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**Cracking the Egg: Which Came First -
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Cracking the Egg: Which Came First— Stigma or Affirmative Action?

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This Article examines the strength of arguments concerning the causal connection between racial stigma and affirmative action. In so doing, this Article reports and analyzes the results of a survey on internal stigma (feelings of dependency, inadequacy, or guilt) and external stigma (the burden of others' resentment or doubt about one's qualifications) for the Class of 2009 at seven public law schools, four of which employed race-based affirmative action policies when the Class of 2009 was admitted and three of which did not use such policies at that time. Specifically, this Article examines and presents survey findings of 1) minimal, if any, internal stigma felt by minority law students, regardless of whether their schools practiced race-based affirmative action; 2) no statistically significant difference in internal stigma between minority students at affirmative action law schools and non-affirmative action law schools; and 3) no significant impact from external stigma.

INTRODUCTION

For nearly thirty years, the American public has debated the merits of race-based affirmative action in higher education.¹ From Allan Bakke's

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1. Compare Ian Ayres & Richard Brooks, Response, *Does Affirmative Action Reduce the*

challenge to the admissions program at the University of California, Davis School of Medicine,² to the current legislative challenges in states such as Arizona³ and Colorado,⁴ opponents of race-based affirmative action have

Number of Black Lawyers?, 57 STAN. L. REV. 1807 (2005) (arguing that affirmative action does not create, but rather mitigates, racial disparities in the law school context), Dorothy A. Brown, *The LSAT Sweepstakes*, 2 J. GENDER RACE & JUST. 59 (1998) (critiquing the racially biased nature of the LSAT and its value as a predictor of law school performance), David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1898 (2005) (arguing that "without affirmative action, both the enrollment of African American law students . . . and the production of African American lawyers would significantly decline"), Sumi K. Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035, 1061 (1997) (describing, in the affirmative action context, dominant conceptions of merit as embracing a "white baseline of experience" and dominant conceptions of societal discrimination as embracing a "Black baseline of experience" and advocating an "alternative racial formation analysis that would conceptually link the experiences of various groups of color through the critique of white supremacy"), Richard Delgado, *Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 139 (1998) (arguing, in part, that stigma "predates and operates independently of affirmative action"), and Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me A River: The Limits of "A Systematic Analysis of Affirmative Action in American Law Schools"*, 7 AFR.-AM. L. & POL'Y REP. 1 (2005) (arguing that existing structural and systemic forms of race and gender inequality within institutions of higher learning, rather than affirmative action, are the most likely causes of racial disparities in law school grades and bar passage), with Kingsley R. Browne, *Affirmative Action: Policy-Making by Deception*, 22 OHIO N.U. L. REV. 1291 (1996) (critiquing implementation of affirmative action programs in various contexts as confused and inconsistent, and defending notions of objective standards and merit), Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33 (1992) (arguing that affirmative action policies both penalize innocent white people who have not themselves perpetrated discrimination and stigmatize their purported beneficiaries, and advocating a return to "race neutral" principles), Lino Graglia, Gratz and Grutter: *Race Preferences To Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly in the Name of Pursuing "Diversity"*, 78 TUL. L. REV. 2037 (2004) (arguing that affirmative action admissions policies such as those at issue in the Gratz and Grutter cases are designed only to increase black enrollment, not to increase diversity), Gail Heriot, *Thoughts on Grutter v. Bollinger and Gratz v. Bollinger as Law and as Practical Politics*, 36 LOY. U. CHI. L.J. 137, 138 (2004) (critiquing the Supreme Court's decisions in Gratz and Grutter as "tragically misguided" and politically impractical, and arguing that race neutral alternatives should have been more closely considered and mandated by the Court), Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) (arguing that affirmative action admissions policies at American law schools create an academic mismatch effect that significantly reduces the number of black lawyers), and Antonin Scalia, *The Disease As Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L. Q. 147 (critiquing the then-existing Supreme Court affirmative action jurisprudence as incoherent and misguided).

2. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

3. The Arizona Civil Rights Initiative currently is campaigning for a November 2008 ballot initiative. Its operative language states: "The state shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting." Arizona Civil Rights Initiative, ADVERSITY.NET NEWS, <http://www.adversity.net/supertuesday2008/arizona.htm>.

4. The Colorado Civil Rights Initiative is also moving forward with plans for an anti-affirmative action ballot measure for November 2008. The language of the Colorado initiative mirrors that of Arizona's, see *supra* note 3. See Colorado Civil Rights Initiative Coming to 2008 Ballot, Apr. 23, 2007, <http://coloradocri.org/> (last visited July 28, 2008). Similar initiatives passed

attacked the policy as discriminatory and constitutionally invalid.

The initial challenges to affirmative action focused primarily on arguments concerning the policy's ineffectiveness as a solution to racial inequality and the innocence of Whites⁵ who found themselves "negatively" affected by affirmative action programs.⁶ As time progressed, however, rather than focusing primarily on affirmative action's purported unfairness to Whites, many affirmative action opponents increasingly began to articulate what they saw as the policy's unfairness to one group of beneficiaries: underrepresented racial minorities.⁷ According to this group of activists, the most damaging consequence of "unfair" affirmative action policies was the stigma that racial minorities experienced because of the programs. Proponents of this view identified both internal stigma—doubt of one's own qualifications—and external stigma—the burden of the doubts of others in one's qualifications—as reasons for dismantling affirmative action programs.⁸

For example, in 1992, Terry Eastland, a former fellow at the Ethics and

previously in the states of California, Washington, and Michigan. *See id.*

5. Throughout this Article, we capitalize the words "Black" and "White" when we use them as nouns to describe a racialized group; however, we do not capitalize these terms when we use them as adjectives. Also, we prefer to use the term "Blacks" to the term "African Americans" because the term "Blacks" is more inclusive. *See Why "Black" and Not "African-American,"* 3 J. HIGHER EDUC. 18, 18-19 (1994) (describing why the term "black" is a more inclusive term than "African-American"). Additionally, we find that "[i]t is more convenient to invoke the terminological differentiation between black and white than say, between African-American and Northern European-American, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1073 (1992).

6. *See, e.g.,* Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 352 (1970) ("Discrimination in favor of some racial or ethnic groups necessarily is or appears to be discrimination against others. . . . Further, discrimination in favor of particular racial or ethnic groups is largely or entirely unnecessary to achieve true equality in educational opportunity and is unjust to those who have been denied such opportunity on other grounds."); Scalia, *supra* note 1, at 153-54 ("I am not willing to prefer the son of a prosperous and well-educated black doctor or lawyer—solely because of his race—to the son of a recent refugee of Eastern Europe who is working as a manual laborer to get his family ahead."); *But see* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002) ("In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants."); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (unpacking the loaded concept of "innocence" in the affirmative action debate).

7. White women are rarely included as a topic in these debates about affirmative action, even though white women are the largest beneficiaries of affirmative action. *See* Gloria J. Ladson-Billings, *Can We At Least Have Plessy? The Struggle for Quality Education*, 85 N.C. L. REV. 1279, 1282 (2007). *But see* Sacha E. de Lange, *Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women's Movement*, 31 N.Y.U. REV. L. & SOC. CHANGE 315, 320-38 (2007) (challenging, from a feminist perspective, the well-accepted assumption that white women are the biggest benefactors of affirmative action).

8. *See infra* notes 10 & 17 and accompanying text (providing definitions for internal and external stigma).

Public Policy Center and a former publisher of the *American Spectator*, proclaimed that stigma was “[p]erhaps the most damning judgment against affirmative action . . . [given that it] comes in the form of objections that could only be expressed by blacks and members of other minority groups typically included in affirmative action programs.”⁹ Eastland focused primarily on the harms of internal stigma, which are “the feeling[s] of dependency, inadequacy, and at times guilt that can strike those who believe themselves to be beneficiaries of affirmative action.”¹⁰ Eastland gave as an example a statement from a Latino officer at Bank of America: “‘Sometimes I wonder: Did I get this job because of my abilities, or because they needed to fill a quota?’”¹¹

Since the late 1980s, arguments concerning the internal effects of stigma have gained significant power and persuasive force, in part due to the voice given to them by conservative members of racial minority groups.¹² In fact, as proof of internal stigma, white opponents of affirmative action often cite anti-affirmative action statements from minority conservatives, such as Shelby Steele,¹³ who once asserted that “when a black student enters college, the myth of inferiority compounds the normal anxiousness over whether he or she will be good enough.”¹⁴

Additionally, scholars and pundits have repeatedly noted the force of the stigma arguments presented by Justice Clarence Thomas, the second black man to serve on the United States Supreme Court.¹⁵ Indeed, Justice Thomas, who is

9. Eastland, *supra* note 1, at 41-42.

10. Ashley M. Hibbett, *The Enigma of the Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education*, 21 HARV. BLACKLETTER L.J. 75, 77 (2005).

11. Eastland, *supra* note 1, at 42 (quoting Sonia L. Nazario, *Many Minorities Feel Torn by Experience of Affirmative Action*, WALL ST. J., June 27, 1989, at A1).

12. See Aya Gruber, *Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital—An Exercise in Praxis*, 35 SETON HALL L. REV. 1201, 1229 (2005) (discussing how conservatives minorities can use their “voice of color” to perpetuate subordination); Alex M. Johnson, Jr., *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 STAN. L. REV. 137, 164 (1990) (arguing that the “voice of the new conservatives of color is so powerful, so damning to some, precisely because it emanates from people of color”); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (suggesting “that those who have experienced discrimination speak with a special voice to which we should listen”).

13. Eastland cited to Steele in making his own arguments concerning the strength of the stigma argument against race-based affirmative action. Eastland, *supra* note 1, at 41-42. Likewise, Justice Clarence Thomas’s external stigma arguments from *Grutter*, see *infra* note 15, were heavily cited by newspapers, scholars, and pundits, with many conceding the force of such arguments in their analyses.

14. SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* 134 (1st ed. 1990).

15. See Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787, 806 (2005) (declaring that Justice “Thomas’s approach [in *Grutter*] open[ed] the door to an argument that these stigmatizing criteria should be understood as a form of discrimination that is cognizable and remediable at law”); Mary Kate Kearney, *Justice Thomas in Grutter v. Bollinger: Can Passion Play a Role in a Jurist’s Reasoning?*, 78 ST. JOHN’S L. REV. 15, 35 (2004) (asserting that Justice Thomas “infused his

likely the most well-known opponent of affirmative action, notably denounces the policy on the grounds of internal stigma in his concurrence in *Adarand Constructors, Inc. v. Pena*:

[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. . . . Inevitably, [affirmative action] programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. *These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.*¹⁶

In addition to internal stigma, opponents of affirmative action also contest the policy on the grounds of external stigma, which is "the burden of being treated or viewed differently by others, or as though one is unqualified, based on the assumption that one is a beneficiary of affirmative action."¹⁷ For example, in *Grutter v. Bollinger*, Justice Thomas raises the argument of external stigma in a manner that many considered to be personal,¹⁸ stating:

It is uncontested that each year, the [University of Michigan] Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those

reasoning [in *Grutter*] with a power that is difficult to ignore"); Joshua M. Levine, Comment, *Stigma's Opening: Grutter's Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CALIF. L. REV. 457, 480 (2005) ("The Thomas opinion presents a bracing case against affirmative action, but more importantly, his opinion sets forth a legal argument about a potential cost to racial minorities from affirmative action: stigmatic harm."); see also Gruber, *supra* note 12, at 1229 (noting that Justice Thomas's "manipulation of language seeks to show the reader his special insights on affirmative action because of his color"); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 987-96 (2005) (describing how Justice Thomas's stance on affirmative action is rooted in black conservative thought, which is distinct from white conservative thought).

16. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) (emphasis added).

17. Hibbett, *supra* note 10, at 77.

18. See, e.g., Kearney, *supra* note 15, at 25 (describing Justice Thomas's stigma argument as "a more personal critique of the majority's analysis"); Maureen Dowd, Editorial, *Could Thomas Be Right?*, N.Y. TIMES, June 25, 2003, at A25 ("[Justice Thomas] knew that he could not make a powerful legal argument against racial preferences, given the fact that he got into Yale Law School and got picked for the Supreme Court thanks to his race. So he made a powerful psychological argument . . . [His dissent in *Grutter*] is a clinical study of a man who has been driven barking mad by the beneficial treatment he has received. It's poignant, really. It makes him crazy that people think that he is where he is because of his race, but he is where he is because of his race."); Michael C. Dorf, *The Supreme Court's Divided Rulings in the University of Michigan Affirmative Action Cases: What Does it All Mean?*, FINDLAW'S WRIT, June 25, 2003, <http://writ.news.findlaw.com/dorf/20030625.html> ("[T]he real heart of Justice Thomas's dissent in *Grutter* is more personal. He harbors an almost visceral hatred for what he terms 'know-it-all elites.' . . . How did this graduate of Yale Law School come to despise the sort of institution that opened so many doors for him? The answer, it seems, is that he believes affirmative action stigmatizes not only its beneficiaries, but all people of color . . .").

who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the “beneficiaries” of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “otherwise qualified,” or it did not, in which case asking the question itself unfairly marks those blacks who succeed without discrimination.¹⁹

Justice Thomas’s arguments in *Grutter* echo past statements by black conservatives, such as Steele, who similarly argued that “[m]uch of the ‘subtle’ discrimination that blacks talk about is often (not always) discrimination against the stigma of questionable competence that affirmative action delivers to blacks.”²⁰ Recently, Professor Richard Sander of UCLA School of Law has utilized the external stigma rationale to explain the high attrition rate of black and Latino attorneys at law firms and to argue against the use of affirmative action in that context.²¹

Given the effectiveness of the stigma argument as a rhetorical and substantive weapon against affirmative action, we decided to explore the relationship between stigma and law school affirmative action admissions policies. To do so, we collected, for the first time ever, survey responses from both white students and students of color in the Class of 2009 at seven high-ranked public law schools. The seven law schools we included in our survey are: (1) the University of California, Berkeley (“UC Berkeley”); (2) the University of California, Davis (“UC Davis”); (3) the University of Cincinnati; (4) the University of Iowa; (5) the University of Michigan; (6) the University of Virginia; and (7) the University of Washington. Four of these schools—the University of Cincinnati, the University of Iowa, the University of Michigan,²²

19. *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting).

20. STEELE, *CONTENT OF OUR CHARACTER*, *supra* note 14, at 120.

21. Richard H. Sander, *The Racial Paradox of the Corporate Law*, 84 N.C. L. REV. 1755, 1812 (2006) (arguing that external stigma contributes to the high attrition rate of black associates at law firms in that partners “tend to [give] less responsibility and fewer ‘proving’ assignments” to black associates because they have low expectations of black associates). Shelby Steele made a similar comment concerning the external effect of affirmative action on black success in the workplace when he contended that the glass ceiling for Blacks may be the result of Blacks’ reputation for advancing, not through their own merits, but because of their race. See Shelby Steele, *A Negative Vote on Affirmative Action*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 37, 41 (Nicolaus Mills ed., 1994).

22. Since 2006, the University of Michigan Law School has not employed a race-based affirmative action program. In 2006, residents of the state of Michigan voted in favor of an initiative that banned the use of race-based affirmative action in public universities. See *Michigan Votes Down Affirmative Action*, INSIDEHIGHERED.COM, Nov. 8, 2006,

and the University of Virginia—employed race-based affirmative action when they admitted the Class of 2009 law students, while the remaining three—UC Berkeley, UC Davis, and the University of Washington—did not use such programs.

By gathering and analyzing data from students at these seven law schools, we were able to compare the responses of students at institutions that use affirmative action in their admission process with those of students at institutions that do not use affirmative action in their admission process. Specifically, we situated and analyzed the collected results within the context of legal scholarship on stigma and affirmative action so that we could empirically examine arguments about internal and external stigma as applied to this small selection of educational institutions. In so doing, we generated new descriptive evidence that counters the stigma arguments that are commonly advanced against affirmative action.

In conducting our survey, we focused primarily on the question of internal stigma. Our goals, as they related to internal stigma, were twofold. First, we wanted to examine the truth, if any, behind the controversial assumption regarding the causal connection between stigma and affirmative action—the argument that affirmative action results in internal feelings of inferiority by its beneficiaries.²³ Although previous studies had found that minority students at elite institutions of higher education graduated at very high rates and went on to have careers equally distinguished as those of their white peers,²⁴ none of these studies specifically addressed the potential effect of affirmative action on the internal thoughts and feelings of minority law students while in school. Consequently, in our study, we placed special emphasis on exploring the following question: To the extent that students of color do feel stigmatized, is it affirmative action that causes such stigma, or does the stigma result from a complex set of environmental, societal, and cultural factors? We wanted to explore whether potential beneficiaries of affirmative action would agree with activist Eva Patterson, who once facetiously proclaimed, “‘Stigmatize [us], give [us] that degree.’ [It’s not] [a]s though if you don’t have [an elite] degree you’re not stigmatized as a black person.”²⁵

<http://insidehighered.com/news/2006/11/08/michigan>.

23. See *infra* Part III.

24. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Richard O. Lempert, David L. Chambers, & Terry K. Adams, *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 *LAW & SOC. INQUIRY* 395 (2000); see also *Grutter*, 539 U.S. at 332 (O’Connor, J.) (highlighting that a significant percentage of the country’s leaders come from “highly selective . . . schools”); Richard Delgado, *Rodrigo’s Riposte: The Mismatch Theory of Law School Admissions*, 57 *SYRACUSE L. REV.* 637, 651 (2007) (arguing that Blacks at top law schools are more likely to succeed in those schools than in lower-tiered schools because, at the top law schools, the professors assume that all of their students will have distinguished careers).

25. Eva Jefferson Patterson, *Affirmative Action and the California Civil Wrongs Initiative*,

Second, we analyzed the issue of external stigma. However, we considered the examination of external stigma to be of less importance than internal stigma because we wanted to focus on what Eastland referred to as “the most damning judgment against affirmative action.”²⁶ Nevertheless, we did examine questions concerning external stigma and affirmative action as a means of analyzing opponents’ claims that external stigma will disappear when affirmative action is no longer in place. Additionally, we examined the question of external stigma in order to understand the environments in which minority law students may be battling the effects of stereotype threat.²⁷

Overall, we wanted to question the validity of the stigma argument because, as Professor Cornel West would say, the stigma argument matters. It matters especially today, as state-by-state political campaigns against race-based affirmative action programs continue to gain ground. Indeed, affirmative action opponents like Ward Connerly and his anti-affirmative action juggernauts, including the American Civil Rights Institute (“ACRI”) and the American Civil Rights Coalition (“ACRC”), have used the stigma argument to great effect, spearheading successful efforts to dismantle affirmative action programs in California and Michigan and currently working to accomplish the same ends in states such as Arizona and Colorado.²⁸ In fact, the stigma argument is a crucial piece of opponents’ attacks on affirmative action

27 GOLDEN GATE U. L. REV. 327, 334 (1997); see also Christopher A. Bracey, *Getting Back to Basics: Some Thoughts on Dignity, Materialism, and a Culture of Racial Equality*, 26 CHICANO-LATINO L. REV. 15, 38 (2006) (“It is hard to imagine how providing the material preconditions to exercise freedom on an equal basis would prove stigmatizing.”).

26. Eastland, *supra* note 1, at 41.

27. See *infra* Part I.B.2; see also Claude Steele, *Stereotype Threat and African-American Student Achievement*, in THERESA PERRY, CLAUDE STEELE, & ASA G. HILLIARD III, YOUNG, GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS 109 (2003) [hereinafter Steele, *Stereotype Threat*]; Claude Steele, *Expert Report, Reports Submitted on Behalf of the University of Michigan*, 5 MICH. J. RACE & L. 439, 440, 444-46 (1999) [hereinafter Steele, *Expert*]. In his research on stereotype threat, Professor Steele discovered that black students comparable in ability to their white counterparts performed worse on examinations when they were told that their ability was being tested. When Professor Steele tested a different group of comparable black and white students but told them that the test was a problem-solving task rather than a test of ability, the performance of the black students matched that of their white counterparts. By changing the function of the test, Professor Steele “changed the meaning of the situation. It told Black participants that the racial stereotype about their ability was irrelevant to their performance on this particular task.” *Id.* at 445.

28. For information on these organizations, see the official website of the American Civil Rights Institute at <http://www.acri.org/>, and the official website of the related American Civil Rights Coalition at <http://www.acrc1.org/>. See Natalie Moore, *At it Again: Affirmative Action For Ward Connerly Returns*, THE CRISIS, Winter 2008, at 9; Peter Schmidt, *4 States Named in Affirmative-Action Fight*, CHRON. OF EDUC., May 4, 2007, at 34; Peter Schmidt, *5 More States May Curtail Affirmative Action*, CHRON. OF EDUC., Oct. 19, 2007, at 1; Melody Dmarch, *Opponents of Equal Opportunity Determined to Protect Their Interests*, NAT’L NOW TIMES, Jan. 1, 2008, at 10; Jan Erickson, *Conservatives Push to End Affirmative Action*, NAT’L NOW TIMES, Jan. 1, 2007, at 2; Louis Freedberg, *The Man Behind Prop. 29*, WASH. MONTHLY, Mar. 1998, at 20.

precisely because it aims to convince people “on the fence” that a vote against affirmative action is a vote to protect minorities from the harms of a well-intentioned but misguided program.²⁹ Although our survey represents only a first step in responding to this stigma argument, its results, which contradict arguments about the causal connection between stigma and affirmative action (at least as it may exist within the seven surveyed law schools), suggest that further examination with a more representative sample of law students from schools across the country could be informative and important for understanding the real impact of affirmative action programs.

In this Article, we give a preliminary answer to the question of which came first—stigma or affirmative action—by presenting and discussing our empirical data collected from the Class of 2009 at the seven surveyed law schools. In Part I of this Article, we give context to our empirical research by examining academic arguments about stigma and affirmative action, with a focus on legal, critical race, and sociolegal critiques.

In Part II, we describe our concerns about administering the survey and identify important limitations of our research methodology. In so doing, we explain how we gathered and analyzed our data and how we selected schools and responded to the concerns of subject and non-subject schools.

In Part III, we present the limits and results of our survey, and our analysis thereof, in three subsections. In the first subsection, we detail the descriptive limits and results of our survey. With respect to the descriptive results, we report four important findings.

First, we present our finding that there is no statistically significant difference in the responses about internal stigma between minority students at the four affirmative action law schools in our survey and those at the three non-affirmative action law schools in our survey. We also reveal that, overall, there is minimal internal stigma felt by responding students of color as a result of the policy.

Second, we share our finding that respondents of color felt no significant impact from external stigma. As our data reveal, minority law students in the sampled affirmative action schools are no more likely to feel that they are treated differently by classmates and professors because of being perceived as affirmative action beneficiaries than those in the sampled non-affirmative action schools.

Third, we report data that support our contention that external stigma does

29. See Hibbett, *supra* note 10, at 78 (asserting that “many affirmative action opponents, in the interest of making their position appear benevolent, have a tendency to exaggerate the prevalence of internal stigma to suggest that the primary objection to affirmative action is that it harms its beneficiaries more than anyone else.”); cf. Johnson, *supra* note 12, at 140 (noting how minorities are “able to espouse [conservative] views that, because [they are of color], are not viewed as racist,” but that “[i]f similar arguments were made by a majority (white) scholar, charges of racism would be rife”).

not disappear when affirmative action is eliminated. Specifically, we reveal data that show that a relatively high number of students at the sampled non-affirmative action law schools responded that they believed that some law students of color were admitted to school because of affirmative action.

Fourth, we describe our findings of strong support across the entire sample for the belief that people should learn to interact with others from diverse backgrounds and the idea that diversity enhances education, though support for this second idea is stronger in non-affirmative action law schools than in affirmative action law schools. Additionally, we report our findings that students at surveyed affirmative action law schools are slightly more likely to agree that affirmative action gives preferences to less qualified applicants and constitutes reverse discrimination and that students at surveyed non-affirmative action law schools are slightly more likely to agree that law schools should make special efforts to overcome past discrimination.

In the second subsection of Part III, we explain the statistical models of these attitudes and the implications of our results. In so doing, we provide further background for how readers may interpret our descriptive results. For example, we explicate how statistical controls for factors such as race and gender explained away the reported differences across school type with respect to attitudes toward affirmative action, as reported in the first subsection. Our examination of the attitudes of all respondents showed that, once characteristics of the respondents such as race and gender were statistically controlled, students at the surveyed affirmative action law schools were no more likely to oppose affirmative action than students at surveyed non-affirmative action law schools.

In the third subsection, we briefly discuss one particular type of comment from a number of students at the end of the survey. Specifically, we analyze comments that called for a revision of affirmative action policies with a focus on socioeconomic class.

Finally, we conclude this Article with a discussion of stigma and an analysis of why neither internal stigma nor external stigma mandates the abolition of affirmative action. In sum, we explain why a true understanding of stigma does not support the dismantling of affirmative action on campuses, but rather requires its preservation and fortification.

I

THE SCHOLARLY LANDSCAPE

This Part provides a broad overview of the existing literature on stigma and other related harms purportedly caused by affirmative action. Part I.A describes the work of the preeminent sociologist Erving Goffman, whose early work in the 1960s opened the door to the study of stigma as a sociological phenomenon. Part I.B discusses William Bowen and Derek Bok's recent comprehensive study on affirmative action, which presents quantitative and

qualitative evidence to disprove arguments relating to the harms, including stigmatic harms, that affirmative action purportedly inflicts upon its beneficiaries. Part I.C reviews some of the more compelling legal scholarship on stigma from recent years and discusses how this work informs this Article's analysis and goals.

A. Erving Goffman's Theory of Stigma: Stigma Defined

In a now famous commencement address to Howard University's graduating class of 1965, President Lyndon B. Johnson explained the necessity for what later became known as "affirmative action":

[F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.³⁰

Soon after giving this speech, President Johnson issued Executive Order 11246, in which he coined the term "affirmative action" by requiring government contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."³¹

Two years prior to President Johnson's introduction of affirmative action in government programs, Erving Goffman published his classic monograph, *Stigma: Notes on the Management of Spoiled Identity*,³² which remains a fundamental sociological text.³³ Of course, the very concept of racial stigma has become central to the growing affirmative action debates, due to opponents' purportedly benign argument that such programs would only harm

30. President Lyndon B. Johnson, Commencement Address at Howard University: "To Fulfill These Rights," 2 PUB. PAPERS 635, 636 (June 4, 1965).

31. Exec. Order No. 11246 § 202(1), 3 C.F.R. 339-48 (1964-65), reprinted in 42 U.S.C. 2000e (2000).

32. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

33. Goffman's work on stigma has been far-reaching in the social sciences. Notably, however, its impact has been far more limited on the legal theorizing of stigma. See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 815-16 n.46 (2004) (discussing, for example, how courts and constitutional scholars theorizing about stigma have not done so uniformly or with particular reference to Goffman's work on stigma).

their intended beneficiaries by stigmatizing them.³⁴ A close look at Goffman's theory of stigma, however, demonstrates the fundamentally misleading nature of those arguments, as racial stigma pre-existed the implementation of affirmative action programs by centuries, and continues to persist, perhaps in an even more severe form, in its absence.

Goffman's theory of stigma—which he initially defines as “a special kind of relationship between attribute and stereotype”³⁵—fundamentally explains an ideological policing of social identity, social intercourse, and social norms. In more contemporary terms, Goffman's theory of stigma can be understood as a theory of social construction.³⁶ His theory of stigma has meaning only insofar as it is used to describe and analyze societal classification of insiders and outsiders to varying degrees and to rank them in the social hierarchy accordingly. This reality is most clear in the way Goffman distinguishes the stigmatized from what he calls “the normals.”³⁷ A stigmatized individual is one who “possesses . . . an undesired differentness from what we had anticipated.”³⁸ Such marks of difference, whether facially evident (like race or disfigurement) or concealable (like sexuality, religion, or criminality), are always discrediting and dehumanizing.³⁹

Stigma brings to light the experiences of different kinds of stigmatized peoples, including (in Goffman's terms): racial minorities, the disfigured, the disabled, homosexuals, non-Protestants (primarily Jews and Catholics), criminals, and the illegitimate. Much of Goffman's study examines how the

34. See *supra* notes 7-21 and accompanying text.

35. See GOFFMAN, *supra* note 32, at 4.

36. Michael Omi and Howard Winant were among the first to theorize and name a social constructionist approach to race in RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S (1986) [hereinafter OMI & WINANT, RACIAL FORMATION 1986] which has since been followed by a second edition—MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994). Omi and Winant's theory of racial social construction rejects “biologicistic notions of race.” OMI & WINANT, RACIAL FORMATION 1986, *supra*, at 60. They define racial formation as “the process by which social, economic and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings.” *Id.* at 61. Further, Omi and Winant's theory of racial formation explicitly rejects conceptions of race that subsume race within other broader categories (such as ethnicity and/or class) and that do not treat race as a “central axis of social relations.” *Id.* at 61-62.

37. “Normals” are defined as “those who do not depart negatively from the particular expectations at issue.” See GOFFMAN *supra* note 32, at 5. Of “normals,” Goffman further writes:

The attitudes we normals have toward a person with a stigma, and the actions we take in regard to him, are well known, since these responses are what benevolent social action is designed to soften and ameliorate. By definition, of course, we believe the person with a stigma is not quite human. On this assumption we exercise varieties of discrimination, through which we effectively, if often unthinkingly, reduce his life chances. We construct a stigma-theory, an ideology to explain his inferiority and account for the danger he represents, sometimes rationalizing an animosity based on other differences, such as those of social class.

Id.

38. See *id.* at 5.

39. See *id.* at 4.

stigmatized interact with “normals” or in overwhelmingly “normal” settings, paying particular attention to the many ways in which the stigmatized may alter and shape their outer selves—their “virtual social identit[ies]”⁴⁰—in order to interact. How, for example, do the stigmatized adjust to life among the normals? How do they preserve their true senses of selves, their “dignity and self-respect,” their “actual social identit[ies]”?⁴¹ Given societal pressure and the necessity to conform to be accepted, how can the stigmatized achieve levels of “normification”⁴² necessary for survival, while avoiding “minstrelization”?⁴³

What is clear in *Stigma*, though not explicitly stated, is that while stigma may have many causes, it exists because of enforced social hierarchy and, to a lesser extent, social isolation. Goffman notes that he uses “stigma” to refer to “an attribute that is deeply discrediting.”⁴⁴ However, he points out that “a language of relationships, not attributes, is really needed” because these attributes are only stigmatized in relation to a specific set of others, and the same attribute may enhance social standing in a different context.⁴⁵ We add that, at least in terms of race, such stigma results most directly from our nation’s unique history of racial inequality. Although Goffman spends little time on the possibility of reducing or eliminating stigma, such isolation and inequality—in its many forms and with its many and complicated causes—are what affirmative action programs have generally aimed to alleviate and eliminate.

B. Bowen & Bok: Stigma and the Related Harms of Affirmative Action

In 1998, Professors William G. Bowen and Derek Bok, former presidents of Princeton University and Harvard University, respectively, published their landmark sociological study *The Shape of the River*, which quantitatively and comprehensively studied the effects of affirmative action in college and university admissions.⁴⁶ Using data on over 80,000 students who had matriculated at twenty-eight selective colleges and universities, Bowen and Bok tested assumptions about “race-sensitive” admissions that, up until then, had not yet been empirically substantiated.⁴⁷ For example, Bowen and Bok

40. *See id.* at 2.

41. *See id.*

42. In more contemporary social constructionist terms, we might refer to “normalization” as “assimilation.” *See* OMI & WINANT, RACIAL FORMATION 1986, *supra* note 36, at 15-20 (discussing the rise of the assimilationist approach to race, which became dominant in the mid and late twentieth century). Assimilation—or “Anglo conformity”—was viewed as “the most logical, and ‘natural,’ response to the dilemma imposed by racism” and is sharply critiqued by Omi and Winant in RACIAL FORMATION. *See id.* at 17-18.

43. *See* GOFFMAN, *supra* note 32, at 110.

44. *See id.* at 3.

45. *See id.*

46. BOWEN & BOK, *supra* note 24, at xxvii-xxviii (1998).

47. *Id.* at xvii, xxvii-xxx.

gathered and analyzed data about affirmative action's impact on: minority graduates' academic performance, both at undergraduate levels and with respect to their subsequent pursuit of graduate and professional degrees; employment, earnings, and job satisfaction; and civic participation, leadership, and satisfaction in life.⁴⁸ Bowen and Bok also studied views of minority and majority graduate students on their college experiences, attitudes, and perceptions of diversity more generally.⁴⁹ *Shape of the River* is widely regarded as a definitive empirical study on affirmative action and, further, as evidence of its success in the incremental struggle toward racial equality.⁵⁰

1. Challenging Claims of Internal and External Stigma

Although Bowen and Bok did not test the stigma argument directly, they persuasively argue against claims that affirmative action harms its intended beneficiaries. Most notably, Bowen and Bok critique Shelby Steele's argument, mentioned in this Article's Introduction, that affirmative action causes internal stigma.⁵¹ Bowen and Bok claim that internal stigma's expected effects—such as more self-doubt in black as compared to white college students—are not borne out by the data. According to Bowen and Bok's study, black matriculants are not demoralized, but rather are just as appreciative of their undergraduate experiences as their white counterparts, and feel even more positively about their experiences than their white classmates.⁵² “[I]f black students admitted to the most academically demanding schools suffered as a result,” write Bowen and Bok, “they certainly don't seem to know it.”⁵³

Bowen and Bok also challenge the argument that affirmative action is harmful because its beneficiaries are academically unqualified for the schools to which they are admitted, and therefore find it hard to keep up. Researchers have used this “fit hypothesis” to explain racial disparities in test scores and college dropout rates. For example, sociologists Stephan and Abigail Thernstrom support the fit hypothesis by pointing out the statistic that the black college dropout rate is roughly 50% higher than the white dropout rate.⁵⁴

48. *See id.* at 53-192.

49. *See id.* at 193-255.

50. In the *Grutter* opinion, for example, Justice O'Connor, writing for the majority, cited and relied on *THE SHAPE OF THE RIVER* to explain the educational benefits that flow from student body diversity, and held that such diversity was a compelling state interest. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Further, as leading scholars in the area, Professors Bowen and Bok each submitted expert reports on “The Compelling Need for Diversity in Higher Education,” based in large part on their influential study, in both the *Grutter* and *Gratz* cases. *See* University of Michigan Admissions Lawsuits, <http://www.vpcomm.umich.edu/admissions/research/#um> (last visited July 28, 2008).

51. *See supra* notes 12-14 and accompanying text.

52. *See* BOWEN & BOK, *supra* note 24, at 261.

53. *Id.* at 261.

54. STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* 405-06, 408 (1997) (comparing dropout rates of black and white

Because the fit hypothesis suggests that the purported beneficiaries of affirmative action are not as qualified as their white counterparts, it feeds directly into arguments that affirmative action programs cause both internal and external stigma.

Some researchers have applied the fit hypothesis to the law school context. In a controversial 2004 article, Richard Sander argues that affirmative action admissions policies at American law schools create an academic “mismatch” effect that reduces the number of black lawyers by 7.9%.⁵⁵ According to Sander, affirmative action in admissions create this mismatch because African American students admitted under affirmative action programs to elite law schools are not academically qualified to compete with their non-black classmates. Thus, Sander argues, affirmative action programs ultimately harm African American students and the African American bar.⁵⁶

Bowen and Bok argue that their findings undermine Thernstrom and Thernstrom’s interpretation of black dropout rates. They state:

If race-sensitive admissions in selective colleges lead to more dropouts, it is more than a little puzzling that in our sample of twenty-eight selective schools, none had a dropout rate for minority students anywhere near as high as the average attrition of 60 percent for black students at all NCAA Division I colleges, many of which are not selective. Black dropout rates are low at all of the [studied] schools (averaging just over 25 percent); moreover, *the more selective the college attended, the lower the black dropout rate.*⁵⁷

students at thirteen elite colleges and universities).

55. Richard H. Sander, *supra* note 1, at 473.

56. Richard H. Sander, *supra* note 1, at 473, 479. Sander’s more specific claim is that the probability of a matriculating law student becoming a lawyer is determined in large part by the student’s entering LSAT score and his or her undergraduate GPA, relative to others at his or her school. Sander uses a regression analysis, based on data collected through surveys at various law schools about their students’ entering credentials and similar data collected by the LSAC, to argue that LSAT scores and UGPAs determine two things: law school grades and the likelihood of passing the bar. To the extent Sander argues that affirmative action programs create a mismatch between the LSAT scores and UGPAs of African American law students relative to white students at their respective institutions (which he refers to as a “cascade effect”), Sander claims that affirmative action results in increasing the likelihood for African American students that they will do poorly in law school and that they will fail the bar. Using the same data, Sander claims that in the absence of affirmative action (and, thus, of the cascade effect at various institutions), the class entering law school in 2001 would have produced 7.9% more new African American lawyers who entered the bar—even though it also would have resulted in decrease in the number of African Americans admitted to law school based on their entering credentials (LSATs and UGPAs). Sander thus concludes that affirmative action is the cause of racial disparities in law school and bar exam performance and, thus, the cause of a 7.9% reduction in black lawyers.

57. See BOWEN & BOK, *supra* note 24, at 258-59. Bowen and Bok wrote: [Within our database,] [w]e compared how black students *with equivalent test scores* performed at colleges where the average score for all students was much higher than their own scores and at colleges where their scores were more like the average score for the entire school (where the “fit” between the black student and the school was presumably better). The results are completely contrary to the claims made by the critics. The higher the average SAT score of the college in question, the *higher* the

Faced with these findings of low dropout rates at the most selective schools, it is untenable to attribute the alarming difference in black and white dropout rates to affirmative action alone.

Sander's study has also drawn sharp criticism by affirmative action scholars and empiricists for its empirical methodology, its assumptions, and the conclusions drawn therefrom. For example, Ian Ayres and Richard Brooks use Sander's own data to argue that it presents no "compelling evidence indicating that the system of affirmative action . . . reduced the number of black lawyers."⁵⁸ David Chambers, Timothy Clydesdale, William Kidder, and Richard Lempert similarly critique the empirical flaws in Sander's study, including "statistical errors, oversights, and implausible assumptions," and argue further that the same evidence used by Sander also demonstrates that "without affirmative action, both the enrollment of African American law students . . . and the production of African American lawyers would significantly decline."⁵⁹ Still others, including David Wilkins, Kevin Johnson, and Angela Onwuachi-Willig, have critiqued Sander's study for failing to acknowledge structural and systemic forms of race and gender inequality and discrimination that still exist within institutions of higher learning. They argue that these entrenched forms of discrimination, rather than affirmative action, are the most likely causes of racial disparities in grades and bar passage in American law schools.⁶⁰

graduation rate of black students *within each SAT interval* (including the intervals for students with only very modest SAT scores). . . . We also found that black students who did drop out were not embittered or demoralized, as some critics of race-sensitive admissions have alleged. On the contrary, of the relatively small number of black students who dropped out of the most selective schools, a surprisingly large percentage were "very satisfied" with their college experience . . ."

Id. at 259; see also Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Students?*, 101 Nw. U. L. REV. 1759, 1780 (2007); Transcript of Briefing at 23, U.S. Civil Rights Commission (June 16, 2006) (testimony of Richard Lempert) (indicating that "data suggests particularly for those attending the best schools a reverse mismatch effect").

58. See Ian Ayres & Richard Brooks, *supra* note 1, at 1853 (arguing that a closer analysis of racial disparities in law school achievement does not show, as Sander claims, that affirmative action dominantly or solely creates such disparities, but instead that affirmative action mitigates racial disparities and "even more affirmative action would have been likely to produce more black lawyers").

59. See David L. Chambers et al., *supra* note 1, at 1857, 1898.

60. See David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1919 (2005) (contextualizing the need for affirmative action in the American history of racism, and arguing that Sander's proposal to eliminate affirmative action, based on flawed analysis of data, "runs the risk of making many of the problems he identifies worse"); see also Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1903, 1914 (2005) (challenging, in particular, Sander's claims about black lawyers and the labor market and arguing that the poor vetting of Sander's empirical analysis has created "unjustified doubt" in the minds of judges, lawyers, and the public at large, about the value of racial diversity); Johnson & Onwuachi-Willig, *supra* note 1, at 4-5 (offering alternative explanations for racial disparities in law school performance, such as racially hostile law school environments and the taking on of time-consuming and psychically stressful race-based leadership responsibilities).

2. Explaining the Racial Performance Gap

Notably, Bowen and Bok, as well as other scholars, do not deny the existence of a problematic racial performance gap in test scores.⁶¹ Unlike scholars such as the Thernstroms and Sander, however, Bowen and Bok consider the myriad of complex factors that may contribute to the existence of the performance gap. Those factors include inequalities in primary and secondary education found in impoverished and usually racially segregated school districts,⁶² racially hostile environments,⁶³ the taking on of time-consuming and psychically stressful “race-based leadership responsibilities,”⁶⁴ and, significantly, the empirically-tested theory of stereotype threat.⁶⁵

The theory of stereotype threat proposes that racial stereotypes can cause black students to under-perform on certain kinds of tests, particularly when such stereotypes are reinforced in stressful test-taking contexts. The psychic burden of potentially confirming negative racial stereotypes in selected types of test-taking circumstances can negatively affect the test-taker’s performance. Controlled lab tests by psychologists Claude Steele and Joshua Aronson confirmed the hypothesis. When the examiners administered stressful verbal tests to groups of white and black students, the black students did significantly worse than the white students when they were told that the tests measured their aptitude. However, the black students did just as well as the white students when they were told that the test did *not* measure aptitude.⁶⁶

In testimony before the Commission on Civil Rights on June 16, 2006, Richard Lempert, the Eric Stein Distinguished University Professor of Law and Sociology at the University of Michigan and Division Director for the Social and Economic Scientists at the National Science Foundation, indicated that he knew of no other empiricists “who have supported Rick Sander’s position in print or in [a] draft [he] kn[e]w of.” Transcript of Briefing at 21, U.S. Civil Rights Commission (June 16, 2006) (testimony of Richard Lempert).

61. See, e.g., THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998) (collection of essays analyzing the myriad of causes of racial testing disparities, such as test biases, school culture, and stereotype threat, and critiquing the over-reliance on test scores as measures of scholastic aptitude).

62. See, e.g., Michael K. Brown et al., *The Bankruptcy of Virtuous Markets: Racial Inequality, Poverty, and “Individual Failure”*, in WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 66, 68 (2003) (analyzing African American prosperity and poverty by taking into account “the changing patterns of racial labor market competition since the 1940s, the impact of government policies on racial stratification, and the cumulative advantages resulting from white control of the labor and housing markets.”); Michael K. Brown et al., *Keeping Blacks in Their Place: Race, Education, and Testing*, in WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 104 (2003) (deconstructing conservative arguments about the racial education gap and offering a more nuanced and intersectional explanation for the gap).

63. See, e.g., Johnson & Onwuachi-Willig, *supra* note 1, at 4-5.

64. *Id.* at 5.

65. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. OF PERSONALITY & SOC. PSYCHOL. 797 (1995).

66. *Id. passim*; see also Karolyn Tyson, William Darity, Jr., & Domini R. Castellino, *It’s Not “a Black Thing”: Understanding the Burden of Acting White and Other Dilemmas of High Achievement*, 70 AM. SOC. REV. 582 (2005) (discussing the way school structures create stigmas experienced by African American students).

The results of the studies discussed in the next Part of the Article suggest that existing rhetoric around stigma and the fit hypothesis are improper rationales for eliminating affirmative action. Stigma and fit hypothesis rhetoric characterize lower test scores and higher college dropout rates among minorities as harms caused solely by affirmative action. The work of such researchers as Bowen and Bok and others mentioned in this Part, however, suggests that, to the extent they exist, lower test scores and higher college dropout rates among minorities are consequences of structural and systemic forms of race and gender inequality and discrimination that still exist within institutions of higher learning, not affirmative action itself. Therefore, neither the racial stereotypes nor pressures would be eased by abolishing affirmative action.

The data presented in *Shape of the River*, and in related scholarship on affirmative action and racial inequalities in higher education, force us to confront a deep moral and philosophical conflict, one that is at the very heart of the continuing controversy over affirmative action. Glenn Loury, in his foreword to the year 2000 paperback edition of *Shape of the River*, incisively identifies this conflict as one between the two public values of procedural color-blindness and substantive racial equality. He states that procedural color-blindness “looks to how people are treated in discrete encounters, affirming as a value that such treatment should not be conditioned on race,” because it deals with “the rights of individuals . . . it is process-oriented, and a-historical.”⁶⁷ On the other hand, substantive racial equality “looks to broad patterns of social disparity between racial groups, advancing as an ethical ideal that such differences should be reduced. . . . [It is] motivated by the status of groups; thus,] it is focused on outcomes, and rooted in history.”⁶⁸

Loury is not the first to have made such observations; critical race and feminist scholars have been making this theoretical and jurisprudential point about affirmative action in higher education, and, in many other contexts, for well over two decades.⁶⁹ Leading critical race scholars such as Kimberlé Crenshaw, Charles Lawrence, Mari Matsuda, and Patricia Williams, among others, continue to incorporate critiques of the dominant rhetoric of color-blindness and its debilitating impact on the struggle toward racial equality

67. Glenn C. Loury, *Foreword* to WILLIAM G. BOWEN AND DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* xxii-xxiii (paperback ed. 2000).

68. *Id.*

69. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that color-blind, perpetrator-focused antidiscrimination law fails to address conditions and causes of material and ideological racial inequality); Neil Gotanda, *A Critique of “Our Constitution is Colorblind,”* 44 STAN. L. REV. 1 (1991) (asserting that color-blind constitutionalism’s approach to race is oversimplified and distorted and thus can do little to meaningfully address American racism).

today.⁷⁰ Like Loury, these scholars argue that in prioritizing procedural color-blindness over substantive racial equality, anti-affirmative action opponents rely on an illusory assumption about the supposed “neutral” or “equalized” state of racial reality in the United States. As has been well documented, racial reality in the United States remains far from equalized. In fact, profound racial disparities in, for example, poverty, employment, education, and incarceration rates demonstrate the current state of racial inequality in our society.⁷¹ Because its general cause—white supremacy—is so deeply and historically ingrained in our political, social, economic, and cultural institutions, attempts to further entrench color-blindness to a reductive desire to end racial discrimination in an a-contextual sense are dangerous indeed. As Loury warns,

[Such an attempt] leads inexorably to doubts about the validity of discussing social justice issues in the United States at all in racial terms. Or, more precisely, it reduces such a discussion to the narrow ground of assessing whether or not certain policies are color-blind. Whatever the anti-preference crusaders may intend, and however desirable in the abstract their color-blind ideal may be, their campaign has the effect of devaluing our collective and still unfinished efforts to achieve greater equality between the races.⁷²

In light of the Supreme Court’s recent decision to strike down public school de-segregation plans in Seattle and Louisville as unconstitutional,⁷³ Loury’s admonition is now more relevant and urgent than ever.

70. See, e.g., MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 1-2 (2003) (contending that implementation of color-blind social policies have resulted in “durable racial inequality”); CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 67-87 (1997) (terming the anti-affirmative action, color-blind assumption of existing racial equality “the Big Lie”); PATRICIA J. WILLIAMS, *RACE TALK: SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* (1st Am. ed., 1998) (noting that racism has evolved in part because of the pervasiveness of color-blind jurisprudence and rhetoric); Kimberlé Crenshaw, *Playing Race Cards: Constructing a Proactive Defense of Affirmative Action*, 16 NAT’L BLACK L.J. 196, 198-202 (1998-2000) (revealing the hypocrisy of anti-affirmative action rhetoric on color-blindness, equality, and black “underachievement”); Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (tracing the discourse of color-blindness developed in the mid-nineteenth century as a reactionary and neoconservative response to civil rights gains that now dominates liberal antidiscrimination jurisprudence); Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 78 (2000) (describing color-blind discourse as a “semantic code” that operates in many ways to “rationalize social stratification”).

71. See BROWN ET AL., *supra* note 70, at 66-103 (discussing causes of growing family income, poverty, and unemployment gaps as between Whites and Blacks, particularly given the rise of the black middle class); *id.* at 104-31 (discussing causes for the existence of the black-white testing gap); *id.* at 132-60 (discussing causes for growing incarceration rates of black males).

72. See Loury, *supra* note 67, at xxvi.

73. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

C. The Legal Literature: Toward a Socio-Legal Theory of Stigma

Much of the legal literature on stigma and affirmative action is theoretical. However, there have been some socio-legal empirical analyses that attempt to refute the argument that affirmative action harms its intended beneficiaries by causing stigma. First, we briefly review some of that empirical work. We then review some recent theories on racial stigma that help to deconstruct anti-affirmative action stigma arguments by more accurately describing the phenomenon of racial stigma, and by historically contextualizing the ways in which stigma rhetoric has been used to oppose racial equality measures.

1. Empirical Analyses: Krieger, Allen & Solórzano, and Hibbett

In *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, Professor Linda Hamilton Krieger presents and summarizes conflicting sociological research on whether the stigmatization of female and minority students results from and/or is exacerbated by affirmative action admissions policies.⁷⁴ Following a comparative analysis of several sociological studies, Krieger concludes that the research, “[t]aken as a whole . . . can be used either to oppose or support preferential forms of affirmative action.”⁷⁵ Krieger adds, however, that even if it were possible to demonstrate that affirmative action’s purported harms outweighed its benefits, it would matter little, in a practical sense, in the absence of policy alternatives that would ensure adequately-integrated educational environments.⁷⁶ The remainder of *Civil Rights Perestroika* focuses on the inadequacy of those alternatives against the backdrop of equally (if not more) inadequate color-blind antidiscrimination laws. Krieger ultimately concludes that, given the state of racial reality, even if affirmative action programs “come at a cost,” their elimination, “without an adequate theory of discrimination or workable equal opportunity policy to replace them,” would ultimately prove unwise.⁷⁷

In a study of University of Michigan Law School, sociologist Walter Allen and education scholar Daniel Solórzano take a less equivocal view of affirmative action, arguing that it is necessary to combat racial educational inequalities and racially hostile campus environments.⁷⁸ With respect to the stigma argument, Allen and Solórzano present evidence demonstrating that stigma felt by black and Latino students, to the extent it exists, is likely not the result of affirmative action admissions programs but of pre-existing, racially

74. Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251 (1998).

75. *Id.* at 1276.

76. *Id.*

77. *Id.* at 1333.

78. Walter R. Allen, Ph.D. & Daniel Solórzano, Ph.D., *Affirmative Action, Educational Equality and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237 (2001).

hostile climates on the University of Michigan Law School campus itself, as well as four of its primary feeder undergraduate institutions (Harvard, University of Michigan, UC Berkeley, and Michigan State University).⁷⁹ Significantly, the data gathered and presented by Allen and Solórzano also show that black and Latino students are less likely to feel stigmatized in the presence of a critical mass of students of color, the presence of which is made possible by affirmative action, rather than when they are scattered and isolated in a given student population, which occurs in the absence of affirmative action.⁸⁰ This conclusion is very much in line with the way that Goffman defines and theorizes stigma: its cause can be understood as social isolation, itself a consequence of a social caste system based, in large part, on race.⁸¹

A study conducted by then-Harvard law student Ashley Hibbett of several black law students at Harvard Law School draws similar conclusions.⁸² Although her study was admittedly very small—there were only 20 participants—and of severely limited empirical value, several of Hibbett’s classmates voiced cogent stigma-related concerns. For instance, one student stated that, with respect to affirmative action opponents’ use of the stigma argument, “there is a complete disconnect because on all other issues [such as healthcare and housing] you don’t care about me at all but on this issue you claim to care about my feelings and you want to use these supposed feelings to disenfranchise me and kick me out of school.”⁸³ Several other students’ comments reflected a similar distrust of those concerned about the stigmatic “harms” they suffered as a result of affirmative action. Their comments focused on the generally alienating and oppressive nature of legal education at Harvard (and other law schools), which has been excoriated by Duncan Kennedy as “training for hierarchy.”⁸⁴ With respect to affirmative action, another of Hibbett’s classmates incisively cut to the heart of affirmative action—not

79. *Id.* With respect to research methodology, Allen and Solórzano gathered and interviewed focus groups comprised of African American, Latino, Native American, Asian Pacific American, and white undergraduate students who were attending the subject schools at the time. Interviews with the focus groups covered several areas, including: the types of racial discrimination experienced by students; students’ responses to such discrimination; the impact of racial incidents on students, including on their academic performance; the advantages of having a critical mass of minority students on campus; whether racial climate had improved or worsened over the years; and whether the students would recommend their respective university to other minority students. *Id.* at 243.

80. *Id.* See also Supplemental Expert Report of Stephen W. Raudenbush, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (811 No. 97-75231), available at <http://www.vpcomm.umich.edu/admissions/research/swrjul13.pdf> (concluding, in this study of the likely racial composition of students in various social contexts on campus under affirmative action and non-affirmative action admission policies, that a non-affirmative action admissions policy likely would result in the absence of a critical mass of minority students).

81. See *supra* notes 32-45 and accompanying text.

82. See Hibbett, *supra* note 10.

83. *Id.* at 91.

84. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 54, 73 (David Kairys 3d ed., 1998).

stigma, but rather the biased nature of existing standards and definitions of merit—noting that affirmative action is not simply about admitting an applicant solely because of his or her race, but about “finding qualified people who are hard to find.”⁸⁵

. . . [I]f you really want to find those qualified people, *you have to change your definition of what it means to be qualified*. Is it only grades? Is it only test scores? There have been tons of studies to show that different racial, cultural, economic backgrounds affect people’s performance on those tests, they are not made fairly, so it’s an issue of how are we as a society going to measure what it means to be qualified.⁸⁶

Hibbett’s study may have little empirical weight, but its value is in its insightful anecdotal evidence, which makes three basic but important points about stigma and affirmative action (at least in the elite law school context). First, stigma is a consequence of institutional and societal racism. Second, stigma caused by racism can be exacerbated by the generally alienating law school environment. Third, and lastly, stigma can be eliminated by changing the way we think about merit, not by eliminating affirmative action programs.⁸⁷

2. Theoretical Analyses and Implications: Lenhardt and Bracey

Legal race scholars also have contributed, in more theoretical and jurisprudential terms, to the stigma literature. In a 2004 article, Professor R.A. Lenhardt identifies four components of racial stigma: (1) the dehumanizing imposition of, in Goffman’s terms, the “virtual identity” on the stigmatized, which is socially constructed, in part, from (2) the shared negative meanings, within both in- and outgroups, about the racially stigmatized. Lenhardt further explains how (3) the socialized responses of the unstigmatized to the racially stigmatized work to (4) reinforce the nature of racial stigma and stereotypes.⁸⁸

85. See Hibbett, *supra* note 10, at 96; see also Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1227-28 (2007) (contending that elite colleges and universities should take more conscious efforts to recruit Blacks who descend from slaves in the United States); “*Roots*” and *Race*, HARV. MAG., Sept.-Oct. 2004, at 69, available at <http://harvardmagazine.com/on-line/090443.html> (quoting Harvard Professor Mary Waters as saying, “If it’s only skin color, that’s a very narrow definition of diversity. I would hate to see Harvard not reaching out to those African Americans who have been in the United States for generations. Are we not looking as hard as we should in Mississippi or Alabama for kids who would do well if they were recruited?”).

86. See Hibbett, *supra* note 10, at 97 (emphasis added).

87. Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 134-35 (2005) (describing “the need for a ‘re-parameterization’ of merit standards by revealing the weaknesses in factors that have been traditionally used for admission”); see also ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002) (chronicling stories of Boalt Hall students, faculty, and staff in immediate wake of the passage of Proposition 209).

88. See Lenhardt, *supra* note 33, at 816-36.

Lenhardt then delineates three types of resulting stigmatic harm that include: (1) group stigmatic harms manifested as racial disparities, discrimination, and microaggressions; (2) individual stigmatic harm manifested as uncertainty, internalization of negative and dehumanizing norms, and anxiety; and (3) racial citizenship harms.⁸⁹ Given the real and multidimensional nature of racially stigmatic harm, Lenhardt argues that racial stigma, rather than intentional discrimination, is the more pervasive source of racial harm in the United States.⁹⁰

As a result, Lenhardt contends that racially stigmatic harms should be actionable as a matter of constitutional antidiscrimination law.⁹¹ Synthesizing the work of critical race theorist Charles Lawrence and her own theory of stigmatic harm, Lenhardt develops a constitutional claim that would subject acts or policies imposing a significant risk of stigmatic harm to strict scrutiny.⁹² She believes that her stigmatic harm claim works to bridge critical race theory and legal practice by shifting claim-related inquiry from the motive of the perpetrator, which is the focus of traditional antidiscrimination claims, to the multidimensional harms suffered by the stigmatized.⁹³

Lenhardt's theory and proposed claim of stigmatic harm have been of enormous help to us in our efforts to shift thinking on stigma as it relates to affirmative action. Her theory turns the anti-affirmative stigma argument on its head. When we begin to understand the complicated and socially constructed nature of racial stigma and its attendant harms—which are social, political, cultural, and institutional in nature and which exist(ed) separate and apart from affirmative action—we begin to see that the stigma argument made by affirmative action opponents is distracting and disingenuous. Those persons and organizations that most vehemently oppose affirmative action are the same persons and organizations that oppose a broad array of policies and programs aimed at meaningfully addressing existing racial inequalities.⁹⁴ If it is racial

89. *See id.* at 836-48. Group harms, according to Lenhardt, are those that are “emblematic or representative of the experience of a large number of a racial group’s members.” *Id.* at 836. Racial disparities, for example, in education, health care, and the criminal justice system, exemplify group harms. *Id.* at 837. Microaggressions—which might take the form of a verbal racial insult or simply being followed around as a person of color by a store employee while shopping—are more individualized, interactive, and often unconscious forms of conduct that contribute to group harm. *Id.* at 838. Individual stigmatic harm, discussed in much depth in *Understanding the Mark*, correlates roughly to the notion of internal stigma as already discussed in this paper. Race-based citizenship harm is related to individual stigmatic harm, and, more specifically, to harms that “have a negative impact on a racially stigmatized individual’s ability to belong—to be accepted as a full participant in the relationships, conversations, and processes that are so important to community life.” *Id.* at 844.

90. *See id.* at 809.

91. *See id.* at 877-78.

92. *See id.* at 885-87.

93. *See id.* at 887-990.

94. *See* Hibbett, *supra* note 10, at 91; *see also* notes 82-83 and accompanying text. In 2003, for example, Ward Connerly introduced Proposition 54, yet another ballot initiative in the state of

stigma which concerns them, a program to fight it would extend beyond fighting affirmative action.

Despite the fallaciousness of the stigma argument, it is devilishly successful as a political tool. At this crucial point in time, as evinced by the successful voter initiatives that gave rise to this Symposium, we cannot underestimate stigma's rhetorical and political power among voters and legislators.

Indeed, a 2006 article by Professor Christopher Bracey brilliantly captures the rhetorical and political dimensions of the anti-affirmative action stigma argument.⁹⁵ Bracey argues that affirmative action opponents have been able to achieve their great political successes by relying heavily on the rhetoric of the "stigma of dependence" in combination with the rhetoric of "innocence," "merit," and "domestic tranquility."⁹⁶ He reveals that these four rhetorical tropes have their roots in post-Civil War opposition to Reconstruction policies, when they were employed by pro-slavery Congressional legislators to argue that the establishment of civil rights for Blacks would grant them "preference" and "special treatment" at the expense of "innocen[t]" Whites and the "domestic tranquility" of the southern states in particular.⁹⁷

For example, Bracey explains how, in the debates over the establishment of the Freedmen's Bureau, its Congressional opponents objected that such efforts to assist newly freed Blacks were "unduly paternalistic and stigmatic."⁹⁸ President Andrew Johnson, in vetoing the bill establishing the Bureau, likewise argued that newly emancipated Blacks would only be stigmatized by dependence on the Bureau's "largesse."⁹⁹ Bracey further points to language in Justice Bradley's majority opinion in the *Civil Rights Cases* to demonstrate how the tropes of stigma and innocence were employed to oppose Reconstruction policies:

In striking down portions of the Act, Bradley criticized the Act on the ground that it afforded privileged status to newly emancipated blacks.

California known as the "Racial Privacy Initiative." Through a constitutional amendment, Proposition 54 would have prohibited the state from collecting data based on race, ethnicity, color, or national origin. See Smart Voter, Proposition 54, <http://smartvoter.org/2003/10/07/ca/state/prop/54/> (last visited May 26, 2008). Such a ban would have made it impossible for the state to track possible racial disparities in health care and disease patterns, educational resources and academic achievement, hate crimes, and employment rates. Proposition 54 was defeated by a margin of 63.9% (voting no) to 36.1% (voting yes). *Id.* See also Lee Cokorinos, *The Big Money Behind Ward Connerly*, http://www.equaljusticesociety.org/Cokorinos_Connerly_BigMoney.pdf (disclosing the identities of seven of Proposition 54's top funders and their various ties to traditional anti-civil rights causes).

95. Christopher A. Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. CALIF. L. REV. 1231 (2006).

96. See *id.* at 1241-93.

97. See *id.* at 1237, 1241.

98. See *id.* at 1279.

99. See *id.*

According to Bradley, blacks must “cease[] to be the special favorite of the laws” and “take the rank of mere citizen” whose rights are protected “in the ordinary modes by which other men’s rights are protected.” The effect of denoting blacks as “special favorites of the law” was two fold. Not only did it suggest that innocent whites would suffer insofar as they were not denoted “special” and thus treated unequally, but it also suggested that there was something unseemly about blacks receiving special treatment, despite an historical legacy of oppression. In juxtaposing black “special favorite” and white “ordinary citizenship,” and indicating that blacks should endeavor to assume the rank of “mere citizen,” the Court effectively reimagines laws designed to promote greater equality as stigmatizing the purported beneficiaries.¹⁰⁰

The arguments brought to light by Bracey in the Reconstruction context, of course, prefigure those made by today’s affirmative action opponents. Their contemporary but familiar rhetoric claims that affirmative action constitutes “special rights” for minorities and women and “reverse discrimination” against innocent white, male victims; in the context of education, the argument is that this “special” treatment results in disruptive “racial balkanization” and hostility on college and university campuses.¹⁰¹ Like its Reconstruction-era prototype, the contemporary rhetoric lacks historical context and fails to acknowledge and consider historically pervasive forms of racism, which are the very targets of affirmative action programs.

Why does this rhetoric, particularly the rhetoric of stigma, continue to gain political and legal traction? By considering the important and compelling work of Professors Bracey and Lenhardt, as well as Goffman’s theory of stigma, we submit that stigma rhetoric is persuasive because of how it impacts the ordering of our national values and political commitments. Stigma rhetoric works because it helps to justify, as Loury has noted, the privileging of procedural color-blindness over substantive racial justice, and of oversimplified and a-historical analyses over more complicated and contextualized analyses. That is, it elevates superficial and decontextualized political rhetoric over more substantive conversation that must occur about existing racial inequality and its myriad and complex causes.

The tropes of innocence, merit, and domestic tranquility—to which stigma is attached—have become part of an American ideology, which is rooted in neo-liberal notions of individual will and individual freedoms. In order for stigma to attach to these tropes, it must in turn be *detached* from its more

100. See *id.* at 1280.

101. See, e.g., ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S STUDENTS* (1987) (criticizing same-race peer association on college campuses as racial balkanization); DINESH D’SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991) (same).

complicated, contextualized causes and aspects, which have been well analyzed by Lenhardt and Bracey, and thoroughly documented by legal and critical race luminaries, including Lani Guinier, Charles Lawrence, and Mari Matsuda.¹⁰² In addition, the rhetoric of stigma, especially as it is deployed with the trope of white innocence, serves to effect a type of “racial redemption,” whereby liberal white opponents of affirmative action can justify their resistance to affirmative action because their opposition is for the “good” of the minorities who would allegedly be harmed by affirmative action.¹⁰³

As the powerful rhetoric of stigma continues to gather force, we must do more to interrogate and challenge the public understanding of stigma and its connectedness to affirmative action. By presenting some empirical data in this connection, we hope to contribute constructively to the important national conversation on race and affirmative action.

II RESEARCH PLAN

As we noted in the Introduction, the purpose of our study is to examine the causal connection, if any, between experiences of both internal and external stigma and the use of affirmative action in a school. Our survey is the first step in this process, collecting the opinions of a set of students at seven diverse law schools. This Part of the Article describes the plan of research for our project. Part II.A describes the method that we used to gather data for the Article, including how we identified the seven schools we included in our study and how we submitted the survey to participating students at those schools. Part II.B describes our ethical concerns about the study as we prepared to undertake it, the confirmation of some of these concerns in responses from certain invited schools, and our methods for addressing these concerns during the course of our research project where possible.

A. Research Methodology

To accomplish our study of both internal and external stigma, we

102. See, e.g., LANI GUINIER, ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997) (arguing that traditional standards of merit, structural barriers, and institutional barriers perpetuate race, gender, and class privilege, which in turn perpetuate stigma related to those identity categories); LAWRENCE & MATSUDA, *supra* note 70 (same); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001) (same).

103. See Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 75 (1998) (defining “racial redemption” as a “psycho-social and ideological process through which whiteness maintains its fullest reputational value”). The project of racial redemption has three components: “(1) repudiating white supremacy’s ‘old’ regime; 2) burying historical memories of racial subordination; and 3) transforming white supremacy into a viable contemporary regime.” *Id.* We suggest that liberal opposition to affirmative action does “transformational” work in a larger project of racial redemption.

conducted, through e-mail, an anonymous web-based survey of law students from the Class of 2009 (during the summer and fall of 2007) at several law schools. Our web-based survey expressly informed subjects of our research interests and asked students to focus on race-based affirmative action, which we defined as “the act of considering race, ethnicity, and diversity as a plus factor in admissions for and recruitment of underrepresented racial minorities.”¹⁰⁴ The survey asked students about a range of topics, including: whether they believed that they were eligible for affirmative action, whether they supported diversity as an interest of educational institutions, whether they thought that they were viewed differently because of any perceptions of them as affirmative action beneficiaries, and what proportion of students from different races they believed had been admitted because of affirmative action.

In determining which schools to include in our study, we utilized three different criteria. First, we focused on public law schools rather than private law schools because public law schools are the institutions that are actually vulnerable to equal protection lawsuits and state voter initiatives. In fact, the ten public law schools on our invitation list either had been directly affected by initiatives that eliminated affirmative action programs on their campuses or were, by virtue of their elite status, vulnerable to attack by anti-affirmative action proponents. We then selected law schools that were legally permitted to employ affirmative action policies when the Class of 2009 was admitted as well as those that were not permitted to use such policies at that time to allow us to engage in a comparative study of student perceptions regarding the relationship between affirmative action and stigma as influenced by their environment and school culture. Second, we identified law schools in the first tier because we suspected that discussion and intensity of feeling around affirmative action would increase as the schools’ selectivity increased, thereby creating fertile ground for the collection of data. Finally, we chose law schools where at least one of us had a contact, with the hope that our connections with one or more persons at these schools would increase the chance of having the schools agree to participate in our study.

In the end, seven law schools agreed to participate in our research project. These seven schools included UC Berkeley, UC Davis, the University of Cincinnati, the University of Iowa, the University of Michigan, the University of Virginia, and the University of Washington. Four of these institutions—the University of Cincinnati, the University of Iowa, the University of Michigan, and the University of Virginia—considered race as one of many factors during the admissions process for the Class of 2009, and three—UC Berkeley, UC Davis, and the University of Washington—did not consider race in its process at the time.

We recognize that these seven highly respected institutions are not

104. For a copy of the survey, see *infra* Appendix.

representative of all law schools in the United States. For example, these schools are more elite than the average law school, and they do not cover every region in the country. Each school also has its own climate; some of these schools are perceived as more liberal environments, while others are perceived as more conservative environments, which may influence students when they are selecting their law school. That having been acknowledged, in the absence of any other data from students currently in law school, there is value in comparing the thoughts of students in these seven schools to support our contention that concerns over stigma are inflated.

B. Concerns About the Project's Impact

We began our project with certain concerns about its potential impact on students, especially minority students, and with worries about our ability to garner participation in the study from law schools. During the course of our research plan, we encountered and addressed these concerns (identified below) as best we could to minimize the emotional and psychological impact on students and to ensure participation from the invited law schools.

1. Implications for Students

At the beginning of our project, we worried about our survey's potential impact on the atmosphere at the subject law schools and on minority students within their hallways. In particular, we held two concerns with regard to the project's implications for potential student participants.

First, we worried that some students would perceive our survey questions about the use of affirmative action as confirmation of a continued practice of using race in admissions at non-affirmative action schools.¹⁰⁵ Because our study necessitated that we ask each group the same questions, however, we had to decide if this concern was sufficient to force us to forego this research. Ultimately, we decided that such a concern was not sufficiently weighty to prevent our study. Although we knew that our questions had the potential of reinforcing the perception of continued consideration of race at non-affirmative action schools, we were hopeful that students at non-affirmative action institutions would challenge this underlying assumption in our questions as they saw fit—and a number of them did. For example, one student at a non-affirmative action school asserted, "I go to [a non-affirmative action law school] so m[y] responses are informed by the fact that [my state's] universities are prohibited from engaging in any sort of affirmative action in admissions - I am not sure what goes on in other states. At [my school], we need it!"

Second, we agonized over the potential negative consequences that might

105. For example, we asked students of color at both types of schools whether they felt stigmatized by affirmative action, and we asked all students at both types of schools to estimate how many law students of color were admitted because of affirmative action.

result from the proven psychological burdens of stereotype threat on minority students at both affirmative action and non-affirmative action law schools.¹⁰⁶ We specifically worried about these potential negative consequences because stereotype threat, unlike internal and external stigma, is “cued by the mere recognition that a negative group stereotype could apply to oneself in a given situation.”¹⁰⁷ Thus, our survey had the potential of negatively affecting minority students merely because they identified as racial minorities and were aware of the relevant stereotype.¹⁰⁸

In fact, the process for approval of our project before our schools’ Institutional Review Boards raised these questions about the potential physical

106. Stereotype threat, discussed in Part I.B.2 of this Article, is the fear that poor performance will confirm negative racial stereotypes, which has been shown to undermine the actual performance of black students on standardized tests and in school. Steele, *Stereotype Threat*, *supra* note 27, at 109 (reporting that “Blacks performed a full standard deviation lower than whites under the stereotype threat of the test being ‘diagnostic’ of their intellectual ability”); *id.* at 117 (describing the same effects of stereotype threat on white male students—who were not expected to have a sense of group inferiority—when they were given a difficult math ability test with a comment that Asian-American students generally performed better than white students on the test); *see also* Steele, *Expert*, *supra* note 27, at 447 (noting also that “Black students performing a cognitive task under stereotype had elevated blood pressure”).

107. Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, in PROMISE AND DILEMMA: PERSPECTIVES ON RACIAL DIVERSITY AND HIGHER EDUCATION 92, 101 (Eugene Y. Lowe, Jr. ed. 1999) (“Ironically, their susceptibility to this threat derives not from internal doubts about their ability (e.g., their internalization of the stereotype) but from their identification with the domain and the resulting concern that they have about being stereotyped in it.”). *Id.* at 94.

108. In fact, the great irony of stereotype threat is that it is most likely to affect the most high-achieving students, or those who, under normal circumstances, would be least likely to perform poorly and are most invested in doing well. *See* Steele, *Expert*, *supra* note 27, at 446 (“Across our research, stereotype threat most impaired students who were the most identified with achievement, those who were also the most skilled, motivated, and confident—the academic vanguard of the group more than the academic rearguard.”). This finding is also consistent with that of Bowen and Bok, who found that most traditional-looking minority students in their study—those most likely to be admitted under a race-blind process—performed the furthest below their potential. *See* BOK & BOWEN, *supra* note 24, at 261; *see also* Hibbett, *supra* note 10, at 88 (arguing that any feelings of demoralization by minority students likely stem “from long-standing racism and deep-seated prejudices than race-based admissions policies”). As Professor Laura Padilla has highlighted, unlike Whites, racial minorities are rarely judged as individuals, but are instead judged as a group. Her article regarding women of color and affirmative action suggests that qualified and successful Blacks are still perceived as the exception, a fact of which many high-achieving minorities are well-aware. *See* Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORDHAM L. REV. 843, 880 (1997) (“[A]ffirmative action has made no significant difference in the way whites look at blacks. Competent and successful blacks are still seen as exceptional. Before and since affirmative action, most white people see another white as competent until proven incompetent and a black person as incompetent until proved competent.”) (quoting THE JOINT CTR. FOR POL. & ECON. STUD., THE INCLUSIVE UNIVERSITY: A NEW ENVIRONMENT FOR HIGHER EDUCATION 18 (1993)); *see also* STEELE, CONTENT OF OUR CHARACTER, *supra* note 14, at 133 (“The accusation black Americans have always lived with is that they are inferior—inferior simply because they are black. And this accusation has been too uniform, too ingrained in cultural imagery, too enforced by law, custom, and every form of power not to have left a mark.”).

or psychological impact of the study on the students who would receive the survey. In our application, we indicated our knowledge of the possible emotional and psychological impact of our study on those students. We concluded, however, that receipt of the survey or participation in the study had the same likely effect of regular law school events that students may encounter, such as heated classroom discussions on affirmative action or school-sponsored debates on the subject. Still, we took one additional precaution to minimize the psychological impact of the survey by excluding from our study first-year law students, a group that we perceived as being especially vulnerable to stereotype threat at the beginning of their law school careers. We thus chose to focus our inquiries on second-year law students only.

2. Securing Participation from Law Schools

Another concern for us was our ability to secure the participation of law schools in our research project. Our apprehension on this issue was particularly high given the potential impact of stereotype threat on minority students and the general sensitivity of the topic of affirmative action at many law schools, especially in light of the most recent wave of anti-affirmative action voter initiatives. Due to these worries, we were careful to assure the schools that we would not identify specific results as coming from any particular law school in this Article, but instead only discuss the survey results as part of a larger group of non-affirmative action or affirmative action schools.

Still, of the ten institutions that we asked to participate in the survey, three declined our request. Two institutions specifically informed us that affirmative action was such a sensitive topic on their campuses that they were concerned that a survey involving the issue would inflame students further or would result in the effects of stereotype threat for students of color on their campus. For example, a person at one law school responded to our request as follows:

While it is clearly a worthwhile project, for the reasons that I explained yesterday, administering this particular survey, framed as it is, would be problematic and potentially quite disruptive, particularly for our Black students. . . . Some of the questions call on students to opine not only on their support for affirmative action policies, but on how admissions policies work at their respective institutions, and whether certain students are undeserving. Our concern is that the administration of the survey would fuel a potentially toxic and misleading dialogue and thus inadvertently heighten the sense of “stereotype threat” under which students operate.¹⁰⁹

Despite our disappointment at not securing as large a number of law schools for our study as we had initially hoped, we understood the reactions of the schools

109. Anonymous E-mail to Professor Angela Onwuachi-Willig, (July 10, 2007, 12:54 CST) (on file with Professor Angela Onwuachi-Willig).

that declined our request and were sensitive to their concerns. Indeed, the strong reactions of these schools, as well as the strong reactions found in some of the student comments on the survey, demonstrate what a difficult topic this issue is for law schools across the country today. At the same time, however, we believe that they demonstrate the importance of and need for continued and expanded research that directly examines the learning environment for minority students at law schools.

III

RESULTS AND ANALYSIS

This Part of the Article reports the results of our survey. Part III.A describes the response rate and summarizes the students' responses to the survey items. Part III.B discusses our analytical models, which test for differences in the responses to these survey items once other differences between the respondents are statistically controlled. Part III.C summarizes some of the comments that students included with the survey expressing their attitudes about the current debates that surround affirmative action policies.

A. The Descriptive Results

The response rates to our survey regarding attitudes toward affirmative action programs are shown in Table 1.¹¹⁰

Table 1:
Response Rates

	Schools with affirmative action	Schools without affirmative action
Responses	443	167
Approx. size of 2L classes	1066	619
Response rate	42%	27%

These response rates are low and imply that our results should be taken only as suggestive rather than definitive. Although the overall sample is sizable (N=610), there are only 32 black, 17 Latino, 40 Asian Pacific American, 31 multiracial, and 14 "other race" respondents in our sample. Also, dividing the sample by school type leads to very small sample sizes of racial minorities. In addition, there is significant potential for biased and non-representative results because only schools that were sufficiently comfortable with surveying their

110. These statistics include all responses to the survey as of December 18, 2007, at which point we downloaded and analyzed the data. Response rates are approximate, because we had to estimate the size of one of the classes based on incomplete data. We had difficulty obtaining a precise number for the size of some classes because of transfers, dropouts, and other factors.

students on the topic of affirmative action participated in the study and because it is possible that only respondents who felt strongly about the topic or were in some other way unusual responded to the survey.¹¹¹ We therefore emphasize that, though we believe that the statistical analyses discussed in this section have value, the value is in (a) adding new (although non-representative) survey evidence to further discussions within the literature, and (b) showing the potential value of a broader and statistically representative study of law schools in the United States.

The principal question that we wished to test was how experiences of stigma and attitudes toward affirmative action varied between schools that did and did not have active affirmative action programs. Our conclusions are limited to the seven schools that participated in the study and are not generalizable to all law schools. Still, the summary statistics for the attitude items as shown in Table 2 reveal several suggestive and interesting patterns regarding internal stigma, external stigma, perceptions of diversity in the classroom, and the desirability of affirmative action policies in the law school admissions practices of these schools. These results point to the utility of a broader, representative study of law schools to examine patterns like these across different types of law school environments.

Table 2:
Descriptive Statistics for Schools With and Without Affirmative Action

	Schools with aff. action		Schools without aff. action
<u>Demographics of the sample</u>			
Percent male	57%	*	49%
Percent White	80%	*	72%
Percent Black	6%	+	2%
Percent Latino	2%	+	5%
Percent Asian Pacific American	5%	+	10%
Percent other race	1%	*	5%
Percent multiracial	5%		5%
Percent first-generation college	12%		14%

Only answered by students who believed their group was eligible for affirmative action:

111. As one subject student noted, "I hope that when you look at the results of this survey, you consider the fact that students with strong opinions are much more likely to respond to it. I'm much too apathetic about most issues to take the time to fill out an online survey, affirmative action just happens to be an issue that gets me excited and angry. In fact, it's widespread apathy and misunderstandings on the part of the majority of white students that gets me so angry and would motivate me to answer this survey and also lead me to believe that this large group might not be adequately reflected in the data you collect."

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<u>Perceptions of stigma (5=strongly agree, 1=strongly disagree)</u>	<u>Mean</u>		<u>Mean</u>
I do not deserve to be a student at my school	1.5		1.2
Classmates act as if I were admitted based only on aff. action	1.7		2.1
Teachers act as if I was admitted based only on aff. action	1.7		1.7
I feel stigmatized by affirmative action	2.2		2.2
Aff. action sends the message that people of color can't succeed	2.3		2.4
<u>Answered by all respondents:</u>			
<u>Beliefs about class composition (All=100, Most=75, Half=50, Some=25, None=0)</u>			
Percent Black students believed admitted because of aff. action	36	*	25
Percent Latino students believed admitted because of aff. action	34	*	25
Percent Asian students believed admitted because of aff. action	14	*	11
Percent Native Am. students believed admitted because of aff. action	37	*	28
<u>Background and experiences (5=strongly agree, 1=strongly disagree)</u>			
Grew up in a racially diverse and integrated setting	2.7		2.8
Attended racially diverse and integrated schools	2.7		2.8
Before law school, I had close friends of different races	3.9	*	4.1
In law school, I have close friends of different races	4.0		4.0
<u>Attitudes (5=strongly agree, 1=strongly disagree)</u>			
Is important to learn to relate to people of different backgrounds	4.4		4.5
Institutions of higher ed should teach students to relate	3.7		3.8
Racial diversity is important; it enhances my education	3.5	*	3.9
Aff. action gives preferences to less qualified people: race	3.3	*	3.0
Aff. action gives preferences to less qualified people: gender	2.9	*	2.5
Affirmative action is reverse discrimination against whites	2.6	*	2.3
Affirmative action is reverse discrimination against men	2.4	*	2.1
Due to past discrimination, law schools should make special efforts	3.2	*	3.5
Due to current discrimination, schools should make special efforts	3.4		3.5
The benefits of affirmative action outweigh the negatives	3.1	*	3.4
Racial aff. action in law schools should be abolished	2.8		2.6
I have never benefited from a legacy	4.4		4.5
I believe my racial group is eligible for affirmative action	1.8		1.8
I was admitted in part because of racial aff. action	1.5		1.3
I was admitted in part because of gender aff. action	1.5		1.4
Sample size	443		167

*Difference between schools with and without affirmative action significant: + $p < .10$, * $p < .05$*

(Pearson's chi-square test for categorical data, and the Wilcoxon rank-sum test for ordinal data.)

Table 2 begins with sample demographics, and shows that those who responded to our survey at schools with affirmative action were more likely ($p < .05$) to be white and male (and marginally more likely to be black, $p < .10$) than those who responded from schools without affirmative action. These differences show that it will be important to control for individual characteristics when we statistically test the relationships that we observe in Table 2, in order to discover whether these differences in respondent characteristics explain differences in attitudes across school types.

1. Experiences of Stigma

When we consider the questions that were asked only of students who believe that their group is eligible for affirmative action (those respondents for whom questions about internal stigma are relevant; $N=92$ respondents, primarily black and multiracial respondents, with smaller numbers of Latino and Asian Pacific American respondents), we can assess the level of internal stigma experienced by students in both types of schools. Our most important finding in Table 2 is that among students of color at the four schools that do have affirmative action programs and the three that do not, there is *no* statistically significant difference in their responses to questions about feeling stigmatized.¹¹² Students surveyed who believe their group is eligible for affirmative action at both types of schools report relatively low levels of internal stigma overall in response to questions about whether or not they feel they deserve to be at the school and whether or not they feel stigmatized by affirmative action. Thus, the “stigma of dependence” that is often described by those who are opposed to affirmative action is no more common in the four schools with affirmative action than in the three schools without affirmative action. The students attending both types of schools also gave statistically equivalent responses to the question of whether or not affirmative action “sends a message” that students of color cannot succeed without assistance.

Students similarly do not report negative effects of external stigma. Most respondents disagree that classmates or teachers treat them differently because

112. Conclusions here are based on the 92 respondents who answered the questions asked only of people who believed their group was eligible for affirmative action. Average scores on these items can be found in Table 2. Throughout Table 2, plus signs indicate a marginally significant difference in responses based on a Wilcoxon rank-sum test for ordinal data ($p < .10$, which means that there is a lower than 10 percent probability that the difference we observe is due to chance), and asterisks indicate a statistically significant difference at the $p < .05$ level (meaning that there is a lower than five percent probability that the statistically significant differences we observe are due only to chance) between the respondents at schools with affirmative action programs and the respondents at schools without affirmative action programs. In other words, asterisks indicate that it is likely that there is a real difference between the two groups.

of affirmative action stigma.¹¹³ The responses to questions regarding external stigma also do not vary significantly between students who attend surveyed schools with affirmative action programs and those who attend surveyed schools without affirmative action programs. It is important to note that this result means only that students of color do not *perceive* negative treatment because of affirmative action; negative reactions from teachers or classmates may objectively still be occurring. Nonetheless, this finding is important because the arguments regarding the negative impact of stigma on students of color are based on the assumption that the students of color *feel* stigmatized or burdened by affirmative action.¹¹⁴

2. Attitudes Towards Affirmative Action Policies and Classroom Diversity

In contrast, the question which garnered the most divergent replies from students at schools with and without affirmative action was: “What proportion of (black/Latino/Asian Pacific American/Native American) law students do you think were admitted because of affirmative action?” These questions did not specify students admitted only at their institution, but asked broadly about “law students.” Although students at law schools without affirmative action have statistically significantly ($p < .05$) lower estimates of the proportion of students of color who they thought were admitted because of affirmative action, the numbers are still high, considering that their schools officially do not have race-based affirmative action in admissions (but may have other affirmative action programs, such as outreach and recruitment programs). Among students attending schools both with and without affirmative action admissions programs, the modal response was that “some” black, Latino, and Native American students had been admitted because of affirmative action. Beliefs that Asian Pacific Americans benefit from affirmative action were far less common in both types of schools, despite the fact that several of the schools surveyed did include preferences for Asian Pacific Americans when implementing affirmative action in admissions decisions.

When we asked students about the diversity of the schools that they attended before law school and the racial diversity of their current friendships,

113. It is important to note that this conclusion, as discussed earlier, could be influenced by selection bias; it is possible that students who do perceive external stigma were less likely to respond to our survey, perhaps because of their negative experiences with affirmative action. However, if response bias led individuals who felt very strongly about affirmative action to respond to the survey, it would be surprising to find that people of color who feel strong negative reactions did not participate, while those with positive reactions did.

114. For example, as we mentioned in the Introduction, Justice Thomas describes affirmative action in *Adarand* and *Grutter* (respectively) as resulting in internal stigma by causing Blacks to “develop dependencies” and external stigma by leaving all black admitted students with the burden of being “tarred [and perhaps treated] as undeserving.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting).

their reports are statistically identical across most indicators, whether or not they attend a surveyed law school that uses affirmative action. The exception is that respondents from the schools with affirmative action report having diverse friends before law school at a slightly lower rate than the respondents from the schools without affirmative action. This discrepancy suggests that it will be important in the analyses below to control for differences in friendship before law school, in order to control for the self-selection of students with more diverse past experiences into our surveyed schools without affirmative action.

The “Attitudes” section of Table 2 shows that there is overwhelming support across the entire sample for the idea that people should learn to interact with others from diverse backgrounds, and this support does not vary by school type. There is also strong support among the respondents for the idea that diversity enhances education, although support for this idea is even stronger in schools that do *not* have affirmative action programs. Students at surveyed schools that use affirmative action are significantly more likely to agree that affirmative action gives preferences to less qualified applicants and constitutes reverse discrimination against Whites and men, which indicates that students from our sample who attend schools with affirmative action do tend to view affirmative action more negatively than students who attend schools without affirmative action. This survey result shows that, although students who are eligible for affirmative action do not report greater experiences of stigma at schools using affirmative action, students overall do report some more negative attitudes about affirmative action policies at the four schools that have affirmative action programs. As discussed in our analyses below, however, this difference across school type is explained by differences in the background of the respondents from the two types of schools, as well as differences in the political climate of the state in which the school is located.

Students at schools that do *not* have affirmative action are also more likely to agree that law schools should make special efforts to overcome past discrimination and that the benefits of affirmative action outweigh the costs. These responses suggest that students attending schools without affirmative action have a more positive interpretation of the policy and are more likely to believe that affirmative action policies would be good for their education, despite attending law school in states where the rhetoric opposing affirmative action has been most pervasive and most politically effective.

B. Models of Attitudes and the Implications of Our Results

Some of these significant differences, however, may be due to the characteristics of the sample, rather than a substantive difference between students who attend the two types of schools. For example, a greater proportion of the respondents who completed the survey in the four schools that have affirmative action programs were white students and male students, and these differences can influence the descriptive statistics shown in Table 2. We know

from previous empirical research that Whites and males are more likely to oppose affirmative action than females and people of color, so differences in the composition of the samples could make it appear that the difference is due to the type of school that the surveyed students attend when in fact it is due to other factors.¹¹⁵ Therefore, we estimated regressions that control for some of the predictors of racial attitudes in order to test the impact of various characteristics of interest net of other factors.

For our first dependent variable, we created a scale¹¹⁶ of the degree of stigma felt by students of color, using three items (“classmates treat me like I was admitted because of affirmative action,” “teachers treat me like I was admitted because of affirmative action,” and “I feel stigmatized by affirmative action”), $\alpha=.77$.¹¹⁷ We also created a standardized scale of support for affirmative action from eleven survey items (the first eleven items under “Attitudes” in Table 2). This scale has a high reliability ($\alpha=.95$), indicating that these items consistently measure a single underlying concept: overall support for affirmative action policies. Finally, we created a standardized scale from the two items that indicated a respondent’s belief as to whether he or she grew up in a diverse community and attended diverse elementary and secondary schools ($\alpha=.90$), which we use as an indicator of a “diverse background.”¹¹⁸

Of course, there are also important differences between these schools other than whether or not they are legally permitted to use affirmative action in their admissions programs. Although many of these differences are difficult to capture, we attempted to control for ideological differences between the schools by including an indicator of the political attitudes of the state in which the school is located. This control helped to address the differences between schools in more politically liberal states and those in more politically conservative states. We gauged these differences by including a measure of the proportion of the state that voted Republican in the 2004 Presidential election (a variable which ranges from 45 to 54). This variable is a rough measure, but

115. HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS (rev. ed. 2007).

116. ROBERT F. DEVELLIS, SCALE DEVELOPMENT: THEORY AND APPLICATIONS (2d ed. 2003).

117. Before the scale was made, each item in the scale was standardized so that it had a mean of 0 and a variance of 1. Then the items in the scale were summed. The scale of stigma ranges from -.75 to 2.00, with higher numbers indicating greater experiences of stigma.

118. Before the scales were made, each item in the scale was standardized so that it had a mean of 0 and a variance of 1. Then the items in the scale were summed. Both scales therefore have a mean of zero. The scale indicating support of affirmative action ranges from -2.01 to 1.13, with higher numbers indicating higher levels of support for affirmative action on the 11 items. The scale indicating the diversity of the respondent’s background ranges from -1.22 to 1.72, with higher numbers indicating reports of more racially diverse experiences in neighborhoods and schools. Students relied on their own definitions of diverse neighborhoods and schools for these questions. We did not provide any definitions in the survey of what a diverse neighborhood or school looks like or of what it means to have a diverse group of friends.

provides some idea of how state climate and context might relate to the attitudes of law students, either because of self-selection into schools with a particular political climate, growing up in a nearby area, or changes in attitudes after arrival at the law school. The schools in our sample that have affirmative action admission programs are also, on average, in more politically conservative states than the schools in our sample that do not.

Tables 3 and 4 include the models¹¹⁹ of stigma and attitudes toward affirmative action.¹²⁰

119. J. SCOTT LONG, *REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES* (1997) (describing the process of estimating and evaluating models for categorical dependent variables); JOHN NETER ET AL., *APPLIED LINEAR REGRESSION MODELS* (3d ed. 1990) (describing the process of estimating and evaluating regressions for continuous dependent variables). Although hierarchical models would be ideal for hierarchical data like this (students who are nested within schools), we lack sufficient numbers of schools to be able to estimate these models, pointing again to the utility of a broader study of law schools across the country. *See* TOM SNIJDERS & ROEL BOSKER, *MULTILEVEL ANALYSIS* (1999) for a discussion of sample size issues in multilevel data. We also estimated more parsimonious models that only include the most common predictors of racial attitudes (variables for attending an affirmative action school, being white, being male, having a diverse background, being the first generation to attend college, and having diverse friends in law school) because of our small sample size. These models have the same findings shown here regarding the effect of attending a school with affirmative action, and they are available on request from the authors.

120. Coefficients in these regression tables can be interpreted as the size of the change in the dependent variable we would expect if the respondent had the characteristic listed rather than the characteristic excluded. For example, the coefficients for males represent the difference between males and females.

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Table 3:
Models of stigma, for individuals who believe their group is eligible for affirmative action

	Feels stigmatized (scale)	Sends a message of dependence
	OLS reg.	Ordered logit reg.
Attends a school with affirmative action	0.313	1.092
	(0.308)	(0.734)
Black	0.388+	-2.294***
	(0.207)	(0.545)
Latino	0.066	-0.752
	(0.243)	(0.605)
Asian Pacific American	-0.405	-0.838
	(0.298)	(0.663)
Other racial groups (excluded category)		
Male	-0.215	0.244
	(0.177)	(0.436)
Diverse background	-0.078	0.183
	(0.091)	(0.218)
First generation college	0.291	0.670
	(0.192)	(0.490)
Had diverse friends before law school	0.070	-0.055
	(0.079)	(0.186)
Has diverse close friends in law school	-0.165**	0.025
	(0.083)	(0.200)
Proportion of state voted Republican, 2004 Presidential election	-0.083+	-0.060
	(0.045)	(0.105)
Constant	4.130+	
	(2.153)	
Observations	88	89

Standard errors in parentheses

+ p<.10; ** p<.05; *** p<.01

We use OLS regression for continuous dependent variables, and ordered logit regression for ordinal dependent variables.

Table 4:
Models of attitudes toward affirmative action and stigma, for all respondents

	Support aff. action (scale) OLS reg.	Percent Black believed aff. act. OLS reg.	Percent Latino believed aff. act. OLS reg.
Attends a school with affirmative action	0.142	8.680***	7.943***
	(0.100)	(2.886)	(2.713)
White	0.014	-4.610	-5.819+
	(0.116)	(3.366)	(3.166)
Black	0.965***	-14.253***	-11.312**
	(0.168)	(4.840)	(4.553)
Latino	0.618***	-4.598	-5.751
	(0.208)	(6.018)	(5.661)
Asian Pacific American	0.242	6.152	6.315
	(0.157)	(4.533)	(4.265)
Other racial groups (excluded category)			
Male	-0.524***	7.232***	5.870***
	(0.059)	(1.714)	(1.610)
Diverse background	-0.120***	1.933**	1.712+
	(0.032)	(0.935)	(0.879)
First generation college	-0.097	1.682	0.870
	(0.091)	(2.630)	(2.474)
Had diverse friends before law school	-0.024	0.126	-0.595
	(0.027)	(0.778)	(0.731)
Has diverse close friends in law school	0.056+	-0.765	-0.393
	(0.029)	(0.839)	(0.788)
Proportion of state voted Republican, 2004 Presidential election	-0.052***	0.419	0.198
	(0.014)	(0.395)	(0.371)
Constant	2.534***	8.822	21.685
	(0.642)	(18.522)	(17.406)
Observations	598	594	595

Standard errors in parentheses

+ p<.10; ** p<.05; *** p<.01

We use OLS regression for these continuous dependent variables.

1. Experiences of Stigma

Table 3, which includes only the students who believe their group is eligible for affirmative action programs, confirms the findings of Table 2: students of color are no more likely to report experiences of stigma in schools with affirmative action programs than in schools without affirmative action programs.¹²¹ Thus, the argument that affirmative action policies send the message that students of color are dependent on assistance—and that these students will have a negative experience in school because of those messages—is not supported by our data. Law students feel similar (relatively low) levels of stigma regardless of whether or not their school has an affirmative action program. As one respondent attending a school without affirmative action put it: “[My university] apparently does not use affirmative action in its admissions policies, however, the stigma is still here . . . which is ironic, because I’m usually the only black student in my classes.”

None of the racial groups surveyed reported feeling high levels of stigma; for example, the modal response for all groups to “I feel stigmatized by affirmative action” was “strongly disagree.” However, Table 3 does demonstrate small differences between different groups on the stigma scale, although the sample size is small for these groups. Among all surveyed students who believe that their group is eligible for affirmative action, Blacks reported somewhat higher average levels of feeling stigma than Latinos, Asian Pacific Americans, and other respondents (based on the marginally significant higher coefficient for Blacks in the regression in Table 3). The black students whom we surveyed were also significantly *less* likely than other minority respondents to believe that affirmative action sends an overall message of dependence (again, based on the significantly lower coefficient for Blacks in the ordered logit model in Table 3). While the data suggest that first generation college students surveyed were marginally more likely to feel stigma as well, this effect is not significant once indicators of the respondent’s race are included in the model because the black and Latino students surveyed were disproportionately likely to have been the first in their families to attend college.¹²² Those who have a diverse friendship group in law school are also less likely to report feelings of stigma, suggesting the powerful impact of social networks. Finally, those who attend law school in a more politically conservative state are less likely to report experiencing stigma (this relationship

121. The coefficients for “attends a school with affirmative action” are not significantly different from zero in Table 3. Models (not shown) that include only the variable “attends a school with affirmative action” also show no significant relationship between either of these dependent variables and school type.

122. See John C. Duncan, Jr., *The American ‘Legal’ Dilemma: Colorblind I/Colorblind II—The Rules Have Changed Again: A Semantic Apothegmatic Permutation*, 7 VA. J. SOC. POL’Y & L. 315, 433 (2000) (noting that low-income and first-generation students are disproportionately black or Latino).

is marginally significant; $p < .10$). This result suggests that, controlling for other individual and school factors, those who attend law schools in more politically conservative contexts are *less* likely to report negative treatment from teachers, other students, and general stigma.

2. Attitudes Towards Affirmative Action Policies and Classroom Diversity

We do find significant differences in attitudes towards affirmative action across school type *before* we include any other statistical controls (model not shown), as suggested by Table 2. The differences across school type observed in Table 2 are *not* significant, however, once we control for race, gender, experiencing a diverse background before law school, being in the first generation to attend college, having a diverse group of close friends before and during law school, and the political attitudes of the state, as we see in Table 4.¹²³ Table 4 includes all respondents in the sample and shows that students who are attending a surveyed school with affirmative action are *no more likely* than students attending a non-affirmative action surveyed school to reject affirmative action.¹²⁴ Males, however, are significantly less likely than female respondents to support affirmative action, while Blacks and Latinos are significantly more likely than all the other racial groups to support affirmative action. In addition, respondents who believed they experienced a diverse background as a child are also less likely to support affirmative action, while those who report *currently* having a diverse set of friends are slightly more likely to support the policy (although this effect is marginally significant, $p < .10$).¹²⁵ Finally, those who are attending law school in more politically conservative states are significantly less likely to support affirmative action.

The relationship between reporting growing up in a diverse environment and rejecting affirmative action policies might be explained at least in part by the fact that some of the students who volunteered comments suggested that their opposition to race-based affirmative action was rooted in their personal knowledge of students of color from privileged backgrounds. One student, for example, noted:

[M]any of the minority students that benefit from affirmative action

123. This result suggests that the reason that these differences appear significant in Table 2 is that the sample of respondents from schools with affirmative action contains a greater share of Whites, males, and students attending school in politically conservative states than the sample from schools without affirmative action, and all of these groups are more likely to express negative attitudes towards affirmative action.

124. The coefficients for “attends a school with affirmative action” are not significantly different from zero in the first model.

125. Responses related to exposure to others of different ethnic and racial backgrounds were self-reported, *i.e.*, one respondent might have reported experiencing diversity, while another respondent might have perceived the same environment as lacking in diversity. We were interested in how respondents’ *perception* of their background related to their attitudes, but it is important to remember that our measure of what it meant to experience diversity as a child was not an objective measure.

come from privilege, while their poorer counter-parts never make it to the application process for law school. I am white, every one of my friends in law school is a minority of one type or other, but they all come from rich families (their parents are lawyers, doctors, business owners), while I grew up extremely poor (single mom raised 6 kids as a substitute teacher) and have never been able to benefit from these types of programs.

Another student noted:

It [affirmative action] should be abolished, but not without a replacement system which, in my opinion, should put more emphasis on reaching out to poor students, regardless of their race. . . . [W]hen it came time to apply to college, I became resentful of my black and [H]ispanic classmates in a way I never had been before. . . . I felt slighted and angry, not at my friends, but at a system which favored students who were less qualified than I was, but who had received the exact same education and gifted instruction that I had for 8 years.

In general, those respondents who developed more diverse friend networks in law school, however, were slightly more likely to support affirmative action, although this relationship should be interpreted merely as suggestive given its marginal significance. This finding suggests that there might be important differences between experiences at a young age and experiences during higher education that deserve further exploration in future research.

The regressions also reveal that the largest difference between surveyed students who attend a law school with affirmative action and those who attend law schools that do not allow affirmative action was the share of the law school population that the students believed were admitted as a result of affirmative action programs. Surveyed students who attend schools that used affirmative action in admissions decisions reported that they believed a significantly higher percentage of black and Latino students were admitted because of affirmative action, as the third and fourth models in Table 4 demonstrate. Male respondents also gave higher estimates of the share of the black and Latino student population they thought were admitted because of affirmative action programs, while black students reported lower estimates of the share of black and Latino students who they thought were admitted because of affirmative action. Those who reported growing up in a diverse school and neighborhood also reported slightly higher estimates. Finally, white students reported slightly lower estimates of the number of Latinos they thought were admitted because of affirmative action than the excluded racial groups reported (i.e., Native Americans, those who reported "some other race," and multiracial groups). This effect is marginally significant, and so again should be taken as suggestive rather than certain, but deserves further exploration, because it suggests that the perceptions of Whites may differ from other minority groups regarding how much Latinos benefit from affirmative action.

C. Students' Responses to the Complexity of Affirmative Action Policies

Finally, when we solicited comments at the end of the survey, many students reported that they wished they could provide more nuanced responses than were possible in the web-based survey. One student wrote:

I don't think [the questions on the survey] will catch the more complex attitudes of my fellow law students towards affirmative action. Some of them – like myself – are strong supporters of affirmative action in its present form but would like to see a discourse on affirmative action that didn't ring in exclusionary terms to some and that took into account class origin, geographical circumstance, educational history and the fact that many of us are multi-lingual, multi-cultural, multi-ethnic multi-racial in ways that the old-time discourse and practice of affirmative action has not accounted for affirmatively and in public.

The comments that called for a revision of affirmative action policies—many called for more focus on socioeconomic status—demonstrate both a more nuanced understanding of affirmative action than we can hope to capture in a web-based survey and a strong belief (among those respondents who support and those who oppose current affirmative action policies) that integrating class-based remedies into affirmative action policies would be perceived as more “legitimate” than purely race-based remedies.¹²⁶ In other words, many

126. For example, “I am an Asian American who come [sic] from a very impoverished background. ... My parents never made any more than \$20K a year—less money than yearly law school tuition! Yet - because of our emphasis only on race as a factor in diversity—I am automatically lumped in with ALL non-Southeast Asians (all Chinese, Japanese, Koreans) whose backgrounds can be VERY different from mine. Yet, many Asian students in my school come from very affluent backgrounds and I have NOTHING in common with them. I am tired of affirmative action and "diversity" programs being centered only on race. A wealthy African American does not necessarily represent an African American from the projects of an inner city—yet our affirmative action programs do not seem to distinguish this.” And: “Race does not automatically equate to disadvantage. Persons from well off families who also happen to be designated a member of a minority race may benefit from arbitrary racial status even though their race may not have disadvantaged them at any time. Poverty is a much more accurate measure of social disadvantage. Take for example a poor white person who lives in the inner city (perhaps in a predominantly black neighborhood) and has gone to substandard public schools. Is this person somehow better off than his or her black neighbors? If a student has had a particular experience with racial prejudice that has shaped their perspective then that experience can be mentioned in personal statements and taken into account in that way. It is not at all inappropriate for a school to take such an experience into account as long as they do so on an individual basis.” And: “...to argue that affirmative action promotes viewpoint diversity is to assume that members of different races categorically have different viewpoints or come from materially different backgrounds. Race is not the most narrowly tailored proxy for differing backgrounds and ideas. Instead, economic status should be used.” And: “In my experience the emphasis of AA is on race and ethnicity—a superficial diversity of skin color. Yet one of the common explanations of AA is to bring together diverse people with diverse experiences—a diversity that is more instructive and enlightening than merely race based diversity. This broader type of diversity comes not just from one's racial or ethnic background, but from their social and economic status, their nationality, political affiliations, the region of the world in which they were raised, and their religion. Too often society uses race and ethnicity as proxies for this more substantive diversity.” And: “I think law schools should make special efforts to recruit minority students and encourage them to apply, but I find it

surveyed students wrote that they supported affirmative action policies designed less to make-up for past discrimination and more to build a student body that takes into account the many kinds of diversity including, but not limited to, race.

CONCLUSION

In this Article, we analyzed the results of a web-based survey of students in the Class of 2009 at seven law schools. These results revealed that there is *no* statistically significant difference in internal stigma between students of color at the four law schools that do have affirmative action programs and the three that do not have such programs. They also showed that there are no significant harms resulting from internal stigma at these law schools, regardless of whether or not they had affirmative action programs in their admissions. Lastly, these results revealed that there was no significant impact from external stigma on surveyed students at both types of law schools.

In terms of other results, especially our findings that students at schools that allow affirmative action do believe that a significantly higher proportion of the minority student population was admitted because of affirmative action, we note our observation that the comments we received through the survey responses demonstrate how the stigma argument itself is raced and one-sided.¹²⁷ Although surveyed students of color did not report significantly worse treatment based on external stigma in schools with affirmative action, comments from a number of white students exhibited the existence of what could be a potential basis for external stigma resulting from affirmative action. A white male student, for example, declared:

I believe that racial and gender diversity is very important, and is a very valuable addition to my education. However, I think affirmative action is the wrong approach. Affirmative action robs talented and intelligent members of minority groups of the credit they deserve for their accomplishments. As a white male student, I can't help but question (at least in the back of my mind) whether a student from a minority group would have gotten into our program if they were not a member of a minority group.

too reductive to say that just because someone is a minority, they deserve special consideration for admission. I feel it would be better to use other proxies for race, such as socio-economic status and geographic origin, then race itself."

127. See Bracey, *supra* note 25, at 39 ("Individuals who are commonly associated with actual beneficiaries—in this instance because of shared racial characteristics—are stigmatized only if one believes the actual beneficiary has been previously stigmatized.") Bracey argues that the "[e]stablishment of the material preconditions of freedom is premised upon the idea of equal humanity and social worth," and "[i]f providing the material preconditions to exercise freedom on an equal basis is not stigmatizing to actual beneficiaries, then there is little reason to think that it would nevertheless prove stigmatizing to members of the same social group who ultimately do not receive any material benefit." *Id.*

Pundits and commentators, however, are rarely as open about acknowledging the stigma that should correspondingly result from benefits obtained merely as a result of white privilege.¹²⁸ In this vein, a minority student asserted:

To the extent there is a stigmatic effect to AA [affirmative action], I believe that it is more the fault of a misunderstanding of how AA is applied. Am I a fan of free rides? No. Nobody is. But I am a fan of considering the fact that based on personal circumstance, two identical LSAT scores may represent two different things. And I'd rather be at [my elite law school] and feel stigmatized against than not be here at all. The best response in a drunken AA debate in a bar in [my town], for me, has always been to ask if the inevitably white, anti-AA advocate had ever benefited from being white. No white person worth arguing can honestly answer 'never' to that question. Only somewhat tongue in cheek, I submit that I'm all for white stigma.

Yet, "white stigma," as a by-product of the unfair advantages of white privilege, has not really surfaced in affirmative action discourse. The absence of such "white stigma" rhetoric can be explained by Goffman's theory of stigma as a sociologically "negative" and relative phenomenon.¹²⁹ Because stigma is both a precondition to and consequence of being a "non-normal"—where "normal" status is defined and perpetuated by the very social and other privileges attached to it—"white stigma" is a fundamentally different phenomenon than minority stigma. In the affirmative action context, Professor Christopher Bracey puts it this way: "Individuals who are commonly associated with actual beneficiaries—in this instance because of shared racial characteristics—are stigmatized only if one believes the actual beneficiary *has been previously stigmatized.*"¹³⁰

The raced nature of the application of the stigma argument is further supported by the low estimates we received in response to questions about the proportion of Asian Pacific American students who benefited from affirmative action, even though a number of the affirmative action schools in our study included Asian Pacific American students in their race-based programs. The low estimates of Asian Pacific Americans presumed to benefit from affirmative action and our survey results suggest that, with respect to the seven law schools we surveyed, it was not affirmative action that resulted in internal and/or external stigma, but rather racial stereotypes that have attached historically to different groups, regardless of affirmative action's existence. Surveyed white students believed a larger share of Blacks, Latinos, and Native Americans were admitted because of affirmative action than Asian Pacific Americans, as we

128. See Ross, *supra* note 6, at 301 ("[T]he rhetoric of innocence avoids the argument that white people have generally benefited from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways.").

129. See *supra* Part I.A.

130. Bracey, *supra* note 25, at 39 (emphasis added).

saw in Table 2 and Table 4.¹³¹ Because Asian Pacific Americans are generally presumed to not be included in affirmative action programs, their surveyed peers tended not to “stigmatize” them as “unqualified” or “undeserving” even when they may actually have been affirmative action beneficiaries. In essence, the stigma attached to affirmative action beneficiaries did not always correlate with who was actually included in the preference programs, but rather with pre-existing stigmas and stereotypes about racial groups. In other words, here, the stigma, not the affirmative action, came first.

On the raced application of the stigma argument, Professor Lani Guinier adds another layer of complexity in her observation that legacy preferences,¹³² given mostly to white students,¹³³ do not generate the same level of “stigma” as race-based affirmative action.¹³⁴ Here again, Guinier’s observation

131. See Cho, *supra* note 1, at 1061 (asserting that the stereotype of “a uniformly successful, exemplary minority who do not face racial discrimination” is problematic); Harvey Gee, *From Bakke to Grutter and Beyond: Asian Americans and Diversity in America*, 9 TEX. J. C.L. & C.R. 129, 149-58 (2004) (discussing the model minority myth); see also William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605 (2006) (arguing that “inattention to the distinction between negative action and affirmative action effectively marginalizes APAs and contributes to a skewed and divisive public discourse about affirmative action, one in which APAs are falsely portrayed as conspicuous adversaries of diversity in higher education.”); see generally Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (discussing the negative stereotypes that attach to Blacks and Latinos).

132. Generally, legacy students are those students who receive a preference in the admissions process on the basis of their familial relationship to alumni of a particular college or university. Onwuachi-Willig, *supra* note 85, at 1149 n.27; Daniel Golden, *Family Ties: Preference for Alumni Children in College Admissions Draws Fire*, WALL ST. J., Jan. 15, 2003, at A1.

133. The vast majority of legacy students are white. For example, in 2002 at Texas A&M, a school that has since abolished its legacy admissions policy, legacy preferences allowed for the enrollment of 321 white students who otherwise would not have been admitted, but only three Blacks and twenty-five Latinos in this category. Todd Ackerman, *Legislators Slam A&M Over Legacy Admissions*, HOUSTON CHRON., Jan. 4, 2004, at A1; see also Texas A&M University, Office of the President, Statement on Legacy, Jan. 9, 2004, available at <http://www.tamu.edu/president/speeches/040109legacy.html> (containing a speech in which the President Robert Gates asserted that “Texas A&M will no longer award points for legacy in the admissions review process”). In fact, Blacks were not allowed to gain admission to Texas A&M University until 1963. See Michael King, *Naked City: Texas A&M’s Racial Legacy*, AUSTIN CHRON., Jan. 16, 2004, available at <http://www.austinchronicle.com/gyrobase/Issue/print?oid=oid%3A193354>. Likewise, one author reported that, at the University of Virginia, ninety-one percent of the legacy applicants who are accepted on an early-decision basis are white, but only 1.6 percent of such admits are black, 0.5 percent are Latino, and 1.6 percent are Asian-American. See Golden, *supra* note 132, at A1.

134. See Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 186-87, 190 (2003) (describing how racism is linked to stigma and helps to explain “why legacy preferences, which account for a larger percentage of admissions at selective colleges than do racial or ethnic factors, do not generate the same ‘stigma’”). But see Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375, 1418-39 (2000) (arguing that legacy preferences in public university

demonstrates Goffman's theory of stigma at work. Because stigma does not attach in the first instance to privileged classes, here consisting of mostly white institutional alumni, legacy preferences do not generate the same forms of stigma claims (or general ire among non-legacy students) that race-based considerations do (among white students). Legacy admits are, to turn to Goffman's phrasing, "uber-normals," the ultimate insiders. These class observations are of particular interest given several of the students' calls for class-based affirmative action programs that would *displace* race-based ones. In addition, they implicate the ways in which we as a society may fail to recognize and understand the interconnectedness of race and class privilege and subordination. Further discussion of this issue, however, is better left to a separate paper that could more adequately address the many complexities of the interlocking nature of class and race subordination.

Finally, surveyed students who attended schools without affirmative action repeatedly expressed in their comments what they viewed as a loss in their education as a result of the lack of racial diversity in their classrooms. For example, one student at a non-affirmative action school proclaimed:

A diverse student body in education is so important. . . . However, I believe in the classroom it is just as important to have a student body with diverse experiences, not just a mix of different races, ethnicities, and gender. I have learned a lot from many of my classmates . . . from large cities. Some of these classmates are racial minorities, and I feel lucky to be able to learn from them the lessons I was unable to learn growing up in a rural, all-White area. . . . I really wish there were more racial minorities in our school to make it a truly diverse experience.

Through their experiences at schools with no affirmative action, these students have pointed to a meaningful deficiency in their education, both inside and outside the classroom. Our society must address this deprivation by preserving and strengthening current race-based affirmative action programs and re-establishing those programs that, for certain students, are sorely missed at their institutions. Overwhelmingly, the students in our sample support the idea that it is "important to learn to relate to people of different backgrounds" and that institutions of higher education should be involved in that process.¹³⁵ If we truly wish to live up to this goal, we must commit to diversifying these institutions. Since our results show that at these schools affirmative action policies do not in fact "harm" students of color in the way that opponents of affirmative action have claimed, we hope that we can move forward to a more productive discussion of the best way to design race-based policies to accomplish this goal.

admissions violate the Constitution's prohibition on titles of nobility).

135. See *supra* Part III.A.2.

APPENDIX A: AFFIRMATIVE ACTION STUDY SURVEY

Stigma and Affirmative Action

We invite you to participate in a research study being conducted by investigators from The University of Iowa and The University of Cincinnati. The purpose of the study is to conduct research on race-based affirmative action in higher education and its relationship to stigma that may be felt by individual students who identify as a member of underrepresented racial and ethnic minority groups or stigma that may be attached by majority students to individual students who identify as a member of underrepresented racial and ethnic minority groups. For the purposes of this survey, “affirmative action,” is defined as “the act of considering race, ethnicity, and diversity as a plus factor in admissions for and recruitment of underrepresented racial minorities.”

We are inviting you to be in this study because you are a second year law student. We have distributed this invitation to you through the dean or professors at your law school. Your name and address were not given to the researchers. Approximately **2,000** people will take part in this study.

If you agree to participate, we would like you to please answer the questions to the survey accessed through the Web link below. The survey asks you to provide information about yourself such as your race, sex/gender, residence at age 15, name of your law school, the year you were admitted to the law school, if you are a transfer student, and whether or not you are the first in your immediate family to attend college or law school. You will be asked questions about the diversity of the communities where you grew up, of the primary and secondary schools you attended, and of your close friends. You will be asked your opinions about affirmative action programs and your experiences with affirmative action program. You will be asked to click the “submit” button at the end of the survey to submit your answers to us. You are free to skip any questions that you prefer not to answer. It will take approximately 10-20 minutes to complete the survey, depending upon whether you choose to add qualitative comments at the end of the survey. We encourage you to add explanatory comments or any other information that you feel we should know at the end of the survey. Again, you should feel free to leave the space reserved for additional comments blank.

We will keep the information you provide confidential; however, federal regulatory agencies and the University of Iowa Institutional Review Board (a committee that reviews and approves research studies) may inspect and copy records pertaining to this research. The Website where you will complete the survey is a secure Website and will not collect information about you. We will not collect your name or any identifying information about you on the survey. It will not be possible to link you to your responses on the survey.

You will not have any costs for being in this research study. You will not be paid for being in this research study.

Taking part in this research study is completely voluntary. If you do not wish to participate in this study, you do not have to answer any of the questions in the survey, and you do not have to submit this survey to us on-line. You may close your web browser at any time to end your participation.

If you have any questions about the research study itself, please contact **Professor Angela Onwuachi-Willig at angela-onwuachi@uiowa.edu or at 319-335-9043.** If you experience a research-related injury, please contact: **Professor Angela Onwuachi-Willig at angela-onwuachi@uiowa.edu, 319-335-9043, or University of Iowa College of Law, 290 Boyd Law Building, Iowa City, Ia 52242.**

If you have questions about the rights of research subjects, please contact the Human Subjects Office, 300 College of Medicine Administration Building, The University of Iowa, Iowa City, IA 52242, (319) 335-6564, or e-mail irb@uiowa.edu. To offer input about your experiences as a research subject or to speak to someone other than the research staff, call the Human Subjects Office at the number above.

Thank you very much for your consideration of this research study. Return of the survey indicates your willingness to participate in this study.

1) What is your race? Check all that apply.

- White/Caucasian
- Black/African American
- Latina/o/Hispanic
- Asian Pacific American
- Native American/American Indian
- Other (please specify)

If you selected other, please specify:

2) What is your sex/gender?

- Male Female

3) What is the name of the city and the state that you lived in at age 15?

4) What law school do you attend?

5) What year did you enter the law school that you currently attend?

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2004 2005 2006 2007 Other (please specify)

If you selected other, please specify:

6) If you are a transfer student, please identify the institution from which you transferred.

7) Are you the first in your immediate family to attend college?

Yes No

8) Are you the first in your immediate family to attend law school?

Yes No

9) For each statement, please select whichever category you deem most appropriate.

	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
I grew up in a diverse and racially integrated community or communities.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I attended diverse and racially integrated primary and secondary schools.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Before law school, I had close friends of different races with whom I regularly interacted (at least once a week).	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
In law school, I have close friends of different races with whom I regularly interact (at least once a week).	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
It is important for students to learn how to relate to people who are of different ethnic and racial backgrounds.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Institutions of higher education should play a role in helping people learn how to relate to individuals who are	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

of different racial backgrounds than their own.					
Racial diversity is important because it enhances the discussion in the classroom and my overall education.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

10) For each statement, please select whichever category you deem most appropriate.

	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
Affirmative action gives special preferences to people over other, more qualified individuals simply on the basis of race.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Affirmative action gives special preferences to people over other, more qualified individuals simply on the basis of sex or gender.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Affirmative action is reverse discrimination against Whites.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Affirmative action is reverse discrimination against men.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Because of past discrimination, law schools should make special efforts to recruit and admit qualified students of color.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Because of existing discrimination, law schools should make special efforts to recruit and admit qualified students of color.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
I have never benefited in any way from a preference due to my status as a legacy (meaning as a descendant of another person who graduated from the	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

school(s) I attended) in admissions to college, graduate school, or law school.					
The benefits of affirmative action outweigh any negatives.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Race-based affirmative action should be abolished in law schools.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

11) What proportion of black law students do you think were admitted because of affirmative action?

All Most Half Some None

12) What proportion of Latina/o or Hispanic students do you think were admitted because of affirmative action?

All Most Half Some None

13) Which proportion of Asian Pacific American students do you think were admitted because of affirmative action?

All Most Half Some None

14) Which proportion of Native American/American Indian students do you think were admitted because of affirmative action?

All Most Half Some None

15)

To assist us with the remaining questions, please be certain to identify your race at the top of the survey. For each statement, please select whichever category you deem most appropriate.

	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
I think that my racial/ethnic group is eligible for affirmative action.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
I was admitted to the law school, in part, because of race-based affirmative action.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

I was admitted to the law school, in part, because of gender-based affirmative action.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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16)

If you selected “Agree” or “Strongly Agree” in response to the statement regarding whether you think that your racial/ethnic group is eligible for affirmative action, please respond to following statements.

	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Not applicable
I do not deserve to be a student at my school because I took the spot of a more deserving student.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
My classmates treat me as though I were admitted solely because of affirmative action.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
My professors and/or teachers treat me as though I were admitted solely because of affirmative action.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
I feel stigmatized by affirmative action.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Affirmative action sends the message that people of color cannot succeed without special benefits.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Submit Survey