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Cry Me a River: The Limits of “A Systemic Analysis of Affirmative Action in American Law Schools”

Kevin R. Johnson*

Angela Onwuachi-Willig**

INTRODUCTION

Richard Sander’s article on affirmative action in the *Stanford Law Review*¹ has generated nothing less than an academic firestorm.² To its credit, “A Systemic Analysis of Affirmative Action in American Law Schools” has energized serious discussion of the costs and benefits of affirmative action. In no small part, this results from the counterintuitive conclusion of his study that affirmative action *injures*, not *benefits*, African Americans.³

No stranger to the spotlight, Professor Sander previously sparked controversy when he publicly proclaimed that UCLA School of Law’s Critical Race Studies certificate program, which each year admits a handful of law students interested in pursuing a concentration in the study of civil rights law,

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1. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

2. See, e.g., Diane Curtis, *Law Professor’s Affirmative Action Findings Prompt Storm of Criticism*, CAL. B.J., Feb. 2005, at 1; John Hechinger, *Critics Assail Study of Race, Law Students*, WALL ST. J., Nov. 5, 2004, at B1; Katherine S. Mangan, *Affirmative Action and Military Recruiting Spur Heated Debate at Law School Meeting*, CHRON. HIGHER EDUC., Jan. 21, 2005, at A19; Stuart Silverstein, *Professor Assails Anti-Bias Program*, L.A. TIMES, Nov. 15, 2004, at B1; *Professors Richard Sander and David Wilkins Discuss Affirmative Action, Morning Edition: Study Disputes Benefits of Affirmative Action* (National Public Radio broadcast, Dec. 6, 2004).

3. Because Professor Sander’s study focuses exclusively on African Americans in law schools, the reader is left to wonder how Latina/os, Asian Americans, and Native Americans fare under affirmative-action programs. See Sander, *supra* note 1, at 370. As Professor Sander himself concedes, “any discussion of affirmative action that ignores other [non-African-American] ethnic groups . . . is *seriously incomplete*.” *Id.* (emphasis added). He plans to complete a study of the experience of non-black minority groups. See *id.*

was an attempted end run of the ban on race-conscious admissions in California; as he stated, “I do not believe the solution to minority underrepresentation in law schools is to find ways to rig the application process so that very small numbers of underrepresented minorities with weak academic qualifications are admitted through the back door.”⁴

In a similar vein, Professor Sander’s latest work reflects a dismal view of race-conscious affirmative action. He boldly challenges the body of scholarship that documents the benefits of affirmative action to African Americans.⁵ As he explains, out-matched by their fellow students, at least as measured by undergraduate grade point average (UGPA) and Law School Admissions Test (LSAT) scores,⁶ African Americans are more likely to perform poorly in law school, drop out, fail the bar examination, and never become lawyers.⁷ Professor Sander offers a simple, if not fail-safe, solution:

4. Daniel Golden, *Case Study: Schools Find Ways to Achieve Diversity Without Key Tool*, WALL ST. J., June 20, 2003, at A1 (quoting Sander); see also Richard Sander, *Colleges Will Just Disguise Racial Quotas*, L.A. TIMES, June 30, 2003, at B11. Professor Sander previously published articles on academic support for “diversity” students and on class-based affirmative action. See Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEG. EDUC. 472 (1997); Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEG. EDUC. 157 (1995).

5. See, e.g., WILLIAM G. BOWEN & DEREK C. BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000).

6. Sander, *supra* note 1, at 369-70. In his analysis, Professor Sander wholly ignores the criticism of undue reliance on the Law School Admission Test (LSAT) in the admissions process. See *id.* at 418-25; Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1070-79 (1997) (reviewing social science research that suggests the need for caution in relying predominantly on grade point average and test scores in admissions decisions); see, e.g., Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593 (2001); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1475-94 (1997); William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving “Elite” College Students*, 89 CAL. L. REV. 1055 (2001); see also Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996) (contending that there is a need to reconceptualize admissions standards for elite educational institutions); Robert Paul Wolff & Tobias Barrington Wolff, *The Pimple on Adonis’s Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate*, 55 HASTINGS L.J. (forthcoming 2005) (exploring critically the conception of merit in university admissions decisions).

Similarly, in looking at minority bar passage rates as a sign of problems with affirmative action, Professor Sanders fails to address the contention that bar examination testing itself reflects racial and socioeconomic biases. See Sander, *supra* note 1, at 442-54. See, e.g., William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547, 569-81 (2004).

7. Sander, *supra* note 1, at 425-68. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice Thomas made a similar argument, contending that “overmatched [minority] students . . . find that they cannot succeed in the cauldron of competition.” *Id.* at 372 (Thomas, J., concurring in part, dissenting in part).

end race-conscious admissions programs, which by his account would increase the number of African-American lawyers.⁸

As Professor Sander contends, African-American underrepresentation among the law student population is a problem that must be viewed systemically, with admissions decisions at the elite law schools unquestionably having ripple effects on black enrollment at law schools across the country.⁹ Professor Sander, however, does not focus his analytical skills on remedying the underrepresentation of African Americans in law schools. Rather, he finds himself in distinguished company in questioning affirmative action as a matter of policy.¹⁰ Future opponents of affirmative action¹¹ will undoubtedly prefer policy-based arguments in the wake of the Supreme Court's reaffirmation of *Regents of the University of California v. Bakke*¹² in the 2003 *Grutter v. Bollinger* decision, reasoning that carefully crafted, race-conscious affirmative-action programs in the pursuit of a diverse student body may be constitutional.¹³

In concluding that affirmative action is detrimental to African Americans, Professor Sander fails to articulate policies that might be pursued to diversify the student bodies of U.S. law schools if, as he suggests, race-conscious programs are abolished. Nor does he seem to be concerned in the least about the racial diversity of student bodies and the impacts of the lack of diversity on the learning environment of the minorities who in fact do enroll in law school.

Challenging questions also can be directed at specific aspects of Professor Sander's study. Importantly, his empirical work has been criticized as not

8. See *infra* text accompanying notes 19-38.

9. See Sander, *supra* note 1, at 151 (“[A]ffirmative action in American law schools is not so much a set of policies adopted by individual schools, but instead a *system* in which the freedom of action of any single school is largely circumscribed by the behavior of all the others.”).

10. See *infra* note 34 (citing authorities).

11. See Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Constitutionalizing and Defining Racial Equality: In Defense of Deference*, 21 CONST. COMMENT. 133, 136 (2004) (contending that the Supreme Court's 2003 affirmative action decisions “are properly understood as representing the proposition that affirmative action in higher education—and perhaps race-conscious state action more broadly—is centrally a question of public policy and less so a question of constitutional law”); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 273-78 (1997) (contending that constitutionality of affirmative action is akin to a nonjusticiable “political question”).

12. 438 U.S. 265 (1978). For a brief summary of the evolution of the Supreme Court's decisions on race-conscious affirmative action, see Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 61-66 (2004).

13. Compare *Grutter*, 539 U.S. 306 (finding that the University of Michigan Law School's affirmative action program, which considered an applicant's entire application and including race as one factor, passed constitutional muster), with *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that Michigan's undergraduate point system scheme, which gave large number of points to minority applicants, failed to satisfy constitutional standards). For analysis of the implications of the Court's decisions, see Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003).

supporting the robust conclusions that he draws from it.¹⁴ For example, Professor Sander states unequivocally that “[i]t is impossible to explain the admissions outcomes at the [Michigan] law school, or at any other law school . . . examined [in the article], unless the schools are either adding points to the academic indexes of [B]lacks or separating admissions into racially segregated pools.”¹⁵ However, the various disparities might well be explained by the information gleaned from individual review of each application and the consideration of difficult to quantify variables such as extracurricular activities, community involvement, leadership abilities, and disadvantages overcome.¹⁶ Professor Sander’s study fails to account for such considerations.

This analysis of Professor Sander’s article makes two points. First, we contend that the focal point of “A Systemic Analysis of Affirmative Action in American Law Schools” is unduly narrow. Rather than propose, as Professor Sander does, that affirmative action injures the relatively few African Americans who attend law school, we believe that a more constructive endeavor would be to consider what policies will further efforts to more fully diversify law schools and attempt to ensure educational opportunity. To do so, Professor Sander should engage in an open and honest dialogue about the problem of minority underrepresentation in law schools. In considering what policies would encourage diversity, we discuss the limited impact of affirmative action. We also point out that the law school admissions process in reality differs dramatically from that described by Professor Sander and his charges of a lack of candor about the salience of race in admissions decisions today stem in no small part from his mischaracterization of the process.¹⁷

Second, we examine critically Professor Sander’s assumption that relatively lower UGPAs and LSAT scores explain why African Americans fail to fare as well academically in law school as their white peers. He neglects to account for the well-documented hostile environment faced by African-American, and other minority, students in law school and how it may adversely affect academic performance.¹⁸ Professor Sander also fails to take into consideration the time many African-American students spend on activities related to racial climate to further the cause of their community, thereby reducing the time that they are able to commit to academic study.

Assuming that African Americans do not perform as well academically in law school as Whites, it might be the result of the hostile law school

14. See, e.g., 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. (forthcoming 2005) (manuscript on file with authors), available at <http://www.equaljusticesociety.org/research.html>.

15. Sander, *supra* note 1, at 481.

16. See *infra* text accompanying notes 55-67.

17. See *infra* text accompanying notes 55-67.

18. See *infra* text accompanying notes 68-128.

environments in which African Americans find themselves and time-consuming, race-based leadership responsibilities, not that they are any less “qualified” upon admission than the rest of the student body. Thus, without accounting for these possibilities, the drawing of any conclusions from Professor Sander’s study is hazardous at best.

I.

THE FUNDAMENTAL PROBLEM: THE UNDERREPRESENTATION OF RACIAL MINORITIES IN LAW SCHOOLS

Racial minorities are seriously underrepresented in law schools across the country and among the practicing bar.¹⁹ Where permitted, affirmative action is one modest measure taken in an attempt to ensure diverse student bodies and, in the end, hopefully to increase the number of minority attorneys. Although adopted with the best of intentions, affirmative action and related programs have not been very successful at achieving their goals.²⁰ According to Census 2000, Blacks, Latina/os, and Asian Americans each comprise 4% or less of the nation’s total lawyers, a fraction of each group’s portion of the total population.²¹

Affirmative action in higher education has been a topic of much debate in recent years. In California and Texas, the end of race-conscious affirmative action in the 1990s resulted in a robust public policy discussion of how to avoid the resegregation of the public universities.²² California, Florida, and Texas adopted “percentage plans” in which the top percentages at every high school in the state were made eligible for admission to the respective state’s public universities.²³

19. See *infra* text accompanying notes 39-54.

20. See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 501-06 (1996); see also Angela I. Onwuachi-Willig, *Moving Ground, Breaking Traditions: Tasha’s Chronicle*, 3 MICH. J. RACE & L. 255 (1997) (critically analyzing reasons why law firms hire so few African Americans).

21. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005, at 385 (124th ed., 2004) (Table No. 597).

22. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (upholding Proposition 209, which barred consideration of race in any California state program, to constitutional challenge); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied sub nom.*, *Thurgood Marshall Legal Soc’y v. Hopwood*, 518 U.S. 1033 (1996) (holding that diversity rationale for affirmative action in *Bakke* had been overruled by subsequent Supreme Court decisions). For analysis and criticism of Proposition 209, see Spann, *supra* note 11.

23. See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY* 67-74 (2002) (discussing the political movement for the Texas percentage plan). For critical analysis of the percentage plans, see Jennifer L. Shea, Note, *Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions*, 78 IND. L.J. 587 (2003); Michelle Adams, *Isn’t It Ironic? The Central Paradox at the Heart of “Percentage Plans,”* 62 OHIO ST. L.J. 1729 (2001); Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2517-38 (2003)

In his article, Professor Sander misses the opportunity to investigate what can be done to fully integrate law student bodies and, in fact, does not concern himself with racial diversity in law schools. Instead, he purports to establish that affirmative action is detrimental to African Americans and denigrates the efforts of law schools to ensure a diverse student body.²⁴ Claiming that law school administrators conspire to hide the truth of racial preferences and avoid honest discussion of the issues, Professor Sander spends little time seeking to identify race-neutral strategies that might achieve the goal of racially integrated law schools.²⁵ Fully integrating the law schools, of course, is not an easy task, but one would expect that someone such as Professor Sander, who expresses a commitment to racial justice,²⁶ might offer alternatives to that end. Instead, Professor Sander criticizes one of the primary programs designed to ensure racial diversity in the law student body.

Nor does Professor Sander engage one of the central problems that attracted him to the study of affirmative action. He became “troubled” in the early 1990s when, in looking at the UCLA diversity programs, he found that they “had produced little socioeconomic diversity; students of all races were predominantly upper crust.”²⁷ This is not the universal perception among Professor Sander’s UCLA colleagues.²⁸ However, given this concern, one might expect Professor Sander to address it head on and offer possible reform proposals that further socioeconomic *and* racial diversity.

This section outlines why we must engage in a candid discussion about affirmative action and consider more far-reaching remedies to the lack of racial diversity in the nation’s law schools. Affirmative action as it works in admissions today is a limited tool to achieve diversity.

A. Open Dialogue and Honest Discussion

Although discussion of controversial public policy issues can be difficult, we encourage a constructive discussion on the pros and cons of affirmative action. Affirmative action—and university and professional school admissions generally—warrants serious and sustained analysis and continued monitoring to ensure that affirmative action is more than a crutch for administrators defending a relatively homogeneous student body by claiming that they are

(book review).

24. See *infra* text accompanying notes 29-38.

25. See *infra* text accompanying notes 39-67.

26. See Sander, *supra* note 1, at 370-72.

27. Sander, *supra* note 1, at 371 (footnote omitted).

28. See Karst, *supra* note 12, at 72 (stating that not all “diversity-admitted minority students have come from elite backgrounds. I speak only of my own (large, urban, public) law school, but I suggest that anyone who wants to discuss this issue should ask Antonia Hernandez [who grew up in a housing project in East Los Angeles], the long-time distinguished leader of the Mexican-American Legal Defense and Educational Fund, about her elite background before she studied law at UCLA. Ask, and then look out.”).

doing all that they can to ensure diversity.²⁹

Despite a stated preference for dialogue, Professor Sander does not seem to be truly open to debate over the efficacy of affirmative action. He instead presents supposedly incontrovertible evidence that racial preferences in admissions are widespread and substantial and that law schools do not individually review the applications³⁰—propositions that most law schools would claim to be wholly inaccurate portrayals of their admissions process.

In a similar vein, Professor Sander understands “honest conversation” about affirmative action leading inexorably to the “most obvious solution” of “stop[ping the use of] racial preferences.”³¹ Again, his “obvious solution” is not self-evident to many. The abolition of racial preferences becomes even more problematic due to Professor Sander’s failure to offer any alternative designed to increase the racial diversity of the law student body. If affirmative action is eliminated, what are we to do in efforts to secure diverse student bodies in law schools? Or, if diversity should not be a concern, what is the justification for its abandonment?

Professor Sander in essence has locked himself into a position that makes it difficult for those who do not share his views to engage in a constructive dialogue with him. Rather, his article, which appears to be indicative of his general approach to law school admissions issues,³² reads like nothing less than an academic ultimatum. This is not a particularly effective method for encouraging constructive discussion of a sensitive policy matter such as affirmative action.

Moreover, the facts belie Professor Sander’s claim that there is no real debate ongoing about the efficacy of affirmative action. The end of affirmative action in California and Texas, along with the Supreme Court’s decisions in the University of Michigan cases, contributed to a robust national discussion of the issue over the last decade.³³ Academic debate over, including much criticism of, affirmative action continues.³⁴ Indeed, voters in California³⁵ and

29. See *Grutter v. Bollinger*, 539 U.S. 306, 354-55, 369-70 (2003) (Thomas, J., concurring in part, dissenting in part); Kevin R. Johnson, *Constitutionalizing and Defining Racial Equality: The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 184-85 (2004).

30. See Sander, *supra* note 1, at 482.

31. *Id.* Professor Sander also suggests limiting race-conscious affirmative action so as “to prevent black enrollments from falling below 4% of total enrollment.” *Id.* at 483. The only difference between this proposal and the wholesale abolition of affirmative action is that it would have less of a negative impact on minority enrollment. It would do nothing to *increase* minority enrollment and would do little, if anything, to improve—and likely would worsen—the learning environment for minorities in law school.

32. See *supra* text accompanying notes 1-3.

33. See *supra* text accompanying notes 9-13.

34. See, e.g., RICHARD D. KAHLENBERG, *THE REMEDY* (1996); PETER H. SCHUCK, *DIVERSITY IN AMERICA* 134-202 (2003); Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839 (1996); Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893 (1994); Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV.

Washington³⁶ eliminated affirmative action. Much public attention was paid to the University of Michigan affirmative action cases, with heated controversies about affirmative action gripping college and university campuses across the United States.

Professor Sander ignores the ferment, perhaps because of his unhappiness with the Supreme Court's resolution of the Michigan cases in 2003, particularly the decision in *Grutter* upholding the constitutionality of the University of Michigan Law School's race-conscious admissions program. His article reads as a response of sorts to the Court's reasoning in *Grutter* and to the law school's justification of its admissions scheme. Publicly, the article has been treated as an empirical challenge to the Court's validation of affirmative action.³⁷

Ultimately, Professor Sander provides no advice to law school admissions officers on how to ensure against the resegregation of public law schools.³⁸ His only prescription is to do away with affirmative action, which is not an issue in the University of California system where race-conscious admissions are unlawful. In sum, Professor Sander's entire approach seems antithetical to an honest and open dialogue on affirmative action.

B. *Affirmative Action as a Limited Remedy*

Severe underrepresentation of minorities can be found in legal education, the bar, and judiciary. While affirmative action is one tool for increasing the number of underrepresented minorities in colleges and universities, including professional schools, across the United States, it most clearly is not a silver bullet that ensures that American college campuses actually reflect America.

Proponents have offered two distinct rationales for race-conscious affirmative action: (1) to diversify the student body, the reason accepted by the Supreme Court;³⁹ and (2) to remedy past discrimination.⁴⁰ To avoid potential

2059, 2070-76 (1996). For sustained analysis—some favorable, some not—of one commentator's criticism of affirmative action, see Symposium, *Assessing Peter Shuck's Diversity in America: Keeping Government at a Safe Distance*, 23 YALE L. & POL'Y REV. 1 (2005).

35. See *supra* text accompanying note 22.

36. See *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (dismissing as moot a challenge to university affirmative action program because voters had passed initiative prohibiting race-conscious programs of this type).

37. See *supra* note 2 (citing authorities).

38. See *supra* text accompanying notes 22-23 (discussing efforts in California and Texas to avoid such resegregation after end of race-conscious admissions).

39. See *Grutter*, 539 U.S. at 327-33; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-15 (1978) (Powell, J.).

40. See *City of Richmond v. Croson*, 480 U.S. 469, 509-11 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280-83 (1986) (plurality); see also Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000) (contending that, to remedy past discrimination by the state, public universities in California should adopt affirmative action

liability and the need to admit their own discriminatory history, institutions often prefer to assert a diversity rather than a remedial rationale for affirmative action.⁴¹

Perhaps not surprisingly, the diversity justification for affirmative action has prevailed. However, the Supreme Court's endorsement of the diversity rationale in *Grutter*⁴² has been criticized on the ground that it fails to ensure true racial diversity in law schools and is not aggressive enough to address the institutional discrimination in U.S. social life.⁴³ Opponents have criticized any race-conscious admissions scheme as impermissible—and unconstitutional—racial discrimination.⁴⁴

Importantly, decades of affirmative action have not significantly diminished the problem of African-American underrepresentation in universities. As is often repeated, more young black men reside in prison than attend college.⁴⁵ Not surprisingly, African Americans are woefully represented among law school student bodies. For example, in recent years, the University of Michigan Law School, even with affirmative action, has enrolled classes that were less racially diverse than U.C. Berkeley, which has been prohibited from considering race as a factor in admissions decisions since 1996.⁴⁶ This made it somewhat ironic that Michigan became the poster child for affirmative action

programs); Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703 (1999) (asserting that Colorado should also adopt affirmative-action programs).

41. See William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 LA RAZA L.J. 173, 174-75 (2001).

42. 539 U.S. 306. For analysis of the courts' move from a remedial—to diversity—based justification for affirmative action, see Robert Westmoreland, *A New and Improved Affirmative Action?*, 72 U. CIN. L. REV. 909 (2004).

43. See Bryan K. Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 TUL. L. REV. 1843 (2004); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191 (2004); Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221 (2004).

44. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J.) (concurring in part, concurring in the judgment) (“To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.”); *id.* at 240, 241 (Thomas, J., concurring in part, concurring in the judgment) (“In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.”) (footnote omitted).

45. See Fox Butterfield, *Study Finds Big Increase in Black Men as Inmates Since 1980*, N.Y. TIMES, Aug. 28, 2002, at A1 (reporting on study showing that “[t]he number of black men in jail or prison ha[d] grown fivefold in the past 20 years, to the point where more black men are behind bars than are enrolled in colleges or universities”).

46. See *Grutter*, 539 U.S. at 367 (Thomas, J., concurring in part, dissenting in part). Interestingly, since the Court decided *Grutter*, the enrollment of African Americans and Latina/os at many undergraduate institutions has declined. See Jeffrey Selingo, *Michigan: Who Really Won?*, CHRON. HIGHER ED., Jan. 14, 2005, at A21.

For a study of the controversy surrounding the dismantling of affirmative action at U.C. Berkeley's law school, see ANDREA GUERRERO, *SILENCE AT BOALT HALL* (2002).

after the Supreme Court's 2003 decisions.

Many prestigious law schools have student bodies with relatively few African-American students.⁴⁷ In recent years, the four public law schools in California have been among this group—UCLA (1.7% of the student body), U.C. Davis (2.4), U.C. Berkeley (2.7), and U.C. Hastings (3.4); other elite schools with low African-American enrollment include Washington (1.8%), Texas (2.3), Minnesota (2.5), Chicago (3.4), Boston University (3.5), and Colorado (4.0).⁴⁸ This means that a handful (or less) of African Americans attended these schools. Indeed, only one African American enrolled at U.C. Berkeley law school in 1997.⁴⁹ In the 2003-04 academic year, African Americans comprised about 6.9% of all law students at U.S. law schools⁵⁰ compared to representing approximately 15.5% of the U.S. population.⁵¹ The data reflect a significant underrepresentation of African Americans—as well as Latina/os⁵²—in U.S. law schools.

Many explanations have been offered for the lack of African Americans, Latina/os, and Native Americans in law schools, beginning with the fact that they are underrepresented among undergraduate student populations. As was the case for public schools generally, segregation in professional schools did not end until relatively recently in U.S. history.⁵³ Many factors perpetuate the past segregation. Educational disadvantages for many minorities in elementary and secondary public schools limit minority enrollment in colleges and universities. Economic disparities also contribute to the status quo; African Americans, Latina/os, Native Americans, and certain Asian-American

47. See Chambers et al., *supra* note 14 (manuscript at 9, Table 2) (listing over fifty schools where African Americans comprised from 0% to 4% of the student body).

48. See *id.* In light of the small number of African Americans in law schools, it is difficult to see how race-conscious admissions could have much of an impact on white applicants. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002).

49. See Jocelyn Y. Stewart, *Black Colleges Woo Students Alienated by Prop. 209*, L.A. TIMES, Nov. 25, 1997, at A1. The lone black student had deferred admission a year after having been admitted in 1996. See *id.*

50. See LAW SCHOOL ADMISSION COUNCIL & AMERICAN BAR ASSOCIATION, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 2005 EDITION 828, 830 (2004) (Appendix A).

51. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2004-2005, at 16 (2004) (Table No. 15).

52. See Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 617 (1998) (“The real tragedy . . . is the low numbers of Chicano/Latino students in graduate schools, which in turn reflects the low number of Latino undergraduates in colleges and universities. Instead of eliminating affirmative action programs in admissions, we should be increasing our efforts to bring more Chicano/Latino students into graduate school . . .”) (footnote omitted).

53. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that University of Texas Law School must admit African-American applicants despite state law barring admission of African Americans); see also Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 955-56 (2004) (stating that Judge Edwards was the only African American in his entering class at the University of Michigan Law School in 1962).

populations are overrepresented among the poor in the United States.⁵⁴

We live in a deeply segregated society, with segregated neighborhoods, schools, and workplaces. Segregated colleges and universities flow from American apartheid and perpetuate future segregation in U.S. social life. Even if one assumes that affirmative action is not the answer to ensuring educational opportunity in higher education, the question then is what policies and programs will help increase the numbers of minority students in law school. Professor Sander, in his apparent quest to eliminate the last remnants of race-conscious affirmative action, fails to discuss this all-important question.

C. *The Reality of the Admissions Process at Law Schools*

In criticizing race-conscious admissions, Professor Sander accuses law schools of dishonesty in admitting the true role played by race in the admissions process.⁵⁵ He is not alone in suggesting that deception and distortion, rather than dialogue and debate, surround affirmative action.⁵⁶ However, given what is known about generally accepted admissions practices and procedures, a closer examination of the admissions process followed by most universities reveals that it may well be the case that administrators are simply telling the truth, rather than attempting to conceal anything. Moreover, they are attempting to enroll racially diverse student bodies, a legitimate goal for which Professor Sander fails to offer strategies to effectuate.

At least in any race-conscious admissions program, the Supreme Court requires individualized review of each application, which is the policy at many major universities, including the University of Michigan Law School.⁵⁷ Such review generally requires the consideration of an array of often incommensurable factors in the admissions process as opposed to exclusive

54. See Peter Edelman, *Beyond Welfare Reform: Economic Justice in the 21st Century*, 24 BERKELEY J. EMP. & LAB. L. 475, 483 & nn.30-31 (2003).

55. See Sander, *supra* note 1, at 83-87.

56. See Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3, 11 (2004); Lino A. Graglia, *Grutter and Gratz: Race Preference to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of Pursuing "Diversity,"* 78 TUL. L. REV. 2037, 2048 (2004); Abigail Thernstrom & Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, 21 CONST. COMMENT. 251 (2004). In his dissent in *Grutter*, Justice Thomas expresses a similar distrust of, if not disdain for, law school administrators who seek racial diversity among the student body. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part, dissenting in part) ("I believe [B] lacks can achieve in every avenue of American life without the meddling of university administrators. . . . Racial discrimination [in the form of affirmative action] is not a permissible solution to the self-inflicted wounds of [an] elitist admissions policy.").

57. See *Grutter*, 539 U.S. at 336-37 ("The Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."); *Gratz v. Bollinger*, 539 U.S. 244, 271-72 (2003) (criticizing undergraduate race-conscious admissions scheme for failing to provide meaningful review of each individual file).

reliance on numerical indicators alone.

Decisions made in this particularized fashion are by their nature difficult to explain as being based on a single factor, such as the race of the applicant, or made quantifiable in a way that an empiricist might desire. In such a multivariate process, one generally cannot be certain with precision how important any single factor or set of factors are in a specific admissions decision.

Although UGPAs and LSAT scores are numbers, which make comparison among applicants an easy task, “soft” factors, such as extracurricular activities, community involvement, leadership abilities, and disadvantages overcome, are not easily quantifiable; nor are we aware of law schools that attempt to quantify such considerations in the admissions process. Consequently, “soft” factors are difficult for an empiricist to factor into an empirical analysis of law school admissions, which may explain why Professor Sander’s study fails to consider them.

Difficulties in isolating the significance of race in an admissions decision are exacerbated because, at many law schools, such decisions are made by a committee. This form of decision-making makes it difficult to isolate any factor, or set of factors, for a single admissions decision, much less scores of them. For schools that employ race-conscious admissions programs, it would be a near impossibility to estimate quantitatively—in the way that an empiricist such as Professor Sander would accept—how significant a role race played in a committee’s admissions decision.⁵⁸ Anybody who has been involved in such decisions in all likelihood would be flummoxed by the demand that he or she attempt to perform such an exercise.

In an extended footnote, Professor Sander claims to offer a “word in defense of admissions officers;” he suggests that 90% of their work amounts to sorting the applicants into “admit” and “deny” categories based on UGPA and LSAT score.⁵⁹ Professor Sander further states that admissions officers also frequently “spend a great deal of time and effort on minority outreach, perhaps reasoning that the larger the applicant pool from which they can draw, the smaller the numeric boost they will have to give minority applicants to achieve the requisite racial diversity.”⁶⁰ Although there may be a grain of truth to Professor Sander’s brief rendition of the facts of admissions procedures, the process is much more complex in ways that he wholly ignores. Admissions

58. Cf. Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1 (1988) (analyzing difficulties in establishing discriminatory intent in land use decisions by local government bodies); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 661-72 (1995) (studying similar problem in scrutinizing initiatives passed by voters).

59. Sander, *supra* note 1, at 410 n.118.

60. *Id.*

officers sort large numbers of applications, as he says; however, many schools have committees responsible for reviewing applications and making final dispositions. At U.C. Davis, for example, the Director of Admissions and the Admissions Committee, composed of faculty and students, review each application, attempting to weigh the many factors listed in the law school admission procedures and criteria, including UGPA, LSAT score, advanced degrees, extracurricular activities, and other achievements, accomplishments, and skills.⁶¹

After the passage of Proposition 209 in 1996,⁶² which bars racial preferences in the admissions process in California, U.C. Davis School of Law revised its admissions procedures and criteria to ensure compliance with the law. Pursuant to this revision, race is not a factor in the admissions decisions at U.C. Davis. The Admissions Committee is not in the ordinary course provided information about any applicant's race. However, the committee may consider:

[a]chievements . . . despite social, economic, or physical disadvantage, including specific experience of discrimination on the basis of characteristics such as race, ethnicity, immigrant status, gender, sexual orientation, religion, disability, and age. Consideration shall be given to individuals who, despite having suffered disadvantage economically or in terms of their social environment, or due to specific experience of discrimination, have nonetheless demonstrated sufficient character and determination in overcoming obstacles to warrant confidence that they can pursue a course of study to successful completion.⁶³

With the hope of avoiding a marked decrease in the diversity of the law school classes while complying with the law, U.C. Davis has expanded outreach efforts to underrepresented communities in recent years. Specifically, the Admissions Office has increased efforts to recruit students on campuses of the California State University system, which have much more diverse student bodies than the University of California undergraduate campuses.⁶⁴ The reason for such efforts is to attract a more diverse applicant pool, with the hope of increasing the diversity of the law school class enrolled.

With financial support from the Law School Admissions Council, U.C. Davis School of Law created the King Hall Outreach Program in order to offer skills training during the summers for socioeconomically disadvantaged undergraduates before they apply to law school; the program, which extends

61. See School of Law, University of California, Davis, Admissions Procedures and Criteria (rev. May 2000).

62. See *supra* text accompanying note 22.

63. School of Law, *supra* note 61.

64. For example, Whites comprised less than 46% of the student body at California State University, Fresno in the fall of 2003, with Latina/os, Asian Americans, and African Americans highly represented. See *Trends in Ethnic Enrollment*, in CALIFORNIA STATE UNIVERSITY (FRESNO) OFFICE OF INSTITUTIONAL RESEARCH, STUDENT DATA BOOK (2004), available at <http://www.csufresno.edu/ir/SDB/tables/table%2006.htm>.

over several years, is designed with the hope of improving the students' law school admission prospects by offering extended writing, application, and Law School Admission Test instruction. Several students have successfully completed the program and attended law school.⁶⁵

It is true that U.C. Davis Law School's efforts to achieve a racially diverse student body are hampered by the inability, due to Proposition 209, to consider race in any way in the admissions process. But rather than abandon the hope of a diverse student body, U.C. Davis, like other public law schools in California, has pursued race-neutral means in an attempt to avoid enrolling less diverse law school classes.

The results have been mixed. While the number of applications at U.C. Davis School of Law has risen dramatically to a record of nearly 4,400 applications for the 190 seats entering the law school in the fall of 2003,⁶⁶ the number of African Americans comprised only 3.2% of total J.D. enrollment during the 2003-04 academic year. The same year, the total minority enrollment was more than 35% of the student body.⁶⁷ Clearly, in a race-neutral admissions world, enrolling African-American law students continues to be a formidable challenge.

Whatever the strengths and weakness of the law school admissions at U.C. Davis, there is no lack of honesty or candor about the process. However, if pressed, it would be difficult to explain decisions based on multiple variables in applications that are reviewed individually by a group of people who bring different perspectives to the admissions process. That difficulty, however, should not be reflexively labeled as bad faith. Impugning the good faith of admissions professionals and others acting in good faith to comply with the law in pursuit of a racially diverse student body, does little good to open up the dialogue and debate about affirmative action, much less make it more "honest."

The real criticism, it seems to us, is not that covert affirmative action is going on in California or that racial preferences are over-emphasized at schools outside of the state. Rather, the problem is that law school student bodies are not as diverse as they should be. This state of affairs contributes to the hostile environment that minority law students perceive at law schools across the United States.

65. For information about the King Hall Outreach Program, see http://www.law.ucdavis.edu/outreach_index.asp. The University of New Mexico Law School also attempts to increase the number of minority applicants in the "pipeline." See Symposium, *Who Gets In? The Quest for Diversity After Grutter*, 52 BUFF. L. REV. 531, 564-69 (2004) (comments of Professor Margaret E. Montoya).

66. See LAW SCHOOL ADMISSION COUNCIL & AMERICAN BAR ASSOCIATION, *supra* note 50, at 157.

67. *Id.* at 154.

II.

THE EFFECT OF A HOSTILE LAW SCHOOL ENVIRONMENT ON MINORITY PERFORMANCE IN LAW SCHOOL: AN ALTERNATIVE EXPLANATION TO PROFESSOR SANDER'S "MISMATCH" HYPOTHESIS

Besides failing to propose any alternatives to race-conscious admissions programs to cure the lack of diversity in law schools, Professor Sander entirely disregards the impact of environment on the law school performance of African-American students. Even if we assume that Professor Sander's social science is reliable, his numbers simply do not tell the entire story.

Even when the LSAT scores and UGPAs of African-American law school students are similar to those of their white peers, black students do not receive law school grades that are comparable to those of their white counterparts.⁶⁸ Professor Sander, who relies heavily, if not exclusively, on numerical indicators of merit, fails to analyze this important fact, which suggests that the academic performance of African-American law students results from the environment in which those students learn the law, not any "mismatch" of qualifications between the student and the law school. As this section will demonstrate, a wide range of factors work to undermine the academic performance of African-American students in law schools, including feelings of alienation and isolation, the amount of study time that African-American law students lose as a result of the hostile environment, and simply recovering from feeling devalued and attacked both inside and outside of the classroom.⁶⁹

A. The Experiences of Racial Minorities in Law Schools

As an African-American woman who recently graduated from Harvard Law School explained, "The problem is not so much the entry; it's what happens while you're there [Y]ou're more likely to feel isolated and marginalized, and feel like 'nobody gets my experience.' That, in turn, can undermine a student's confidence."⁷⁰ Environmental factors affect not only African-American students but also Latina/o students, Asian-American

68. See generally Chambers et al., *supra* note 14 (manuscript at 5, 15-16, 19-21) (noting how Professor Sander switched data sets in his article instead of basing his predictions on one data set when his initial data set did not match the results he desired); Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711, 736-45 (2004) (offering empirical support for claim that law school environment affects minority students' academic performance).

69. See Walter R. Allen & Daniel Solorzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 LA RAZA L.J. 237, 275-303 (2001); Onwuachi-Willig, *supra* note 20, at 259-60, 274-75.

70. Katherine S. Mangan, *Does Affirmative Action Hurt Black Law Students?*, CHRON. HIGHER EDUC., Nov. 12, 2004, at 35 (quoting former law student).

students, and students who begin law school when they are thirty or older.⁷¹

The impact of environment on students of color in law school, particularly the effects of unconscious racism⁷² on minority students' feelings of belonging and their actual performance, is well-documented. For example, a study of the impact of race and gender on the experiences of law students at the University of Florida found that "[c]lassroom culture, methods, teacher-student interaction, student-student interactions, evaluation methods, and other factors make the experience and quality of legal education significantly different on the basis of race"⁷³ Race had an impact on minority students' level of comfort in the classroom.⁷⁴ Specifically, although only 28% of white students agreed that discussions in class made them feel uncomfortable, almost 43% of African-American students agreed with this statement.⁷⁵ In addition, although a majority of white students did not think that race mattered in the classroom, the majority of African Americans disagreed.⁷⁶ They believed that there were not enough professors of their own race to serve as role models and that race influenced the way that students were treated in class.⁷⁷ African-American students also reported that they were more likely to speak in a class taught by a same-race professor and that they ordinarily were more comfortable with the teaching approach of a same-race professor.⁷⁸

Brian Owsley, an African-American graduate of Columbia Law School, recounted many similar burdens in his description of the difficulties that African-American students consistently faced during their legal education,⁷⁹ most notably intense feelings of isolation and depression. Latina/o and Asian-American law students, including successful ones who later became law professors, have also reported feelings of alienation, anomie, and hostility in law school. Professor Margaret Montoya wrote eloquently of her deep alienation as a student at Harvard Law School, where she felt that the experiences of a Latina criminal defendant were not "relevant" to class

71. See Chambers et al., *supra* note 14 (manuscript at 5, 21).

72. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329-44 (1987) (explaining the nature of unconscious racism).

73. Nancy Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 J.L. & PUB. POL'Y 11, 34 (2003) (also cited as 15 U. FLA. J.L. & PUB. POL'Y 11); see Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 3-4 (1998) (finding that students of color participate in class discussion more frequently in classes taught by professors of color or with larger numbers of students of color in them).

74. See Dowd et al., *supra* note 73, at 26.

75. See *id.*

76. See *id.* at 27-30.

77. See *id.*

78. See *id.*

79. See Brian Owsley, *Black Ivy: An African-American Perspective on Law School*, 28 COLUM. HUM. RTS. L. REV. 501 (1997).

discussion.⁸⁰ Similarly, Dean Frank Wu has analyzed how the Asian American-as-foreigner and model minority myths permeate all aspects of U.S. social life, and influenced his educational experience.⁸¹

Even at U.C. Davis School of Law, where we teach and which is known for its student-friendly environment, minority students may feel isolated and unsupported.⁸² A study of U.C. Davis law students made findings that mirrored those of the study at the University of Florida,⁸³ including the perception of minority students that race affected the way a student was treated in the classroom.⁸⁴ Much like in the Florida study, the U.C. Davis study revealed that African-American students reported the least positive feelings toward faculty and the most pressure to set aside their values during law school.⁸⁵

In his article, Professor Sander neglects to address the possibility that minorities find themselves in a hostile environment during law school and fails to recognize how debilitating an unconscious act of racism can be to a minority student. For example, when a professor calls on an African-American student to answer a “black” question, that one incident may immobilize a student for hours, or perhaps even days:⁸⁶ specifically, when a professor asks one of few African-American students in class why African-American people act a certain way or why they hold certain views—as though the student can speak for his or her entire race.⁸⁷ That student may spend hours after class recounting the incident; rethinking how he or she should have responded to the question;

80. See Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking The Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1, 18-26, 17 HARV. WOMEN'S L.J. 185, 201-10 (1994) (“While I was at Harvard, my voice was not heard again in the classroom, examining, exploring or explaining the life situations of either defendants or victims As time went on, I felt diminished and irrelevant. It wasn't any one discussion, any one class or any one professor.”); see also KEVIN R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY 10-51 (1999) (discussing his profound sense of alienation at Harvard Law School).

81. See FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 39-129 (2002).

82. See Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. (forthcoming 2005) (manuscript at 1-2 n.5, 14, 27, on file with the authors).

83. See *supra* text accompanying notes 73-78.

84. See Cassman & Pruitt, *supra* note 82 (manuscript at 52).

85. See *id.* (manuscript at 41, 46); see also Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2282, 2298 (2000) (quoting a student who described the silencing that minority students may feel because most of their professors are white males).

86. See Owsley, *supra* note 79, at 524 (“It’s funny how [W]hites can turn on and off this whole dialogue, but once I get started, I’m so screwed up and freaked out by it I can’t concentrate or study.”); see also Moran, *supra* note 85, at 2303 (detailing the effects of the exclusion of minority students from law school study groups).

87. See Allen & Solorzano, *supra* note 69, at 277 (“[M]any students [who participated in a study at the University of Michigan Law School] indicated being racially singled out to explain how all people of their race think about a certain issue. For example, they are called upon in and out of class to give and defend the ‘minority’ opinion on racial topics.”).

wondering why an allied white student did not speak out against the question; feeling alone; pondering why an educated professor would pose such a question; asking himself or herself if he or she answered the question in a way that would negatively affect how others viewed African Americans;⁸⁸ and simply disbelieving that he or she even responded or felt forced to respond to the question in light of its racism.

Professor Sander further ignores the time lost by African-American students who combat racist comments or actions, time that their white peers can devote to studying. For example, African-American students might find themselves spending precious time combating claims by white students that the one black professor in the entire law school would give the African-American first-year students a higher grade, an unfounded claim that was made by white students at Columbia Law School during Brian Owsley's years there; as he stated, "while white students believed that [Professor] B would give black students a higher grade, they did not believe white professors would favor white students."⁸⁹

African-American students also might find themselves spending significant time addressing issues of race at the law school or devoting countless hours in leadership positions that are directly tied to race, many of which do not receive the prestige or financial support accorded to other law school organizations, such as a school's main law review. Consider this incident: while one of the co-authors was a student at the University of Michigan Law School, the office door of an African-American law professor at the law school was defaced with the phrase, "Nigger Go Home."⁹⁰ In response, the Dean of the law school expressed his shock and dismay and his certainty that a member of the law school community was not responsible. Such comments left many students of color, especially African-American students (few of whom were surprised by the incident or certain that no law student or professor had written the comments), feeling even more alienated. The racial slur spurred student action.⁹¹ Students of color and sympathetic white students,

88. See *id.* at 278 (asserting that many minority law students in the study reported that "they believe[d] they [were] responsible for representing their race every time they succeed[ed] or fail[ed]" and that they were "not afforded the privilege to be seen as a positive individual in the midst of overwhelmingly negative ideas about their race").

89. Owsley, *supra* note 79, at 516-17. African-American students also felt forced, on occasion, to defend activities, such as review sessions, which were sponsored by the Black Law Students Association to decrease feelings of alienation among the African-American students. See *id.*

90. See Onwuachi-Willig, *supra* note 20, at 256-57 nn.2-3; see also Jennifer M. Russell, *On Being a Gorilla in Your Midst, Or, the Life of One Black Woman in the Legal Academy*, 28 HARV. C.R.-C.L. L. REV. 259 (1993) (recounting racist incident directed at an African-American woman faculty member).

91. See Onwuachi-Willig, *supra* note 20, at 257 n.3. Such activism has resulted in the creation of many journals devoted to issues of race and civil rights, such as the *Michigan Journal of Race and Law* and the *African-American Law & Policy Report*. In addition, minority law

who had already formed the Critical Race Theory Reading Group, spent many hours not only addressing the hate speech incident, but also working to create and sustain the *Michigan Journal of Race and Law*, an organization that many minority students viewed as necessary for their emotional survival in law school. Naturally, many of the white peers of these students, who did not feel so alienated or compelled to respond to the racist incident, had all of this time to focus on their classes. Students missed an estimated 1,352 hours of class time to establish the Michigan journal.⁹²

As Professor Patricia Williams has explained, acts of racism are common at law schools. Students of color regularly encounter problematic race-based hypotheticals in the classroom and even on their exams.⁹³ As one African-American law student summarized:

I am totally fed up with reading cases where many of the criminals are obviously black or Latino. It's about the only diversity we get in this school . . . I look around this school and I see hardly any black faces. I have no black professors, and no other black students in my section.⁹⁴

Indeed, in extreme circumstances, a student may avoid class, which is certain to undermine performance, as a means of emotional survival. As one black male student explained, "I skipped class [one] week because I knew what the conversation in the classroom discussion [on race] was going to be like and I was so upset by even the thought of it. I knew I couldn't go."⁹⁵

Microaggressions, subtle yet consistent slights and insults like these cause emotional damage, undermining the ability of minority students to perform well academically.⁹⁶ Even professors of color, who are presumably in positions of power in the class, have detailed the effects of consistent challenges by students in their own classrooms.⁹⁷ Repeated attacks on the competence and

students have devoted time to attempting to integrate law school faculties. See, e.g., Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements That Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 (2004) (documenting efforts of minority students to diversify faculty at U.C. Berkeley School of Law).

92. Telephone Interview with Maureen Bishop, Publications Manager, Student Journals Publication Center of the University of Michigan Law School (Feb. 22, 2005).

93. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 82-90 (1991); see also Moran, *supra* note 85, at 2289-91 (describing repeated frustrations by students of color with classroom discussions of white vigilante Bernard Goetz); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 46 n.117 (1994) (describing the silencing effects on African-American students of a professor's hypothetical that used the word "nigger").

94. Cassman & Pruitt, *supra* note 82 (manuscript at 52); see Beth L. Goldstein, *Little Brown Spots on the Notebook Paper: Women as Law School Students*, 84 KY. L.J. 983, 1021 (1995/96) (describing a minority student's horror at the professor's showing of a video with "black people . . . attacking white people").

95. Allen & Solorzano, *supra* note 69, at 287.

96. See generally Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (analyzing the impact of microaggressions on people of color).

97. See, e.g., Pamela J. Smith, *The Tyrannies of Silence of the Untenured Professors of*

fairness of minority professors of color only intensify the feelings of alienation felt by students of color who witness these dynamics play out in the classroom.⁹⁸

In this vein, one can only wonder whether Professor Sander considered the effects of his public promotion of his article on African-American students at UCLA, whose contact information was being hunted down by journalists who then called these students in their homes to ask them their opinions of Professor Sander's article, just weeks before law school finals?⁹⁹ What emotional harm did the publicity surrounding the article cause at such a crucial time? The African-American students undoubtedly experienced "one more troubling incident to ponder as a distraction during the examination period. Once again [their] attention was distracted from [their] purpose in being in law school."¹⁰⁰

B. *Additional Pressures on Minority Students: Stereotype Threat*

Professor Claude Steele's stereotype threat findings offer support for the claims that professors and law students of color suffer from pressures above and beyond those experienced by their white counterparts.¹⁰¹ In addition to feelings of isolation, the fear of poor performance that will confirm negative racial stereotypes undermines the actual performance of African-American students.¹⁰² Specifically, Professor Steele found in a study that African-American students, although statistically equal in ability to their white counterparts, performed more poorly on examinations when told that their

Color, 33 U.C. DAVIS L. REV. 1105, 1106-13 (2000); Reginald Leamon Robinson, *Teaching from the Margins: Race as a Pedagogical Subtext, A Critical Essay*, 19 W. NEW ENG. L. REV. 151, 152-181 (1997); Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor*, 6 BERKELEY WOMEN'S L.J. 81, 82-90 (1990); Rachel F. Moran, *The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503, 504-12 (1986); see also *supra* notes 90-92 and accompanying text (documenting racist incident involving faculty of color). For a study of the experiences of minority law professors, see Richard Delgado & Derrick Bell, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 359-61 (1989).

98. See Owsley, *supra* note 79, at 518-20; see also Allen & Solorzano, *supra* note 69, at 281 (quoting an Asian-American male student in the study as stating about a female Korean-American professor: "I was in the class and it seemed like people really didn't respect her at all. People attacked her all the time, much more than other professors.").

99. See Society of American Law Teachers Strategy Meeting, San Francisco, Cal., Jan. 8, 2005.

100. Owsley, *supra* note 79, at 537.

101. See 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* 109-30 (2003).

102. See Claude Steele, *Expert Report, Reports Submitted on Behalf of the University of Michigan*, 5 MICH. J. RACE & L. 439, 440, 444-46 (1999); see also Steele, *supra* note 101, at 117 (describing the same effects of stereotype threat on white male students, who should not 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).

ability was being tested.¹⁰³ On the other hand, when Professor Steele tested a different group of equally able African-American and white students and told them that the test was not a test of ability but was a problem-solving task,¹⁰⁴ the African-American students' performance matched that of their white counterparts.¹⁰⁵

Qualitative data supports the claim that stereotype threat adversely affects minority students. One Latina law student expressed that she was uncomfortable interacting with law professors because "I feel that the questions I have are stupid or that the professor will think I haven't read the material."¹⁰⁶ As another Latina student proclaimed, "I have to show that I'm smart enough to be here I feel I have to justify People are impressed if I do extra work because of the fact that they don't expect that [amount and quality of work] from somebody who's Hispanic."¹⁰⁷ Racial stereotyping disadvantages racial minorities by forcing them to "work" their identities to ensure that their actions counter harmful stereotypes within a particular context.¹⁰⁸ Many students of color bear the burden of having to consistently negate stereotypes about their communities.

Professor Sander concedes that "[s]tereotype threat' does appear to exist."¹⁰⁹ Yet, rather than address the impact of the law school environment on African-American achievement, Professor Sander exercises his privilege to ignore them,¹¹⁰ stating vaguely that "it is hard to pin down how much of the black-white gap proponents believe it explains."¹¹¹

103. See Steele, *supra* note 102, at 445, 447 (noting that "Black students performing a cognitive task under stereotype had elevated blood pressure"); see also Steele, *supra* note 101, at 114 (reporting that "Blacks performed a full standard deviation lower than [W]hites under the stereotype threat of the test being 'diagnostic' of their intellectual ability").

104. 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." Steele, *supra* note 102, at 445.

105. See *id.*

106. Cassman & Pruitt, *supra* note 82 (manuscript at 42 n.240) (quoting student); see Steele, *supra* note 102, at 445 (noting that stereotype follows its targets, affecting behaviors such as "participating in class, seeking help from faculty, contact with students in other groups, and so on").

107. Allen & Solorzano, *supra* note 69, at 277.

108. See Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260-62 (2000) (describing how members of subordinated groups must do extra identity work on the job to negate the imposition of harmful stereotypes associated with outsider group members); see also Steele, *supra* note 101, at 116 (noting in his study that "when Black students expected to take a test of ability, they spurned things African American, reporting less interest in, for instance, basketball, jazz, and hip-hop than [W]hites did" but "[w]hen the test was presented as unrelated to ability, Black students strongly preferred things African American").

109. Sander, *supra* note 1, at 424.

110. See Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 892 (1995) ("Members of privileged groups experience the comfort of opting out of struggles against oppression if they choose.").

111. Sander, *supra* note 1, at 424.

One must wonder why Professor Sander does not address the issue of what may be causing the underperformance of African-American students based on their numbers. After all, he acknowledges that, “[i]f anything, [B]lacks tend to underperform in law school relative to their numbers, a trend that holds true for other graduate programs and undergraduate colleges.”¹¹² If, as Professor Sander claims, the traditional predictors, especially the LSAT, are so reliable, why do they not predict the performance of African-American students? What other than environment could make African Americans underperform in relation to these predictors? Again, even if we accept Professor Sander’s claims about African Americans’ law school performance, the remainder of the story might well be the environment, not LSAT scores and UGPAs.¹¹³

Moreover, if these predictors do not work for African-American students, how, then, does one determine which schools are the best “match” for African-American students? This is critical to Professor Sander’s theory that affirmative action mismatches African-American students with law schools. In other words, given that environment plays a critical role in performance of African Americans at schools for which they are purportedly mismatched, why would such issues of environment not affect them at less elite schools? Indeed, to the extent that having a true “critical mass” assists in creating a friendlier environment for students of color, these lower tiered schools may prove to be more hostile, as they tend to be among the least diverse law schools in the nation.¹¹⁴

Finally, Professor Sander fails to adequately address studies that show that African-American law school graduates from the University of Michigan Law School, despite having entered with lower standardized test scores and having left with lower law school grades, achieved success equal to their white peers in terms of earned income and career satisfaction.¹¹⁵ Minority students not only paralleled their white peers in advancement to positions of status and career satisfaction, but even outperformed their peers in terms of community service.

112. *Id.*; see Olivas, *supra* note 6, at 1072-75 (“For minority students, moreover, studies by several admissions scholars reveal small or no meaningful statistical relationships between test scores and academic performance.”).

113. See Goodwin Liu, *A Misguided Challenge to Affirmative Action*, L.A. TIMES, Dec. 20, 2004, at B11. Studies have shown that white women, despite having similar entering statistics as men, “have fared worse academically than the men.” Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN’S L.J. 81, 92 (1996); see Guinier et al., *supra* note 93, at 21-28; Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN’S L.J. 1, 30, 39 n.109, 51 (1989-90).

114. See Vernellia Randall, *The 2004 Whitest Law Schools Report*, available at <http://academic.udayton.edu/race/03justice/LegalEd/Whitest/HWLS0403.htm> (last visited Mar. 20, 2005) (reporting that 7 of the 10 whitest law schools were in the third or fourth tier of law schools). Elite law schools actually tended to be among the most diverse law schools. *See id.*

115. See Lempert et al., *supra* note 5, at 401-02, 459-63, 492-503.

Professor Sander's only response to the Michigan study is that the benefits of affirmative action accrue solely to African-American students at the top of the law school hierarchy. As he puts it, "black graduates at Harvard and Yale have their pick of jobs. But in most of the job market, legal employers . . . seem to attach more weight to grades than school elitiness."¹¹⁶ To support his claim, Professor Sander presents evidence from his project "After the JD," which analyzes the effects of law school GPA on earnings (not law firm hiring) for students of all races and shows that the "second most-powerful predictor of earnings is not school prestige . . . but law school grades."¹¹⁷ From this finding, Professor Sander concludes that "affirmative action may pose a bad tradeoff for [B]lacks [because] the better brand names they secure through preferential admissions may not offset the lower grades they get (on average) as a consequence."¹¹⁸

Professor Sander fails to separate his findings on the effects of law school GPA on earnings by race. While he examines the t-Statistic for simply being Asian American, African American, and Latina/o and finds those variables to be insignificant in determining earnings, he does not separate his findings on the t-Statistic for law school GPA and earnings by race. As a result, we do not know if the t-Statistic based on grades or prestige varies by race. For example, it may be that, for African Americans, law school prestige matters much more than grades, and for Whites, who do not have to overcome any stereotypes of incompetence, grades matter much more than law school prestige. In other words, it may be that firms are willing to hire the white law student with high grades at the University of Missouri but are not willing to do the same for an African-American law student with similar grades.

As a practical matter, "[i]t is a mathematical impossibility for all persons hired by large law firms to measure up to their so-called hiring criteria. By definition of percentages, there just are not enough people in the top 10% or 25% [and on Law Review in classes at the top twenty law schools] to fill the hiring needs of large law firms."¹¹⁹ Law firms therefore must look at a broader pool of applicants to fill their entry-level positions. That firms may broaden their criteria to hire a few entry level people outside the elite law schools does not mean, however, that African Americans are or will be included in this latter group. Indeed, given that African Americans constitute only 3% of attorneys in the top 214 firms, we have little reason to believe so:

[Large law] firms hire the cream of the crop But after the cream of

116. Sander, *supra* note 1, at 107.

117. *Id.* at 189.

118. *Id.* at 190.

119. Daniel G. Lugo, *Don't Believe the Hype: Affirmative Action in Large Law Firms*, 11 LAW & INEQ. 615, 626 (1993); *see also* Wilkins & Gulati, *supra* note 20, at 505 (Today, the hiring needs of elite corporate firms are so great that their demand probably could not be satisfied if they hired every graduate in the top half of the class from the nation's top twenty law schools.).

the crop has been picked, those same firms hire graduates with lesser credentials in a category where there are many Blacks and they don't hire Black candidates When law firms deviate from their hiring criteria to hire sub-standard white applicants, this is viewed as a broadening of its consideration, but when there is deviation from these arbitrary criteria to hire persons of color, it is called and seen as a lowering of standards, or a "lowering of the bar."¹²⁰

In essence, Professor Sander fails to examine how the stereotype of black incompetence may make firms less willing to take a "risk" on an African-American student who is at a lower tiered law school with high grades than a white student with such grades from the same school or, as Professor Sander asserted, "to overcome the intrinsic reluctance of employers to give good jobs to black candidates."¹²¹ Indeed, as Professors David Wilkins and Mitu Gulati have explained, not only do African-American law students not get the same mileage as white law students out of traditional signals, such as good grades and Law Review, but factors such as the stereotype of black intellectual inferiority and black disinterest in corporate law also work against African-American law students during the interviewing process in ways that negatively impact their employment opportunities in large law firms.¹²² In fact, we wonder why Professor Sander did not provide what we believe would be the most convincing data of his claim regarding grades over prestige—an analysis that identifies the schools from which black lawyers at the top law firms have graduated.¹²³

Moreover, Professor Sander provides no qualitative data to support his claim that grades matter more than prestige, that "many employers exercise strong preferences for Blacks in their own hiring,"¹²⁴ and that employers "are already looking at lower-tier schools to find and hire [B]lacks with good

120. Lugo, *supra* note 119, at 627.

121. Sander, *supra* note 1, at 197; *see also* Wilkins & Gulati, *supra* note 20, at 555 ("Even black students with superstar credentials from lower status schools have little or no chance of being hired by a large firm."); Linda E. Davila, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403, 1413 (1987) ("According to the American Bar Association Journal, 'often white law students with average backgrounds are considered for positions when minority students with similar backgrounds are not.'").

122. *See* Wilkins & Gulati, *supra* note 20, at 560 ("Since hiring partners know that criteria such as grades are fuzzy, lawyers who are predisposed to believe that [B]lacks are less likely to be superstars than [W]hites can justify looking beyond the usual signals to reach a more subjective evaluation of the candidate's quality."); *see also* Davila, *supra* note 121, at 1412-17 (arguing that Latina/os are similarly prejudiced by race-based preconceptions).

123. *See* Wilkins & Gulati, *supra* note 20, at 561-62 (reporting the results of a survey from 250 elite law firms that revealed that, out of New York's large firms, 51% of the African-American associates graduated from either Harvard, Yale, Columbia, or NYU (with 24% of those associates being Harvard graduates), and out of Washington, D.C.'s large law firms, 52% of the African-American associates graduated from Harvard, Yale, or Georgetown (with 32% of those associates being Harvard graduates)).

124. Sander, *supra* note 1, at 107.

grades.”¹²⁵ Our own experience tells us that the higher ranked a school is, the more firms will travel to that school to recruit attorneys. For example, Harvard Law School will attract more recruiters than Cornell Law School, while Cornell will attract more firms than the University of Alabama, and so on. Furthermore, Professor Sander presents absolutely no evidence of interviews with the hiring coordinators or committees at law firms to demonstrate that these committee members indicate a preference for strong grades over prestige. For those of us who have worked at large law firms and who urged our firms to diversify the attorney workforce, the truth is all too saddening. Too often we were told, as we encouraged our firms to expand the schools that they interviewed at to include predominantly minority schools such as Howard University School of Law, that the “firm simply stopped recruiting at Howard several years ago because they previously hired one summer associate from there, one at the top of his class and on Law Review, and had a bad experience.”¹²⁶ Elitism mattered very much. The sad truth is that while many law firms talk the talk of diversity, very few of them walk the walk, as demonstrated by the extremely low percentages of attorneys of color at large law firms.

Ultimately, rather than ask law schools to do the hard work of figuring out how to make law school more welcoming and less isolating for students of color, Professor Sander chooses to blame students of color.¹²⁷ Professor Sander asks us to accept that it is not the culture of the law school that must change, it is not the diversity of the faculty that must increase, and it is not the faculty that must work to examine their own biases; rather, it is simply a matter of African Americans’ lack of qualifications compared to their white classmates that causes the gap between—the performance gap.

Sander would have us believe that rather than change the school to benefit all, it is the African-American students who must change, specifically by not entering the doors of the law school. However, the focus in law schools must “be on developing legal education that serves all students equally well by being

125. *Id.* at 198.

126. One of the authors was explicitly given this explanation during conversations about recruiting more attorneys of color. See also J. Cunyon Gordon, *Painting by Numbers: “And, Um, Let’s Have a Black Lawyer Sit at Our Table,”* 71 *FORDHAM L. REV.* 1257, 1267 (2003) (asserting that despite encouragement to “recruit outside the ‘usual suspects’ at historically black law schools such as Howard University,” his firm in Chicago never hired a law graduate from Howard); Allen & Solorzano, *supra* note 69, at 279 (noting the commonly held sentiment that when minorities succeed, they are considered to succeed as individuals but when “they fail, they fail as a group”); Wilkins & Gulati, *supra* note 20, at 572 (asserting that minority “group members will be tied together in the minds of members of the dominant group”).

127. See Dowd et al., *supra* note 73, at 36 (asserting that a focus on admissions standards necessarily deters “consideration of what happens once students are inside the door”); Liu, *supra* note 113 (arguing that Professor Sander’s claims about the racial achievement gap “distract[] us from seeking to improve the climate and quality of the educational experience in ways that enable all students to do their best”).

conscious of differences, context, and culture.”¹²⁸ That includes changes by professors of all races, who should be sensitive to how their actions may disparately hurt discrete segments of the law school population, and by all law schools, which should think carefully about the educational environment for minority law students.

CONCLUSION

Professor Sander has failed to prove that affirmative action hurts, rather than helps, African-American students. However, we welcome the examination of the causes of the performance gap between white and African-American students in U.S. law schools. Critical analysis of the ways in which law schools can work to achieve more than diversity and help create a less hostile environment for students of color is essential—with or without affirmative action.

Discussions of racial diversity can be difficult because they require institutions to conduct a painful inquiry into their contributions to the lack of diversity and a hostile learning environment for minority students.¹²⁹ Unfortunately, *no* law school should be immune from this self-assessment. In so doing, a law school should ask itself many hard questions including: What is its mission, what types of lawyers does it wish to produce, and how does it wish to serve not only its students but the greater community?¹³⁰ Has the law school made significant efforts in reaching out to communities that are largely invisible in its student body? Do the schools’ admissions criteria perpetuate the exclusion of minority students? Does the school give in to outside pressures, such as national rankings, which embrace the myth of one-law-school-fits-all?¹³¹ Has the law school hired minority professors to teach on the tenure track?¹³²

For professors, in particular majority professors, such introspection may prove especially painful because it will require self-critical analysis into how one personally may have contributed to a minority student’s negative experiences. Nevertheless, a professor should scrutinize his or her actions both inside and outside of the classroom and ask difficult questions such as the

128. Dowd et al., *supra* note 73, at 16-17.

129. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1277-79 (1992); see also *supra* text accompanying notes 39-41 (noting reluctance of universities to document their own history of discrimination to justify affirmative action on remedial grounds).

130. See Guinier, *supra* note 13, at 113, 206-24.

131. See 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. (forthcoming 2005) (manuscript at 65-69, on file with author); see also Guinier, *supra* note 13, at 155-57, 224 n.40 (noting admissions officers’ preference for applicants with high LSAT scores because of the positive impact on *U.S. News & World Report* rankings of law schools).

132. See Fischer, *supra* note 113, at 81, 87-88 (“For women and minorities, the small percentage of female and minority professors in law schools can be profoundly isolating.”).

following: If an African-American student raises a question about race in the class, does the professor ignore or dismiss it because he or she has no idea how to address the issue or is uncomfortable talking about race?¹³³ When discussing a case that involves the civil rights of a group to which the professor does not belong, does the professor constantly refer to that group as “they”—as though his or her group is the norm? Does the professor mentor students who share a similar racial background, or does he or she make a conscious effort to mentor all students, including those most likely to be marginalized within the law school?

Professors of color also should be careful to contribute positively to the experiences of minority students. For example, just as majority professors should, professors of color should inquire whether they teach criminal cases that have only African-American and Latina/o defendants in their classes? And if so, do they study these cases without examination of the ways in which race may have affected the case?¹³⁴ Or do the professors of color make an effort to connect with students of color who may specifically seek them out for advice, a time-consuming burden that is placed on many professors of color? Many of these environmental problems are deeply entrenched within the institutional culture of all law schools and will take enormous effort to overcome. Yet, even small remedies may make any law school situation more tolerable. For example, a law school may examine its portraits of alumni in the building to see whether it is inclusive of all who have been part of the law school community.¹³⁵ Certainly, nothing can be more alienating than entering into a law school for the first time, looking around at the walls, and seeing no reflection of oneself in the pictures surrounding them.

133. See Allen & Solorzano, *supra* note 69, at 279 (quoting a Latino student as stating “I remember trying to bring up the relationship with race, the torts issues, and those sorts of issues being minimized . . . and people not wanting to talk about those issues, those issues were being put under the rug”); see also *id.* at 279 (quoting another student as stating that “[i]n criminal law more than any place else, there’s race issues. And, [the professor] would avoid them at all costs” and one more as asserting “[i]n terms of race in the classroom, I . . . can think of at least two instances where race was an appropriate topic. It was very related to what we were discussing. What we should have been discussing. And the professor shut down that conversation and moved on very quickly.”).

134. We, of course, recognize that professors of color may, for the sake of their careers, make a conscious effort to limit discussions about race to avoid alienating majority white student bodies. As summarized by Professors Carbado and Gulati:

Assume that student evaluations play an important role in the tenure and promotion process Assume also that the student body is overwhelmingly white. If so, the professor might choose not to focus on—or even ignore—the racial aspects of the case Given the professor’s fears about what sort of assumptions the students might make if he talks about race, the professor might make the pragmatic choice to avoid race, for fear that talking about it would result in his receiving negative evaluations.

Carbado & Gulati, *supra* note 108, at 1284.

135. See Dowd et al., *supra* note 73, at 37-38 (discussing ways in which law schools may change).

In important ways, the problems of diversity are critically intertwined with the learning environment for minority law students. A true “critical mass” of minority students will improve the environment for students of color who already feel marginalized. This is the shape of the river that Professor Sander fails to appreciate.

In this response, we have attempted to re-cast the question posed by Professor Sander from “what’s wrong with affirmative action?” to “how do we diversify our law schools?” In addition we address the related question of the need to address the perception of African-American law students that law schools are hostile environments, thereby affecting their performance and undermining the recruitment and retention of minority students.

**ESSAYS FROM *THE ROLE OF LAW &
POLICY: AFRICA, THE CARIBBEAN,
AND THE UNITED STATES***

