cabin the discretion of others regarding the treatment of difference, this practice can secure adherence to the goals of equality and neutrality by forbidding consideration of differences except in the manner explicitly specified by the legal rules. Although likely to promote accountability, this solution of formal rules has drawbacks. Making and enforcing specific rules engages legal officials in the problem of reinvesting differences with significance by noticing them. Specifically articulating permissible and impermissible uses of difference may enshrine categorical analysis and move further away from the ideal of treating persons as individuals rather than as members of groups defined by shared traits.

Alternatively, legal officials can grant or cede discretion to other decision-makers. Then, any problems from noticing or ignoring difference, any risks of nonneutrality in means and in results, are no longer problems for courts but become matters falling within the discretion of other public or private decision-makers. This solution, of course, merely moves the problem to another forum, giving the new decision-maker discretion to take difference into account, perhaps in an impermissible manner.

The choice between discretion and formality vividly occupied the Supreme Court in its debate over charges of racial discrimination in the administration of the death penalty in Georgia's criminal justice system. If the criminal justice system must not take the race of defendants or victims into account, is this goal achieved by granting discretion to prosecutors and jurors, who can then make individualized decisions but may also introduce racial concerns? Or should judges impose formal rules specifying conditions under which racial concerns must be made explicit in order to guard against them? The Court's majority emphasized the central importance of jury discretion in the criminal justice system as a reason for resisting the implication of unconstitutional discrimination from the statistical demonstration of differential risks of the death penalty, based on the races of both victims and defendants. Justice Powell reasoned that "it is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice."[104]

Justice Brennan's dissent agreed that individualized assessments are critical to the criminal process, but he argued that "discretion is a means, not an end" and that under the circumstances of the case the Court must monitor the discretion of others.[105] The dissenters saw the grant of discretion to prosecutors and juries, though disengaging judges and legislators from directly endorsing the use of differences in decisions, as allowing *those* decision-makers to give significance to differences. The majority saw a risk that if courts and legislatures specify formal rules restricting the discretion of other

[104]107 S.Ct. at 1778 n.37.
[105]Id. at 1790, 1793–94.

decision-makers and directing them not to allow gender, race, or other traits of difference to influence their judgments, this very specificity might make difference newly significant and undermine the goal of justice based on individualized, rather than categorical, consideration.

Articulating the assumptions behind the difference dilemma can expose what hinges on the choice between broad discretion and formal rules. That choice seems a dilemma if difference is intrinsic, for then difference will reappear under either regime. Similarly, if the norm used for defining difference remains unstated and uncontestable, neither grants of discretion nor formal rules can restrain the attribution of difference. Alternative perspectives may be silenced if courts refrain from monitoring decisions by other bodies—but the same result may occur if courts presume to know how to regulate difference without considering the perspectives of others. And if the status quo is taken as a neutral benchmark, neither formal rules nor informal discretion can reach the institutional arrangements that burden some more than others.

If the assumptions behind the difference dilemma are exposed and debated, however, the tension between formal, predictable rules and individualized judgments under discretionary standards becomes simply another terrain for reconsidering the relationships and patterns of power that influence the negative consequences of difference. Stating the assumptions that have gone unstated, I believe, opens room for debate and for new kinds of solutions. Discovering that difference arises in relationships and in contexts that are themselves mutable introduces new angles of vision, new possibilities for change. The next chapter offers glimpses of new approaches to difference and also considers the problems that these approaches themselves may raise.