

## MEETING ACROSS THE RIVER: WHY AFFIRMATIVE ACTION NEEDS RACE & CLASS DIVERSITY

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Richard Sander's goal in his latest article, *Class in Legal Education*,<sup>1</sup> is to spur a serious and sustained discussion about how to address socioeconomic diversity in the legal academy. This goal would be an admirable one if it were not for its second unwritten goal of denigrating racial diversity<sup>2</sup> while continuing to promote the author's prolifically challenged "mismatch theory."<sup>3</sup> Sander's article presents a compelling story about which populations have access to law school and which are actually deserving of preferences in order to attend.<sup>4</sup> Sadly, the story he tells is wide of the mark, as the empirical evidence demonstrates.

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1. Richard H. Sander, *Class in Legal Education*, 88 DENV. U. L. REV. 631, 633 (2011).

2. Sander criticizes the use of racial diversity as becoming increasingly arbitrary, unfair, and offensive as the United States becomes more multiracial. *Id.* at 665. He further alleges possible harms of affirmative action, including stigmatization, group self-segregation, lower graduation rates, and higher bar failure rates. *Id.* at 665–66.

3. See David L. Chambers et al., Response, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN L. REV. 1855, 1857 (2005) (examining data and concluding that eliminating racial preferences would yield a "substantial net decline in the number of African Americans entering the bar"); see also Ian Ayres & Richard Brooks, Response, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1816–18 (2004); andré douglas pond cummings, "Open Water": *Affirmative Action, Mismatch Theory and Swarming Predators—A Response to Richard Sander*, 44 BRANDEIS L.J. 795, 795–806 (2006); Daniel E. Ho, Scholarship Comment, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997, 2000–02 (2005); Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649, 650–56 (2008) (empirically analyzing Sander's data and concluding that eliminating affirmative action would reduce the number of black lawyers at far greater rates than the increase in number of black law students who might pass the bar exam with the elimination of negligible mismatch effects concentrated in the small pool of the weakest students). See generally Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, 46 J. BLACKS HIGHER EDUC. 102 (2004) (discussing results of Sander's data and after their own analysis, drawing the opposite conclusion).

4. Sander contrasts racial diversity across law schools with SES across law schools, noting that unlike racial diversity, SES diversity has changed very little since the 1960s and that "the great majority of non-white law students are, like whites, from relatively elite backgrounds." Sander, *supra* note 1, at 632. He then finds that "[f]or all racial groups, in all law school groupings, the SES distribution is tilted towards the top . . . . It is not the case . . . that the typical beneficiary of race-based law school affirmative action has low SES." *Id.* at 651. This data leads Sander to conclude that "[i]t is hard to justify giving large preferences to blacks and Hispanics from privileged backgrounds while ignoring the needs of low-SES applicants of all races." *Id.* at 664.

Essentially, Sander asks the same question that Professor Charles Ogletree asks in his book *The Presumption of Guilt*: Does class trump race?<sup>5</sup> Ogletree examines the dilemma that accomplished African American men in particular, but presumably all people of color, come to expect: with success comes privilege.<sup>6</sup> Specifically, he asserts that license provides the advantage of “being presumed innocent” or “left alone.”<sup>7</sup> Ogletree raises this benefit in the context of criminal suspicion and guilt that the large pool of African American men, who have enjoyed academic and economic success, confront so often.<sup>8</sup> The dilemma that emerges is the issue of exceptionalism<sup>9</sup>—what about the millions of other black males not in possession of an Ivy League degree or high profile position?<sup>10</sup> Do we treat economically successful minorities differently than their less well-off peers when it comes to criminal surveillance?<sup>11</sup> Ogletree answers this question emphatically:

The solution of treating prominent middle- and upper-class African Americans differently from poor African Americans may be too great a cost for our community to bear. Indeed, it may have just the opposite impact, leading us to ignore that injustice and inequality . . . is pervasive and persists . . . . The class-race distinction may be with us forever . . . .<sup>12</sup>

While Ogletree addressed this question in the most vexing arena that African Americans must endure, the criminal justice system, I argue that the answer to whether we should treat minority college applicants differently according to class is a resounding “No.” The presumption of “guilt” and racial profiling uniformly permeates the educational system from preschool to graduate school and virtually every social structure in which racial groups interact.<sup>13</sup> As discussed below, the historical and contextual narrative of race is one of guilt and suspicion at every turn.<sup>14</sup>

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5. CHARLES J. OGLETREE, JR., *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA* 99 (2010).

6. *Id.* at 98–99.

7. *Id.* at 98.

8. *Id.*

9. W.E.B. Du Bois described those academically and economically accomplished African American men as the “Talented Tenth.” W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 78 (Bantam Classic Reissue 2005) (1903).

10. OGLETREE, *supra* note 5, at 98–99.

11. *Id.*

12. *Id.* at 99–100.

13. The focus of this Article is on affirmative action in higher education and the educational system. For studies of racial interactions in other social institutions see Lathonia Denise Stewart & Richard Perlow, *Applicant Race, Job Status, and Racial Attitude as Predictors of Employment Discrimination*, 16 J. BUS. & PSYCHOL. 259, 259–75 (2001). See also Somnath Saha, Jose J. Arbelaez, & Lisa A. Cooper, *Patient-Physician Relationships and Racial Disparities in the Quality of Health Care*, 93 AM. J. PUB. HEALTH 1713, 1713–19 (2003).

14. For a full accounting of the variety of ways in which this guilt and suspicion play out daily in the lives of African Americans, see generally OGLETREE, *supra* note 5, at 129–241. Another example is the arrest and felony conviction of a woman who used her father’s suburban address to send her children to a better school. Her felony conviction now prevents her from pursuing her

At best, Sander naively ignores this central theme, and at worse, he chooses to promote the theme in order to reify the fiction of a post-race world in which enough, if not all, minorities have arrived.<sup>15</sup> Central to Sander's argument and empirical narrative is that we live in a colorblind world in which race is no longer relevant.<sup>16</sup>

In this paper, I take up Ian Haney López's mantle when he writes:

[A] stratification analysis makes clear that no division between a universalistic focus on class versus a particularistic emphasis on race is tenable: race and class in the United States inextricably interdigitate such that neither can be engaged without sustained attention to the other. A focus on class as a complement to a close engagement with race would be quite helpful; but a focus on class *as a substitute for race, as part of an evasion of race, will prove counterproductive*. Class should not be used to obfuscate the interrelated yet distinct issues associated with race, nor vice versa. Whether one privileges class or race, focusing on their interconnection will advance justice, while stressing one to the exclusion of the other will lead to failure along both fronts.<sup>17</sup>

Although Haney López and Ogletree were writing in connection with criminal justice, I assert this same warning is in order with education and affirmative action. This Article is divided into three sections, each containing a critique of Sander's arguments and analysis. First, I briefly reframe and reiterate the history of race and ethnicity in affirmative action's origins to directly confront the assumption that Sander makes about what affirmative action's original purpose entailed.<sup>18</sup> The goal of Part I is to correct the erroneous epistemology from which Sander's study emerges: the entrenched de-contextualization of race and ethnicity as a means to supplant race with class in an effort to assert that high socioeconomic minorities are over-represented in law school admissions.<sup>19</sup> Part II critiques the way in which Sander presents the data to create a

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teaching career. Meghan Barr, *Rev. Al Sharpton Supports Kelley Williams-Bolar In Ohio School Choice Case*, HUFFINGTON POST, (Feb. 17, 2011, 10:54 PM), [http://www.huffingtonpost.com/2011/02/18/al-sharpton-kelley-williams-bolar\\_n\\_825144.html](http://www.huffingtonpost.com/2011/02/18/al-sharpton-kelley-williams-bolar_n_825144.html).

15. I use this term in the sense to suggest that some individuals of color enjoy academic and economic success and therefore, class has triumphed over race.

16. See Sander, *supra* note 1, at 648. "College graduates of all races attend law school at rates that approach or even exceed the white rate. But low- and middle-SES college graduates are far less likely to attend law school than are high-SES graduates." *Id.*

17. Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1051 (2010) (emphasis added).

18. Sander, *supra* note 1, at 660. Sander asserts that affirmative action, as originally conceived, was "not using preferences, but making sure that outreach and admissions procedures are fair and class-neutral." *Id.*

19. I cannot emphasize enough how essential it is to grasp the insidious nature of our current discourse of colorblindness. See, e.g., Charles A. Gallagher, *Color-Blind Privilege: The Social and Political Functions of Erasing the Color Line in Post-Race America*, 10 RACE, GENDER & CLASS, no. 4, 2003 at 22, 26, 32–33 (finding that the color-blind perspective allows whites to classify themselves as progressive, non-judgers of race, view society as a meritocracy and attribute any inequality as based on class differences not institutional racism).

narrative that supports his post-race argument rather than presenting them in the most transparent manner—thus allowing the data in their fullest form to reveal their story.<sup>20</sup> Specifically, Sander ignores wealth as a key measure of socioeconomic status (SES), ignores the increasing data on *racial* inequality, and ignores the data indicating that class and race are not interchangeable. In Part III of this Article, I consider the arguments Sander continues to reify regarding the harms of affirmative action for students of color. Ultimately, I argue that while class and racial diversity should and do intersect, racial diversity should play a key role in higher education regardless of one's SES. In addition, I argue that a central component of Sander's goal is to perpetuate the myth of a colorblind society<sup>21</sup> without confronting how best to use racial diversity within educational institutions.<sup>22</sup> Finally, I address the role of wealth and its function in access to education.

## I. A BRIEF ACCOUNT OF THE ENACTMENT OF AFFIRMATIVE ACTION

### A. *The Social Construction of Race*

Sander observes that it will become increasingly difficult to identify “true”<sup>23</sup> Hispanics or “true” blacks<sup>24</sup> as the United States becomes multi-racial and “intermarriage” increases.<sup>25</sup> He has a point. It is difficult to

20. To be clear, many social scientists fall into this trap. Indeed, my own work has been criticized for doing the same. See Mark Strasser, *On Disguises, Tokens, and Affirmative Action Policies*, 85 IND. L.J. 1293, 1294 (2010).

21. The language of color blindness came originally from Justice Harlan's dissent in *Plessy v. Ferguson* in which he stated, “Our constitution is color-blind, and neither knows nor tolerates classes among citizens.” 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In the context of *Plessy*, color blindness is asserted as a lofty goal toward which United States society should work: racial distinctions should be eliminated in the hopes of remedying racial oppression. *Id.* However, this concept now finds use to question the legitimacy of race-based remedies to amend race-based discrimination. See Ian F. Haney López, “*A Nation of Minorities*”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 988 (2007). Haney López uses the term “reactionary colorblindness” specifically to discuss “an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility.” *Id.* Moreover, Justice Thomas writes in *Parents Involved in Community Schools v. Seattle School District No. 1*, “The dissent attempts to marginalize the notion of a color-blind Constitution by consigning it to me and Members of today's plurality. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy* . . . .” 551 U.S. 701, 772 (2007) (Thomas, J., concurring) (footnote omitted) (citations omitted).

22. TIM J. WISE, AFFIRMATIVE ACTION: RACIAL PREFERENCE IN BLACK AND WHITE 69 (2005) (“Conservatives claim that people of color are taking college admissions slots from more-qualified whites, thanks to affirmative action in higher education.”). Essentially, Sander makes the same claim in this article. See generally Sander, *supra* note 1.

23. It is not entirely clear what Sander means when he uses the word true. I presume that means having four grandparents who all share the same racial background as the student. See Sander, *supra* note 1, at 665.

24. Blacks are not capitalized here in accordance with the stylistic model that *Denver University Law Review* uses.

25. I presume that Sander means inter-racial or inter-ethnic marriage when he uses this term. See Sander, *supra* note 1, at 665. However, I find the concern for finding “true” racial minorities interesting. A *New York Times* chart shows that only 9% of marriages are inter-racial and whites, both male and female, are least likely of any group to marry a person from a different racial or ethnic group of color. Haeyoun Park, *Who is Marrying Whom*, N.Y. TIMES (Jan. 29, 2011),

figure out “true” race. However, any conversation about race must first begin with a discussion of what is and is not included in the term’s definition. While most individuals view race as a biological classification based on shared genetic traits and physical attributes, in fact, no definitive, distinctive, and apparent racial characteristics exist.<sup>26</sup> Furthermore, no “race gene” has been discovered that is completely distinctive from one racial group to another.<sup>27</sup> Thus, the classification of the human population into particular racial groups is largely arbitrary. Instead, race is the shared experience of being placed in one particular racial group, not the perceived physical characteristics of that racial group.<sup>28</sup>

If race is defined in this fashion—namely, by human interactions—we are anything but a colorblind society. At the societal level, we come to a collective agreement as to the meaning of a particular race, as it has no innate connection to culture or institutions.<sup>29</sup> Significantly, though, race comes to have vital meaning and impact within an institution once the individuals and the institution give definition and status to an individual’s perceived racial/ethnic grouping. This point is central to understanding why affirmative action must continue to play a key role among

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<http://www.nytimes.com/interactive/2011/01/29/us/20110130mixedrace.html>. Thus, the larger point remains that people of color, whether racially mixed or not, will continue to engage with society in a different way than white people. See, e.g., David Knowles, *Obama on ‘MythBusters’: Top 5 Presidential Myths in Need of Busting*, AOL NEWS (Oct. 18, 2010, 5:17 PM), <http://www.aolnews.com/2010/10/18/obama-on-mythbusters-top-5-presidential-myths-in-need-of-bust/> (stating that among five myths about President Obama, two that persist include that he is a Muslim and that he was not born in the United States); Liz Sidoti, *That Brief Time Out from Heated Discourse? No More*, CBSNEWS.COM (Feb. 13, 2011), <http://www.cbsnews.com/stories/2011/02/13/ap/politics/main7346308.shtml> (stating that at the Conservative Political Action Conference Idaho Representative Raul Labrador joked that he “was fortunate enough to be an American citizen by birth, and [he had] the birth certificate to prove it,” and pundit Ann Coulter suggested that President Obama “looked into becoming the President of Egypt [because n]obody would complain about him being a Muslim then”); *Barack Obama Myths*, BARACKOPEDIA.ORG, <http://www.barackopedia.org/page/Barack+Obama+Myths> (last visited Apr. 5, 2011) (dispelling the myth that President Obama’s books contain racially charged language and ridiculing the “terrorist fist bump” rumor).

26. The attempt to classify human races in any sort of definitive manner appears to meet with little agreement. In fact, most social scientists will agree only to the conclusion that any race classification system that emerges is based on the eye of the beholder. See generally RUTH BENEDICT, *RACE: SCIENCE AND POLITICS* 22–38 (1959).

27. Not only is there no pure race, but differences within alleged racial groups outnumber those found across racial groups. JOAN FERRANTE & PRINCE BROWN, JR., *THE SOCIAL CONSTRUCTION OF RACE AND ETHNICITY IN THE UNITED STATES* 132–133 (1998). While it is certainly true that we can statistically identify certain phenotypes associated with certain groups, as well as certain diseases that seem more prevalent in one group than another, these phenotypes and diseases are never exclusive to a group. DAVID M. NEWMAN, *IDENTITIES AND INEQUALITIES* 40–41 (2007).

28. See generally Adrian Piper, *Passing for White, Passing for Black*, 58 *TRANSITION* 4 (1992) (describing her experiences as a light-skinned black woman at an elite graduate school). According to one prominent sociologist, “What makes a society multiracial is not the presence of physical differences between groups, but the attribution of social significance to such physical differences as may exist.” PIERRE L. VAN DEN BERGHE, *RACE AND ETHNICITY: ESSAYS IN COMPARATIVE SOCIOLOGY* 10 (1970).

29. MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* 26–28 (1964).

a whole host of remedies available to under-represented minorities (URM) in the educational system from preschool to graduate school. We, as faculty and students alike, make agreed-upon assumptions about our professors and students based on race *regardless* of SES.<sup>30</sup>

The meaning of race has changed dramatically over time and between societies.<sup>31</sup> To say that race is socially constructed<sup>32</sup> is to suggest that society defines the reality of race, and this reality is reproduced daily through interpersonal exchanges as well as interactions with institutions.<sup>33</sup> Early on, as individuals are socialized into a specific society, they learn about the boundaries of group membership, otherness, group position,<sup>34</sup> and the cultural significance of a particular group status.<sup>35</sup> In giving meaning to a particular race, society assigns that race a social standing, or status, among all other racial groups.<sup>36</sup> In turn, members of a particular group come to experience the world—social relationships, rankings, and access to resources—through the eyes of how others perceive their group’s status.<sup>37</sup> Interactions with members of other groups as well as individuals within a group serve to create and reinforce a racial status.<sup>38</sup> Race embeds itself in social relations where coded interpretations serve as the rules of interaction with others.<sup>39</sup> Society then uses obvious (or sometimes less obvious)<sup>40</sup> physical characteristics, or pheno-

30. Dr. Allen Counter, a prominent neurobiologist at Harvard, was strolling across Harvard Yard accompanied by students, wearing his usual attire of a high end business suit and tie, when university police stopped Counter to inform him that he was a bank robbery suspect. OGLETREE, *supra* note 5, at 81–82. Dr. Counter had an alibi, bore no resemblance to the suspect, and still the police insisted the students verify Dr. Counter’s identity. *Id.* at 82.

31. According to Jacobson, “[E]ntire races have disappeared from view, from public discussion, and from modern memory, though their flesh-and-blood members still walk the earth.” MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 2* (1998). In addition, from one geographical location to the next, the members of a racial group vary. For example, the race classifications of the United States and Brazil vary so greatly that a person classified as black in the United States may be considered white in Brazil. See PIERRE L. VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 61–62, 71–72 (1967).

32. Social scientists assert that race is a social construct. By that they mean values and ideas about race arise and perpetuate themselves through social situations. As Montejano aptly puts it, “Although race situations generally involve people of color, it is not color that makes a situation a racial one. . . . [T]he race question . . . represents an arena of struggle and accommodation. . . . [I]t comes into being when these ideas and sentiments are publicly articulated and institutionalized.” DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS 1836–1986*, at 4 (1987).

33. See generally OGLETREE, *supra* note 5, at 129–241 (profiling 100 successful black men).

34. See STEPHEN CORNELL & DOUGLAS HARTMANN, *ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD* 81–82 (1998).

35. See NEWMAN, *supra* note 27, at 27, 37.

36. See MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 44–53 (2003); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 116 (10th anniversary ed. 2006); DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 518–21 (6th ed. 2008).

37. See CORNELL & HARTMANN, *supra* note 34, at 182–83.

38. Michael Omi & Howard Winant, *Racial Formations*, in *RACE, CLASS, AND GENDER IN THE UNITED STATES* 12, 16–17 (Paula S. Rothenberg ed., 6th ed. 2004).

39. See *id.* at 16.

40. In research I have conducted, students of color increasing report that as white students attempt to place a student of color in a racial category, but cannot rely on the most obvious pheno-

types, associated with a particular race as a way of explaining differences in human nature.<sup>41</sup>

Because society decides racial group membership based on certain physical traits, these traits become the primary identifiers of one's social status. Goffman referred to this primary identifier—the characteristic of a person that overrides all other features of that person's identity, in this case, race—as their “master status.”<sup>42</sup> One's master status has a significant impact on one's sense of self. Cooley articulates this concept as the “looking glass self.”<sup>43</sup> Specifically, Cooley and other symbolic interactionists assert that one's self perception is the effect of interactions with others in social settings. For under-represented minorities, social interactions serve as a daily reminder of their status in the hierarchy of race.<sup>44</sup>

Particularly significant to this concept of “looking glass self” is the awareness of “significant” others. That is, certain individuals in society will have more influence over others in the development of one's self-conception.<sup>45</sup> Goffman asserts that individuals aware of their master status will engage in impression management<sup>46</sup> to achieve desired goals

types, white students will often ask, “So what are you?” Deirdre M. Bowen, *American Skin: Dispensing With Colorblindness and Critical Mass*, 73 U. PITT. L. REV. (forthcoming 2011).

41. Omi and Winant refer to this process as “amateur biology,” in which racial ideology suggests that one's abilities like athleticism, intelligence, and personality can be presumed from discernable physical characteristics associated with race. Omi & Winant, *supra* note 38, at 16.

42. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959). This master status becomes the lens through which all others view an individual regardless of the situation or setting. Perhaps more significant, every master status accompanies a set of auxiliary traits. An individual interacting with a person of a particular master status will assume that person possesses these traits and will react accordingly. PATRICIA A. ADLER & PETER ADLER, *CONSTRUCTIONS OF DEVIANCE* 222 (4th ed. 2006). In the case of race, a set of stereotypical traits are imputed on students of color because one's racial or ethnic status overrides all other statuses an individual may possess. These auxiliary traits then determine how others will interact with that student.

43. See CHARLES HORTON COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* 183–84 (1902).

44. See *id.* at 183–210; see also, e.g., CORNELL & HARTMAN, *supra* note 34, at 184–89. White normativity is the standard by which all other racial groups find themselves measured. Both institutionally and individually, “White norms” are the measure of what is acceptable, appropriate and merit-worthy. See Albert Murray, *White Norms, Black Deviation*, in *THE DEATH OF WHITE SOCIOLOGY* 96, 106–10 (Joyce A. Lander ed., 1998). In the colorblind discourse, “whiteness [is] the unacknowledged dominant set of norms, aesthetics, and values from which all others are defined and judged.” Black Hawk Hancock, *Put a Little Color on That!*, 51 SOC. PERSP. 783, 788 (2008).

45. For example, students aware that professors (such as Sander) have lower expectations of them because they believe the students have lower credentials based on a white meritocracy system, are likely to perform less well. See Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 620–21 (1997) [hereinafter Steele, *A Threat in the Air*] (demonstrating that highly domain attached individuals are at most risk for the negative effects of stereotype threat); see also CLAUDE M. STEELE, *WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US* 54–62 (2010) [hereinafter STEELE, *WHISTLING VIVALDI*]; Deirdre M. Bowen, *Visibly Invisible*, in *PRESUMED INCOMPETENT* (Angela Harris & Carmen Gonzales eds., University of Utah Press forthcoming 2011).

46. Goffman asserts that actors engage in a day to day dramaturgy anytime they interact with others. Often the goal in any interaction is to create a “front” that idealizes the actor's persona to conform with the socially sanctioned norms of the particular situation the actor finds him/herself in and de-emphasize those traits that are considered aberrant. In order to establish these social identities, individuals will attempt, not always successfully, to control communication and information about themselves through performance. The performance in social interaction is known as impres-

particularly from those who have influence over their access to resources.<sup>47</sup> Put another way, an URM student is aware of his or her racial group membership and the culturally defined expectations that are associated with such membership. In the social context of the university, the URM student, *regardless of her socioeconomic status*, will engage in impression management in an attempt to influence the perceptions of her peers and professors as she navigates her educational career. The unique status of URM group membership creates a significant cost; the daily burden<sup>48</sup> of engaging in impression management at institutions of higher learning demonstrates that “race” always matters—not just for lower SES minorities, as Sander seems to suggest.<sup>49</sup> The key point that Sander

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sion management. See GOFFMAN *supra* note 42, at 208. The difficulty with impression management is that an individual can only control so much of the other actors’ perceptions. For example, a minority student may dress, speak, exhibit body language and facial expressions that are all socially exemplary, but there is little they can do to overcome the pre-conceived notions that the other actors hold about that individual based on the color of her skin, i.e. their auxiliary traits. The result, as Goffman points out, is that one’s master status, in this case, race, can be a stigma. In other words, “Any scientist can disprove all its facts and still leave the *belief* untouched.” BENEDICT, *supra* note 26, at 99.

47. GOFFMAN, *supra* note 42, at 208.

48. The cost from carrying the daily burden of being a member of a racial group measures itself in a number of psychological and physiological ways. See Tené T. Lewis et al., *Chronic Exposure to Everyday Discrimination and Coronary Artery Calcification in African-American Women: The SWAN Heart Study*, 68 PSYCHOSOMATIC MED. 362, 365–66 (2006) (finding a correlation between coronary artery calcification and chronic exposure to discrimination for African American women); Diane L. Rowley, *Closing the Gap, Opening the Process: Why Study Social Contributors to Preterm Delivery Among Black Women*, 5 MATERNAL & CHILD HEALTH J. 71, 71–74 (2001) (finding that low birth weight babies among middle class college educated African American women mirror that of poor uneducated white women); David R. Williams et al., *Racial/Ethnic Discrimination and Health: Findings from Community Studies*, 93 AM. J. PUB. HEALTH 200, 200–08 (2003) (finding that physiological responses to discrimination are the same as those associated with diseases). See generally STEELE, WHISTLING VIVALDI, *supra* note 45, at 128, 131–32 (reporting the research on the health effects of managing chronic stereotype threat).

49. Minority students must continually combat the stereotypes that others hold regarding racial groups. This is particularly acute for under-represented students who attend colleges and universities with student bodies who have little to no interaction with individuals outside their own racial background. Unfortunately, these populations receive most of their information about other racial groups from media portrayals that acutely reify stereotypes of racial minorities. One of the most significant casualties of under-represented minority students’ management of stereotypes is the negative effect such stereotypes have on a student’s performance. Claude Steele’s stereotype threat theory demonstrates that otherwise successful minority students, who are faced with a stereotype that the dominant group may use to explain their performance, will often not perform as well, or simply avoid an attempt at achieving success for fear of confirming that stereotype. See generally Steele, *A Threat in the Air*, *supra* note 45, at 613–14, 617, 622, 627. For example, Professor Steele found that in giving students the same achievement test but in one group telling them it was a problem solving exercise while telling the other group it was a diagnostic test of intelligence, the average score was virtually identical for white and black students in the former setting. However, blacks performed half as well in the latter setting when faced with a stereotype threat. The results were even more profound when Professor Steele gave the same test to both groups, but in one group asked all students for their racial background but not in the other. Once again, the performance of black and white students was identical when race was not asked, but black students performed at a rate of 60% less than white students when they were asked to identify their race. Such is the power and burden of racial stereotypes. *Id.* at 620; see also Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1225 (2010) (finding that “students experience far more stigma at schools without affirmative action, contrary to what the color-blind idealists would argue. . . . On the other hand, affirmative action seems to be associated with reduced levels of racial stigma, both external and internal, for underrepresented minority students”); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1261–62 (2000) (arguing

and other detractors of affirmative action miss is that the experience of race is not just a question of who gets into an educational institution based on a white normative merit-based match, but a question of the experience of interacting with students and faculty once an URM student arrives at that institution.<sup>50</sup> As will be discussed in section three, the presumption of affirmative action guilt, as I call it, does not dissipate under a colorblind or even SES model of admissions, as Sander relentlessly asserts.

Sander is certainly not the first to employ the colorblind discourse.<sup>51</sup> He follows a generation of writers who responded to the enactment of affirmative action before the ink of President Kennedy's signature was dry.<sup>52</sup> Let us examine how anti-affirmative action activists and the judiciary manipulated the discourse of race, inequality, and "fairness"<sup>53</sup> to assert that race is no longer a significant issue in a "nation of minorities."<sup>54</sup> Although Sander argues that the resentment of "reverse discrimination"<sup>55</sup> and the feelings of being unqualified undermine URM students' experiences, what is most harmful is the dominant group's *failure to acknowl-*

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that minorities subject to negative stereotype threat must "work their identities" at much greater rates with considerable costs and risks).

50. Richard Delgado, *Rodrigo's Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637, 644 (2007) (showing that students of color even at second and third tier law schools don't seem to outperform their white peers even at schools where affirmative action plays a marginal role).

51. To be sure this line of discourse is a particular kind of colorblindness that packs a one-two punch. As Bobo and Kluegel define it, *Laissez Faire Racism* allows whiteness as a privileged status to be replaced with equal opportunity in which persons of color are blamed for their cultural inferiority and allows whiteness invisibility in which the dominant group is not culpable for the "pipe line" problem as Sander calls it, nor the institutional racism that permeates educational institutions. See Lawrence Bobo & James R. Kluegel, *Status, Ideology, and Dimensions of Whites' Racial Beliefs and Attitudes: Progress and Stagnation*, in RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE 93, 95 (Steven A. Tuch & Jack K. Martin eds., 1997).

52. President Kennedy used the term affirmative action in an executive order designed to promote the integration of minorities into the workforce. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

53. Fairness is a term used often in the anti-affirmative action camp. Richard Sander employs it in his article five times ("fair to say," "fair basis," "fair and class-neutral"), unfair one time ("unfair and offensive"), and fairness one time ("grounds of fairness"). Sander, *supra* note 1, at 649, 652, 656, 660, 664–65.

54. NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 201 (1975). Glazer states:

We have created two racial and ethnic classes in this country to replace the disgraceful pattern of the past in which some groups were subjected to an official and open discrimination. The two new classes are those groups that are entitled to statistical parity in certain key areas on the basis of race, color, and national origin, and those groups that are not.

*Id.* at 197 "We are indeed a nation of minorities; to enshrine some minorities as deserving of special benefits means not to defend minority rights against a discriminating majority but to favor some of these minorities over others." *Id.* at 201.

55. Hodding Carter, Jr. used the term in the December 17, 1955, edition of the Saturday Evening Post, accusing the NAACP of "reverse racism" in response to the *Brown v. Board of Education* ruling. Hodding Carter, Jr., *Racial Crisis in the Deep South*, SATURDAY EVENING POST, Dec. 17, 1955, at 26.

edge the damaging nature of racial narratives and white privilege.<sup>56</sup> Below is a brief discussion of how race became unanchored from its historical, institutional, and structural underpinnings.

### *B. The Ethnicity Model and Reactionary Colorblindness*

The success of the anti-affirmative action movement can be attributed to the slow moving but effective perfect storm of three factors: the social scientific paradigm away from race-based discourse to ethnic-based discourse; Sander's favorite, the judiciary's application of so-called colorblindness in the name of equality for all; and finally, the manipulation of Martin Luther King's ideas to suggest that he aspired for a colorblind ideal based on meritocracy.<sup>57</sup> The success of this approach lies in its complete removal of race from its hierarchical social setting.

Ethnicity is based on a "sense of peoplehood"<sup>58</sup> where a group *perceives or believes* they share ancestry, similar language, customs, religion, and often a political community.<sup>59</sup> Like race, ethnicity is a social, not a biological phenomenon.<sup>60</sup> Tremendous changes in ethnic identities over the course of a lifetime, as well as changing generational allegiances, intermarriage, and transformed social categories suggest that ethnic groups are not as clearly defined by blood lineage as members may believe.<sup>61</sup> The characteristics that define an ethnic group are flexible, but they do emerge from a sense of cultural heritage in which the artifacts of that heritage create inclusionary and exclusionary boundaries.

56. See generally BLACK ON WHITE: BLACK WRITERS ON WHAT IT MEANS TO BE WHITE (David R. Roediger ed., 1999); Bowen, *supra* note 49; Delgado, *supra* note 50, at 649; Bowen, *supra* note 40 (arguing that white students do not seem to grasp that different racial narratives even exist or possess the skills to process them).

57. It is not the idea of meritocracy in of itself that is objectionable. It is the institutional application of a meritocracy that has benefited and continues to benefit the privileged elite. See generally Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008).

58. GORDON, *supra* note 29, at 28.

59. Ethnic groups are often accorded specific cultural traits that set them apart into a subculture within a larger cultural and social system. Melvin M. Tumin, *Ethnic Group*, in A DICTIONARY OF THE SOCIAL SCIENCES 243-44 (Julius Gould & William L. Kolb eds., 1964).

60. See RICHARD D. ALBA, *ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA* 16-19 (1990); RICHARD D. ALBA, *ITALIAN AMERICANS: INTO THE TWILIGHT OF ETHNICITY* 17 (1985); Fredrik Barth, *Introduction*, in *ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE* 15-16 (Frederick Barth ed. 1969); MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 389 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968) (1922).

61. Sociologists Helen and Everett Hughes see the social creation of ethnic differences in this way:

An ethnic group is not one because of the degree of measurable or observable differences from other groups; it is an ethnic group, on the contrary, because the people in it and the people out of it know that it is one; because both the *ins* and *outs* talk, feel, and act as if it were a separate group.

EVERETT CHERRINGTON HUGHES & HELEN MACGILL HUGHES, *WHERE PEOPLES MEET: RACIAL AND ETHNIC FRONTIERS* 156 (1952).

Yet, the very essence of the “the melting pot”<sup>62</sup> was that Europeans would shed the cloth of the old country and adorn the quilt of America, in which a new American identity emerges from the patchwork of many different ethnic groups. Such was the power of transformation that particular groups’ identities could change from a non-white racial group to that of a white euro-ethnic group.<sup>63</sup> Thus, the melting pot became a metaphor for a nation of ethnic groups that had assimilated into American culture and reaped the rewards of economic and political opportunity.

The idea of a nation of ethnicities, rather than of races, may have begun with the transformation of Southern and Eastern European races into ethnicities<sup>64</sup> but its broader application to other racial groups, most particularly, African Americans, began with Nathan Glazer and Patrick Moynihan.<sup>65</sup> To devastating effect, they argued that ethnicity should cross a (darker) color line. However, ethnicity was not embraced to welcome African Americans or Puerto Rican Americans into the pool of economic or political opportunities, or to celebrate the cultural traditions they could add to the melting pot; rather, ethnicity was used to explain the *lack* of economic success of these groups. Instead, African American and Puerto Rican *culture* lay at the root of these groups’ plight, according to Glazer and Moynihan, “to the complete exclusion of structural factors.”<sup>66</sup> The discourse of group difference as a celebratory device of white ethnicities became a weapon of culpability against African Ameri-

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62. Israel Zangwill introduced this phrase in the title to his play “The Melting Pot,” which opened in Washington, D.C. in 1908. Zangwill penned the play during the largest wave of immigration the U.S. had experienced. The immigrants were overwhelmingly Irish, Germans, Italians, and Eastern Europeans. William Booth, *One Nation, Indivisible: Is it History?*, WASH. POST, Feb. 22, 1998, at A1, available at <http://www.washingtonpost.com/wp-srv/national/longterm/meltingpot/melt0222.htm>.

63. For example, Italian, Poles, Irish, Greeks and Jewish immigrants experienced significant hostility by the native born Anglo-Saxon race who viewed themselves as ‘real’ Americans. Mary C. Waters, *Optional Ethnicities: For Whites Only?*, in *ORIGINS AND DESTINIES* 445 (Silvia Pedraza & Rubén Rumbaut eds., 1996). However, subsequent generations of those immigrants have successfully moved up the economic ladder due to educational and economic opportunities, beginning with the Irish in the mid 1800s. Euro-ethnic groups previously “racialized” as non-white, and therefore inferior, began to be included in the American social construct of whiteness. What was once a non-white inferior racial group of European descent now became an ethnic group within the white race. The same educational and economic opportunities were not afforded to non-European racial minorities. See KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* 25, 27, 41–42 (1998).

64. As Haney López points out, the transformation from race to ethnicity was intended to apply only to those boundaries that divided people who could be clearly classified as whites, *i.e.*, Southern and Eastern Europeans often of Jewish descent. Haney López, *supra* note 21, at 1007–08; see DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE* 22 (2005).

65. Haney López, *supra* note 21, at 1008; see also Barth, *supra* note 60, at 13–15; STEVE FENTON, *ETHNICITY* 68 (2003); RICHARD JENKINS, *RETHINKING ETHNICITY: ARGUMENTS AND EXPLORATIONS* 23–24 (1997). See generally NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* (1963).

66. Haney López, *supra* note 21, at 1010.

cans.<sup>67</sup> By extension, if cultural pathology rather than structural factors were at the root of African American subordination, then race-based remedies such as affirmative action would not solve the problems of that community.<sup>68</sup> Using ethnicity theory, Glazer and Moynihan argued that affirmative action was simply interest group politics—yet another ethnic group competing for resources.<sup>69</sup> As Haney López writes:

By dropping structural inequality and entrenched racial hierarchy from the ethnic account, Glazer and Moynihan stripped the clarity of history from the claims for race-conscious remedies. Such demands no longer seemed to call on the nation to repair gross injustice; instead, they sounded like special pleading by yet another pressure group, effectively shifting the moral register of affirmative action from an impassioned appeal to political pulling.<sup>70</sup>

The application of ethnicity theory to African Americans as an instrument of blame was a particularly tragic backlash against the legal and political system's coming to terms with the causes of African Americans' post-World War II subordination in the United States.<sup>71</sup> With the slow adoption of Myrdal's *An American Dilemma*<sup>72</sup> in *Brown v. Board of Education*,<sup>73</sup> liberal race theory<sup>74</sup> briefly took hold amongst the country's elite. Prejudice came to be viewed as irrational and placed at the feet of the dominant culture—i.e., white elite.

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67. This language of cultural pathology soon found use by neoconservatives during a time when jobs and wages were decreasing for white workers. While espousing the ideal of equality for all, neoconservatives ensured the discourse of meritocracy took hold above all else. Thus, African Americans who might benefit from affirmative action emerged not as victims of monopolized power and white privilege, but as unqualified beneficiaries of affirmative action. According to this notion, black people lacked merit because of their own doing, not because of blocked access to opportunity. Cornel West, *Affirmative Action in Context*, in *THE AFFIRMATIVE ACTION DEBATE* 32–33 (George E. Curry ed., 1996).

68. Daniel P. Moynihan, *The New Racism*, *ATLANTIC MONTHLY*, Aug. 1968, at 35, 37–38; see HANEY LÓPEZ, *supra* note 36, at 17 (discussing that defining “White” as a race is a difficult, if not impossible task for the legal system).

69. This refrain appears in Sander's piece when he says schools are under huge political pressure to create racial diversity but not socioeconomic diversity. Sander, *supra* note 1, at 664. It is worth pointing out why racial diversity remains a key priority; however, pointing out the worth of racial diversity does not mean that socioeconomic diversity should not receive its due. The vital point is that race and socioeconomic diversity are important at their intersection and at their divergence. See TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* 115–16, 182–83 (1996) (arguing that affirmative action causes reverse discrimination, against white men particularly, and that social engineering causes resentment).

70. Haney López, *supra* note 21, at 1012.

71. See generally Bobo & Kluegel, *supra* note 51, at 93, 95 (regarding *Laissez Faire Racism*).

72. See generally GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944) (detailing the struggle of the African American's ability to fully participate in American society during the 1940s).

73. 347 U.S. 483 (1954).

74. Liberal race theory, developed in the early 1900s, rejected the notion that physical characteristics could determine one's talents and abilities. Specifically, this theory sought to dispel the idea that nature aligned racial groups into an indisputable hierarchy. Physical characteristics associated with race were nothing more than physiognomy. Haney López, *supra* note 21, at 996–97.

This first step of acknowledging the irrationality of prejudice and subordination of African Americans led to an individualized cure—Americans needed to stop engaging in their bigoted practices on a day-to-day level.<sup>75</sup> However, as the status of African Americans did not change in the face of the alleged transformation of individual white attitudes towards African Americans,<sup>76</sup> political leadership looked to redress the effects of racism embedded in virtually every institution in the United States. Political leadership understood what the courts had finally come to comprehend: structural change using race-based means was necessary to counter the effects of three hundred years of oppression.<sup>77</sup> Unfortunately, as Haney López observed, “[T]he window for fundamental change opened just slightly before blowing shut again in the face of a quickly gathering backlash.”<sup>78</sup>

As others have written extensively and expertly elsewhere<sup>79</sup> about the Supreme Court’s retrenchment of affirmative action in a series of cases beginning with *Regents of the University of California v. Bakke*,<sup>80</sup> I

75. MYRDAL, *supra* note 72, at 1003.

76. In fact, three forces made clear that structural, not individual, racism needed to be addressed. First, a New York Times best selling “paperback,” the National Advisory Commission on Civil Disorders, issued its report in 1968 outlining the grim realities and effects of every aspect of African American life from overt discrimination to appalling housing conditions, substandard schools, blocked access to health care and employment, police abuses, and police harassment. The Commission issued the report, known as the Kerner Report, in the hopes of explaining the wave of riots that took hold in urban areas throughout the United States. The report made clear that the poverty and overall punishing existence of African Americans lay definitively in the hands of white society. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL COMMISSION ON CIVIL DISORDERS (1968), available at <http://www.eisenhowerfoundation.org/docs/kerner.pdf>; see Haney López, *supra* note 21, at 1005–06. Second, the report validated the work of Stokely Carmichael and Charles Hamilton in which they asserted in *Black Power* that the stark conditions in the African American Community were a direct function of institutional racism. STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1967). Finally, the need to address structural racism came even earlier in 1965 with Dr. Martin Luther King’s assessment:

At the root of the difficulty in Negro life is pervasive and persistent economic want. To grow from within the Negro needs only fair opportunity for jobs, education, housing and access to culture. To be strengthened from the outside requires protection from the grim exploitation that has haunted it for 300 years.

Dr. Martin Luther King, Jr., Address at Abbott House, Westchester County, New York (Oct. 29, 1965), available at <http://www.directblackaction.com/museum/shmuseum/MLKJR.htm>.

77. In 1964, Congress passed the Civil Rights Act that banned discrimination in public places, schools, and employment. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended in sections of 42 U.S.C.). Congress also passed the Voting Rights Act in 1965 to prevent barriers to minorities voting. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)). In addition, Congress passed the Civil Rights Act of 1968 to eliminate discrimination in the sale or rental of housing. Similarly, courts found that the Constitution required the use of race conscious means to undue discrimination embedded in social institutions. Indeed, in *N.C. State Bd. of Ed. v. Swann* the unanimous Court stated: “Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.” 402 U.S. 43, 46 (1971).

78. Haney López, *supra* note 21, at 1004.

79. See, e.g., *id.* at 1027–28. See generally Richard Delgado, 1998 *Hugo L. Black Lecture: Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135 (1998) (discussing the arguments against affirmative action).

80. 438 U.S. 265 (1978). Grounding his decision in the color-blind ideal, Justice Powell claimed:

will not recite an analysis here, but rather focus briefly on the third factor enumerated above—the political movement and rhetoric of colorblindness. A key ingredient in colorblindness emerged from both the left and the right in the early 1990s. Focusing on SES instead of race as a way to provide affirmative action would assuage those claiming that race-based admission policies were reverse discrimination,<sup>81</sup> and at the same time, it diverted attention from redressing past and present racial discrimination.<sup>82</sup> Specifically, racial identity as a group no longer mattered, but SES might. The key to the success of this model was that race disappeared as a vocabulary word in the policy of affirmative action in favor of help for poor people of all shades.<sup>83</sup> This disappearance was to play a major role in the shaping of the political movement to come.<sup>84</sup>

Based on the preceding discussion, I argue that the benefits of diversity can and should come from racial groups from all social strata because we are all *still* judged based on the color of our skin.<sup>85</sup> But even more importantly, in focusing on high SES minority students without

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[T]he United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a “majority” composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups.

*Id.* at 292 (footnotes omitted).

81. Steven A. Holmes, *The Nation; Mulling the Idea for Affirmative Action for Poor Whites*, N. Y. TIMES, Aug. 18, 1991, available at <http://www.nytimes.com/1991/08/18/weekinreview/the-nation-mulling-the-idea-of-affirmative-action-for-poor-whites.html>. See generally RICHARD D. KAHLLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) (providing support for Holmes’ ideas regarding affirmative action).

82. Holmes, *supra* note 81; see also West, *supra* note 67, at 31–32 (arguing that affirmative action was a weak response to the structural problems of racism and white supremacy and corporate power in the United States).

83. WISE, *supra* note 22, at 61–62. As Tim Wise writes, by obscuring the way in which race permeates interactions at every stage of a student’s life, and instead focusing on colorblindness—by treating low income students of color the same way as low income students who do not face racism or treating these students like students of higher SES—we ignore the social context within which low income students of color (or for that matter, high income students of color) must learn. *Id.* at 62–63. “[The teacher] would not be educating the actual child, but rather, just a theoretical child, divorced from his or her social reality.” *Id.* at 62. However, this model serves to reinforce white domination, because white privileges and the ways in which these structures at every level preference whites never get interrogated. *Id.* at 63. Instead, we can adopt the passive language of “less fortunate” and “underprivileged.” Understandably, this discourse is comforting because one never has to address a power imbalance. *Id.* at 63–64.

84. The de-contextualization of race is only part of the story that Sander relies on. The underlying theme of Sander’s question, shouldn’t class trump race, returns to Harris’s concept of whiteness as property. See Sander, *supra* note 1, at 631–33. While I shall explore this idea in more detail in section three, it remains a significant thread at this stage too. The privilege of whiteness is that it is not only an object that possesses the right to exclude, but also an object to be deployed as a resource. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714, 1733 (1993). Writing of whiteness as a resource worth deploying in order to achieve access to education, Harris was prescient: “Whiteness [is] an ‘object’ over which continued control was—and is—expected.” *Id.* at 1730.

85. See Bowen, *supra* note 49, at 1220–25 (findings show that URM students admitted on the basis of conventional credentials alone in anti-affirmative action states encounter more hostility than their counterparts admitted in affirmative action states). The sample includes wealthy students as well as those from low SES.

considering wealth or the “pipeline” problem, Sander manipulates the colorblind discourse so that he might ignore the mounting evidence of racial inequality. Finally, I am in agreement with Sander that institutions must do more than congratulate themselves on achieving diversity but must look carefully at the function of wealth in education.<sup>86</sup>

## II. WHAT SANDER’S DATA DON’T TELL

Let us begin with the basic facts of who goes to law school. As Sander points out, one in 70 white and one in 160 black students enroll in law school.<sup>87</sup> Sander notes in Table Five, in which he uses whites as the control group, that Hispanics are 25% as likely to go to law school, and blacks are 39% as likely, as whites.<sup>88</sup> To his credit, Sander acknowledges that “[t]he disparities in representation are shockingly large for both racial minorities.”<sup>89</sup> However, Sander’s point is to convey that those who are poor are far worse off in law school representation compared to wealthy students than those members of racial groups identified in the chart compared to whites. What is problematic is that Sander changes the reference group from race to SES and then asks us to make a comparison. This section of the paper will present a critique of the way in which Sander asks us to consider these numbers for the purposes of moving forward his post-race agenda that poor students are suffering at the hands of racial minorities in affirmative action.

### A. Ignoring the Pipeline Problem

Sander briefly surmises why the representation rates of blacks and Hispanics are substantially lower than whites, laying the blame at the feet of the URM students. Using the *laissez faire* discourse<sup>90</sup> that allows for individual blame, he states, “Much of the reason for underrepresentation of some groups [read black and Hispanic students] in law school has to do with low rates of college entrance and completion.”<sup>91</sup> As it does not fit squarely with the narrative Sander wishes to present, he does not delve into the reasons why high school dropout rates, college entrance rates, and college dropout rates might be the *symptoms* for low law school representation, but not the *cause* of low representation rates in higher education. In order to get past the problem of the underrepresentation of racial minorities relative to whites, Sander moves

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86. See Bowen, *American Skin*, *supra* note 40, at 48..

87. Sander, *supra* note 1, at 645.

88. *Id.* at 646 tbl.5. He also mentions Asians as a group but correctly observes the oversimplification of including a whole continent of people from a variety of ethnicities into one classification. *Id.* at 646 n.47.

89. *Id.* at 646.

90. Recall that the *laissez faire* racism model “encompasses an ideology that blames blacks themselves for their poorer relative economic standing, seeing it as a function of perceived cultural inferiority.” Bobo & Kluegel, *supra* note 51, at 95.

91. Sander, *supra* note 1, at 647.

quickly onto what he finds the more logical population from which to analyze: the pool of college graduates from whom law school can draw.<sup>92</sup>

By contrast, I think it is worthwhile to ponder the issue of “the pool.”<sup>93</sup> After all, it is this lack of available applicants that is the problem, as Sander points out in his life chances analysis.<sup>94</sup> To give some perspective, the intersection of race and poverty is certainly at play in terms of a student’s educational career.<sup>95</sup> Hispanics and African Americans top the list of Americans living in poverty—approximately 25% for both groups. However, poverty does not explain the whole picture of why Hispanics and African Americans are not included in the “pool” available to apply to law school. We must confront the full reality of race and education. The schools that blacks and whites attended up until the 1960s were profoundly unequal.<sup>96</sup> And of course today, with the property tax funding of schools based on housing values, parental advantage, ability tracking, classroom climate, and college campus environment,<sup>97</sup> we must acknowledge that poverty and racism play a role in a student of color’s college education. Paraphrasing Ronald J. Fiscus, Tim Wise observes,

Unless one believes in the inherent inferiority of blacks, for example, one would have to assume that in the absence of institutional racism and white privilege, historically speaking, blacks would be roughly equally distributed throughout the economy and educational institutions, relative to their share of the population... Unless one believes blacks to be less capable of succeeding in these professions or in school, the only rational assumption to make is that the difference in share of blacks at a given college or in a given job, and their share of

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92. *Id.* at 648 tbl.6.

93. Olivas takes issue with words like “pool” and “pipeline” to describe the available population of URM students available for higher education, preferring the term “river.” While pool and pipeline connote finite sources of students, river allows for the possibility of a variety of sources in which a student could enter the river—tributaries, ponds, puddles, streams. The metaphor could go on and on, but the point is, long before the stagnate population of URM college applicants, we might consider how creative we are in bringing individuals to the proverbial water. See Michael A. Olivas, *Law School Admissions After Grutter: Student Bodies, Pipeline Theory, and the River*, 55 J. LEGAL EDUC. 16, 16–18 (2005).

94. Sander, *supra* note 1, at 646–47.

95. As a point of reference, the 2010 census reports the percentage of people living in poverty in 2009 as follows: 9.4% of all non-Hispanic White (18.5 million people); 12.5% of all Asian-American (1.7 million people); 25.3% of all Hispanic (of any nationality) (12.4 million people); 24.2% of all American Indian and Alaska Native; 25.8% of all African-American (9.9 million people). CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, at 15 tbl.4 (2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf>.

96. As Tim Wise points out, most would agree that until *Brown v. Board of Education*, African Americans did not have the same opportunities for educational equality as whites, yet he notes in a 1962 poll that 90% of whites believed that they did. WISE, *supra* note 22, at 39.

97. See *id.* at 40–45, 50–56.

the population indicates the effect of discrimination *past* and *present* on black opportunity.<sup>98</sup>

Thus, the pool of students available to apply to law school, or college for that matter, cannot so easily be dismissed as part of the honest dialogue Sander professes to welcome.

### *B. Race and SES are Not Good Surrogates for Each Other*

As it is readily apparent that race and poverty do intersect, understanding the significance of the data may lie in what Sander does not report in his tables. Sander's Tables Five and Six raise a vexing question: What is the overlap of who falls in the bottom quartiles of SES based on race, compared to whites in the three SES categories Sander created?<sup>99</sup>

However, a number of social scientists have rejected the claim that we can adequately learn about URM student college participation by examining the decision making behavior of low-SES students, or vice versa for that matter.<sup>100</sup> In fact, Terenzi et al. note very little association between race and SES.<sup>101</sup> Thus, Sander has set out to compare two groups—racial minorities and the poor—that are not effective comparison groups. Not only are they not good proxies for each other, but the reality is that according to Bowen and Bok, low income whites are still in the majority among all low income college students.<sup>102</sup> Therefore, when Sander ultimately claims that race barriers can be resolved far more ef-

98. WISE, *supra* note 22, at 74.

99. To state more plainly, Sander claims that a universal SES affirmative action program would benefit the truly needy, those students of all shades whose parents do not possess the status, income, and wealth of the upper echelons of the college educated elite. Therefore, I would be curious to see the representation of blacks and Hispanics in the 50th–90th percentile, bottom half and bottom quartile, as comparison groups to the control group of whites in the top 10%, or top quartile or top half of the SES. That way, the reader could get a clearer sense of the disparity based on the intersection of race and class against economically privileged whites. A similar exercise would use blacks and Hispanics as the control group in the upper SES echelons against lower SES whites as well as lower SES blacks and Hispanics to examine just how the representation over various groups is presented. Data from a 2001 report reveals some sense of the intersection of race and class. PATRICK T. TEREZINI ET AL., COLL. ENTRANCE EXAMINATION BD., SWIMMING AGAINST THE TIDE: THE POOR IN AMERICAN HIGHER EDUCATION (2001), available at [http://professionals.collegeboard.com/profdownload/pdf/rdreport200\\_3918.pdf](http://professionals.collegeboard.com/profdownload/pdf/rdreport200_3918.pdf). In 1992, low SES students entering post-secondary education were more likely to be members of underrepresented racial/ethnic groups than their high SES counterparts. *Id.* at 23. Furthermore, 76% of low SES students have parents with a high school diploma or less compared to 0.4% of high SES students and 27% of low SES students live with a single mother versus 6% of high SES students. *Id.* at 20 tbl.6. Relatedly, a low SES student is more likely to make a decision to attend college without conferring with a parent and more likely to attend a public two-year institution, 56% compared to 23% of high SES students. *Id.* at v.

100. *Id.* at 2–3.

101. *Id.* at 3. (“After examining the association between SES and race in the high school classes of 1972, 1982, and 1992, Bernal, Cabrera, and Terenzini (1999) found the correlation between the two ranged from .20 to .27. This low level of association means that 93 to 96 percent of the variance among high school students’ ethnicity or SES status has nothing to do with either race or SES.”). Put simply, one variable is not duplicative of the other in explaining behavior.

102. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

fectively and fairly through universal SES affirmative action programs rather than race-based admissions, he ignores some significant social scientific findings. For example, Olivas wrote, “There is no good proxy, no more narrowly tailored criterion, no statistical treatment that can replace race.”<sup>103</sup> The story of being poor and the story of being Hispanic and/or black may have a cumulative effect, but they also have independent effects.

*C. Selective Samples, Selective Data Gathering, and the Case of the Missing N's*

Perhaps rightly, Sander goes on to focus his analysis on the top ten law schools to further support his narrative that racial minorities have representation rates (compared to whites) far greater than do students in the lowest SES quartiles (compared to students in the highest SES quartiles). It is really only in these top ten law schools that one finds the most aggressive use of affirmative action.<sup>104</sup> Indeed, looking at Sander's Table Seven, one might perceive cause for celebration in that every racial group, except African Americans, is represented at law schools at rates equal to or greater than white students. The problem, frankly, lies in what the percentages do not show. A review of the appendix Table A2-1<sup>105</sup> for Tables Five, Six, and Seven, shows the actual *number* of students enrolled in top ten law schools. As expected, the numbers are dismal. The reality is that the over-representation that Sander reports is more a reflection of the very small sample sizes of these minority groups in the available pool. For example, only 22 Native American students, 242 black students, and 211 Hispanic students enrolled in top ten law schools in the Fall of 2002.<sup>106</sup> Thus, another way of thinking of representation might be

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103. Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1095, 1117 (1997) (noting that the anti-affirmative action camp continues to believe that meritocratic measures, such as higher scores on tests, translate into more deserving applications, and “that reliance upon ‘objective’ measures and statistical relationships constitutes a fair, race-neutral process”). “The evidence for this proposition is exceedingly thin; indeed, a substantial body of research and academic common practice refutes it.” *Id.* at 1117; *see also, e.g.*, Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1913–14 (1996) (arguing that economic surrogates are poor proxies for race); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1850 (1996) (arguing that economic measures are ineffective replacements for racial-based admissions programs).

104. WILLIAM T. DICKENS & THOMAS J. KANE, RACIAL AND ETHNIC PREFERENCE (1996), available at [http://www.brookings.edu/papers/1996/11/race\\_kane.aspx](http://www.brookings.edu/papers/1996/11/race_kane.aspx). *See generally* Chambers et al., *supra* note 3, at 1880 tbl.2 (pointing out the effects of the top law schools not using affirmative action).

105. Sander, *supra* note 1, app.II tbl.A2-1.

106. *Id.* Sander rightly observes that recent DOE figures show that many of the blacks admitted at top schools were Caribbean, biracial, or African immigrants; and few were descendants of American slaves. *Id.* at 665–66. My response is twofold. First, these types of students are not exempt from the contemporary contextualization discussed *infra* section one. Second, while their scores may be higher than other minorities landing them a place in the most elite schools, it could be that they are not experiencing the social contingencies that create negative stereotype threat and under-performance. We must redouble our efforts to eliminate much *earlier* in the pipeline the social contingencies of stereotype threat of other students. Most importantly, we must remember that

to consider that of the 3,112 students enrolled in top ten law schools, 85% were white or Asian American.<sup>107</sup>

*D. Reconfiguring the Data to Show a Different Narrative of Minority Access to Law School*

Furthermore, a more informative piece of data would not be who enrolls from the pool of available college graduates as Sander presents the data, but rather, who *applies* and gets accepted into law school presented by racial categories. Parker and Redfield provide such an analysis with the population of students who enrolled a year after the population that Sander analyzed. Their results are presented below:<sup>108</sup>

Figure 10. Law School Admissions 2003

	Percentage of Total Applicant Pool and Percentage of Total Admitted Applicant Pool Race/Ethnicity (Fall 2003)									
	Black	Hisp.	Asian	PR	Chic.	Nam	Other	Non-Wh	Cau / Wh	
App.	10.7%	4.3%	8.1%	1.8%	1.6%	0.7%	4.7%	27.3%	64.4%	
Adm.	6.4%	3.8%	8.1%	1.6%	1.4%	0.7%	4.5%	22.0%	70.8%	

The data considered here represent the pool of candidates who actually apply to law school and the percentage who are admitted. Under the analysis above, the only group that is over-represented in admissions is white students. The data presented in this manner reveal a narrative different than the one Sander presents. In fact, the data are even bleaker when considering the period since 2003.<sup>109</sup>

Let us consider the trends of minority access to law school as analyzed by Professor Conrad Johnson in collaboration with the Society for American Law Teachers. First, he observes that for the fifteen years leading up to 2008, African Americans, Chicanos, and Mexican Americans have applied to law school at relatively consistent rates with increasingly stronger white-normative objective scores—*i.e.*, UGPA and LSAT.<sup>110</sup> Second, he notes during this same fifteen-year period that

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affirmative action is built on diversity theory now, not reparation. The diversity contribution remains just as valid for student immigrants. To suggest otherwise, is to return to the theme of privileged black suspicion.

107. *Id.* at app.II tbl.A2-1. Sander discusses the grand success of UCLA's universal SES affirmative action plan in which UCLA had greater diversity than ever before—yet he concedes that diversity consisted of mostly Asian Americans. *Id.* at 29. His analysis above seems remarkably similar and discouraging.

108. Elizabeth Rindskopf Parker & Sarah E. Redfield, *Law Schools Cannot Be Effective in Isolation*, 2005 BYU EDUC. & L.J. 1, 43 fig.10 (2005).

109. According to ABA data on law school applicants for 2011, 151 Native American or Alaskan Natives applied to law school, representing a 20.1% drop from last year, 3,922 African Americans applied, a drop of 9.7%, Hispanics included 2516 applicants, dropping 13.9% while 23,900 whites applied, with a 19.8% drop from 2010. Data on file with author.

110. Conrad Johnson et al., *DISTURBING TREND L. SCH. DIVERSITY*, <http://blogs.law.columbia.edu/salt/> (last visited June 6, 2011) (A collaboration between the Society

twenty-four new law schools emerged, adding three thousand new spots for law students.<sup>111</sup> Third, in spite of this colossal increase in available slots, African American matriculation has declined by 7.5% and Mexican American matriculation by 11.7% in the last fifteen years. To put it plainly, in the last fifteen years, of the three thousand additional students who happily opened their thick manila envelopes offering them a place in the law school classes of 1993 through 2008, none of them were African American or Mexican American.<sup>112</sup> Finally, as Sander is clearly and validly expressing concern about who gets shut out of law school from a SES point of view, it is worth considering the data from a race standpoint as well. Nearly double the number of African Americans (61%) and one-third more Mexican Americans (46%) are rejected from all law schools to which they applied compared to white applicants (34%).<sup>113</sup>

*E. Wealth is a Crucial Datum Point Missing from Sander's Analysis*

For Sander, however, when it comes to who should get the benefits of affirmative action, race is not the issue—socioeconomic status is. To his credit, Sander acknowledges that race and SES can intersect.<sup>114</sup> The problem is that SES, as measured by education, income, and occupation, does not capture an important factor in determining educational trajectory: wealth.<sup>115</sup> As Oliver and Shapiro point out, wealth, unlike a parents' income, education, or occupation, allows for the command of resources to *access* education.<sup>116</sup> Sander acknowledges that SES means different things in different racial groups and sets out to solve the lack of validity in his measure.<sup>117</sup> He does so by comparing the within-group SES rather than the across-group variety and draws the conclusion that patterns of admission by racial group reveal no meaningful differences. Unfortunately, the volatility of SES without including the measure of wealth as part of that index does not allow for Sander to make the conclusion he does. Terenzini et al. argue that wealth needs to be included in a SES index along with education, income, and occupation precisely because it reveals different social locations from which students approach educational decisions.<sup>118</sup> Specifically, wealth offers the opportunity to live in a

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of American Law Teachers (SALT) and Lawyering in the Digital Age Clinic at Columbia Law School).

111. *Id.*

112. *Id.*

113. *Id.*

114. Sander, *supra* note 1, at 650.

115. Wealth is defined as net assets and liabilities. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 30 (10th anniversary ed. 2006).

116. *See id.* at 32.

117. *See* Sander, *supra* note 1, at 650–53. I use the term validity here to signify that scientifically SES does measure the same thing from one racial category to the next. *See generally* THOMAS D. COOK & DONALD T. CAMPBELL, *QUASI-EXPERIMENTATION: DESIGN & ANALYSIS ISSUES FOR FIELD SETTINGS* (1979) (explaining that validity refers to a variable measuring what it is supposed to represent in the real world).

118. TEREZINI ET AL., *supra* note 99, at 2.

certain neighborhood, which allows for meaningful social networks and social capital.<sup>119</sup>

Thus, even comparing within racial groups to suggest that high SES blacks, for example, relative to low SES blacks land at the top of the education heap is probably inaccurate. Consider the median net worth of whites versus non-whites and Hispanics in 2007: \$170,400 versus \$27,800.<sup>120</sup> The disparity is staggering. Consider further the relative income based on race and gender for individuals with a bachelor's degree:<sup>121</sup>

Mean Earnings by Highest Degree Earned 2008 with a Bachelor's Degree

White Male \$75,053

White Female \$43,848

Black Male \$51,691

Black Female \$42,858

Hispanic Male \$56,980

Hispanic Female \$39,231

Although Sander asserts that “upper-middle class minorities have made dramatic gains over the past fifty years,”<sup>122</sup> it is worth stating the percentage of minorities who *are* actually in the upper middle class<sup>123</sup>: 32.3% of Asian Americans, 21.6% of whites, 11.7% of Hispanics, and 9.9% of blacks.<sup>124</sup> Thus, whites, in income alone, outpace Hispanics and blacks two to one in the upper middle and upper income categories. When we consider the data points left out of Sander's analysis—the massive disparity in wealth between whites and non-whites, the significant differential in income based on race and gender even with the same level of educational attainment, and the substantial difference between whites compared to Hispanics and blacks in the upper and upper middle income categories—Sander's conclusion that non-white students attending law schools come from relatively elite backgrounds is suspect.<sup>125</sup>

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119. Social capital refers to the resources obtainable within the social structure of a person's community—norms, social networks, and interpersonal relationships—that contribute to personal development and attainment. See James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. 95, 119 (1988).

120. Brian K. Bucks et al., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, 95 FED. RES. BULL. A1, A11 tbl.4 (2009).

121. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 150 tbl.228 (2011).

122. Sander, *supra* note 1, at 668.

123. Upper middle class in the United States was estimated as household incomes of over \$122,000 in 2006 according to analysis by the Tax Foundation, which relied on census data. See GERALD PRANTE, TAX FOUND., NEW CENSUS DATA ON INCOME GIVES A WELCOME DOSE OF FACT CHECKING TO “MIDDLE-CLASS” RHETORIC, 2 tbl.1. (Sept. 11, 2007), available at <http://www.taxfoundation.org/files/ff102.pdf>.

124. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 454 tbl.692 (2011). The numbers reflected above actually capture the percentage of the populations with household incomes above \$100,000 because of how the census created income categories.

125. Sander, *supra* note 1, at 653–54.

SES alone is thus an imperfect measure of what Sander refers to as “eliteness.”<sup>126</sup> Two other major variables come into consideration when looking at income, education, and occupation as measures of Sander’s eliteness measure. First, geography plays a significant role in the income and cost of living that an individual encounters. Thus, if people of all races were evenly distributed across the nation in expensive and inexpensive locations, using income as a measure of eliteness might be less problematic. However, a parent of color may have income that puts the household in Sander’s elite category because that parent may hold two or even three jobs in order to afford to live in an apartment in a safe neighborhood with decent schools. Never mind that she may live in Boston, Los Angeles, or New York.

The second issue is access to resources that come about with wealth accumulation. As Oliver and Shapiro point out, the nature of Sander’s classification of eliteness for minorities is tenuous because households of color have so little wealth.<sup>127</sup> Thus, a serious illness, a job loss, or emergency repairs at one’s business can rapidly send a household of color tumbling out of the elite category.<sup>128</sup> Why? Because households of color tend to have so few resources from which to draw on for their own financial security. In fact, in an analysis of wealth, Oliver and Shapiro found, “One startling comparison reveals that *poverty-level whites* control nearly as many mean net financial assets as the *highest earning blacks* . . . . This analysis of wealth leaves no doubt regarding the *serious misrepresentation* of economic disparity that occurs when one relies exclusively on income data.”<sup>129</sup>

Sander’s conclusion regarding the eliteness of students of color leads him to assert that racial diversity contributes modestly to socioeconomic diversity in legal education.<sup>130</sup> In addition to the generalized skepticism articulated above, one could ask, who cares? Sander, in his color-blind agenda, misses the point that the contribution of racial diversity can work in concert with socioeconomic diversity, but works, perhaps more importantly, independently. Before I explore this point in further detail in the next section, Sander’s analysis of credentials and conclusion of SES bias is deserving of comment. Again, what is most significant is the data not presented.

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126. *Id.*

127. Oliver and Shapiro would agree with Sander that the black middle class is central to the argument of racial equality. They would also agree that educational achievement, earnings, and occupation are the foundation for those blacks who have found their way into the middle class. However, I suspect Oliver and Shapiro’s line of thinking goes far beyond where Sander would like to go when they write, “[A]n accurate and realistic appraisal of the economic footing of the black middle class reveals its precariousness, marginality, and fragility.” OLIVER & SHAPIRO, *supra* note 115, at 93–95.

128. *See id.* at 98–99.

129. *Id.* at 103 (emphasis added).

130. Sander, *supra* note 1, at 654.

*F. The Road Less Travelled: The Concern for (White) Wealth Preferences and Credentials*

In his next set of analyses on credentials, race, and SES, Sander concludes that racial preferences and credential disparities are massive.<sup>131</sup> First, it would be useful information in Table Eleven, as provided in Table Ten, to know the sample size of the racial groups. Small sample sizes lead to less reliable results.<sup>132</sup> Second, as mentioned earlier, with regards to Tables Five, Six, and Seven, as Sander's main point seems to be that privileged minorities are benefitting above all groups, the reader would profit from seeing the intersection of the standardized indices based on race *and* parent's mean education level.<sup>133</sup>

I presume, based on Sander's critique that race preferences are not a good proxy for SES diversity, that if a more detailed analysis revealed that black, Hispanic, or Asian applicants whose parents had low mean education levels were admitted at greater rates than high SES minority applicants, he would support the current affirmative action program.

Finally, a useful exercise would be to compare the standardized indices of white applicants based on level of education with non-white standardized indices based on level of education. Such data would provide an accurate answer to the argument Sander is trying to postulate: to what degree are white students with parents who have little education receiving fewer *preferences*<sup>134</sup> than black students whose parents have a significant level of education?<sup>135</sup>

131. *Id.* at 658.

132. *Id.* at 657–58; see also Russell V. Lenth, *Some Practical Guidelines for Effective Sample-Size Determination*, 55 AM. STATISTICIAN 187, 187 (2001) (“An under-sized study can be a waste of resources for not having the capability to produce useful results . . .”).

133. A major flaw with this particular analysis is using education alone as a measure of SES. It dismisses the potential assets, resources, networks, neighborhoods and income available to a student. Thus, educational attainment fails to accurately reflect the disparity of income among racial groups despite accomplishing the same level of educational attainment as whites. Furthermore, it discounts across racial/ethnic groups the occupational choices available despite having the same educational level.

134. I use the plural of the word preference because even white students receive some sort of preference in the law school admission process. The essence of Sander's argument is that reverse discrimination is at play during the admission process. Less qualified rich minority students are taking the place of more qualified, poor white students. Using the University of Michigan as a case in point, Tim Wise points out all of the preferences that were available to white students. Certainly, URM students had 20 points added to their scores, but so did low income students and students who attended low resource schools—regardless of race. WISE, *supra* note 22, at 79. Those points did not have a cumulative effect. *Id.* Thus, students from each of these three categories, no matter their race, received 20 points. However, the point bonanza did not stop there for white students. If you happened to be a poor white student from Michigan's mostly rural, mostly white upper peninsula, 16 points were added to your score for a total of 36 points. *Id.* at 80. These points *were* cumulative. *Id.* The best for which a poor black student from Detroit could hope was ten points for being a Michigan resident, for a total of 30 points. *Id.* Points for wealthy white students were also in the offing. The University awarded up to ten points for attending an academically challenging school and eight points for choosing an especially demanding course load. *Id.* Minorities were least likely to have access to these points because 84 percent of whites attended an academically challenging school while minorities are placed in the more challenging courses sixty percent less than are white stu-

Oddly, Sander is quite forgiving of law schools' unconscious bias towards wealthy (white) students. He dismisses the idea that legacy admits could play a significant role in who finds a place in a law school. He suggests that not much evidence exists that law schools use the legacy program to the degree that it meaningfully harms poor (white) students, but does not provide this evidence.<sup>136</sup> Legacy admissions also occupy a key role in who gets into the pool of students who can ever apply to law school, and these students are generally wealthy whites. As Tim Wise observes, 96% of living alumni at Ivy League schools are white.<sup>137</sup> That being the case, it is rational to expect that their beneficiaries will be mostly white as well. These legacy students have a huge advantage in the application process. For example, at Harvard, non-legacies have a 15% chance of admission while nearly 40% of legacy applicants are admitted.<sup>138</sup> The rate of admission for legacy students is greater than that of all students of color, whether admitted to Harvard under an affirmative action program or not.<sup>139</sup> Yet, legacy admits possess lower credentials than other applicants.<sup>140</sup> Furthermore, a recent study shows that affirmative

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dents. *Id.* But wait, there is more. Four points went to legacy applicants—again, mostly white students—given the history of educational access in the United States. *Id.* at 81. Five additional points could be had for leadership and service. *Id.* At the risk of sounding like a broken record, these points were more likely available to wealthy white students who had the opportunities and resources to engage in leadership and service activities like spending spring break in Mexico building houses for Habitat for Humanity. Students with athletic ability received the same number of points as students who received twenty points for affirmative action. *Id.* Similarly, 20 points could be had under the ubiquitous category known as provost's discretion for students with some special quality not previously covered. *Id.* It is not hard to imagine that the special qualities not previously covered might include the types of characteristics passed down through opportunities made available through assets (as opposed to income). As Oliver and Shapiro observed, "The potential for assets to expand or inhibit choices, horizons, and opportunities for children emerged as the most consistent and strongest common theme in our interviews." OLIVER & SHAPIRO, *supra* note 115, at 86. What Sander's data cannot tell us is the extent to which minorities in the upper echelons had wealth. Rather, as Wise points out, Sander focuses on some of the facts above to explain bias in favor of wealthy applicants without acknowledging wealthy white applicants may benefit disproportionately. *See WISE, supra* note 22, at 79–81.

135. I imagine the difficulty in doing this analysis is a function of the small sample number Sander had to rely on in completing his standardized index based on race. Only 33 schools had the minimum five racial minorities per category needed to complete the analysis. Thus, I return to my earlier point. We have too few minority students in law school in the first place.

136. A survey of the top twenty-five law schools reveals that eleven use legacy admissions programs. Two schools refused to answer the question regarding legacy admissions. Data on file with author.

137. WISE, *supra* note 22, at 122.

138. *Id.*

139. *Id.*

140. DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* 4 (2006). Golden reveals that top colleges and universities employ the practice of admitting children of alumni, wealthy donors, celebrities and politicians—some with substandard academic credentials—over applicants with higher SAT scores or grades who are without wealthy parents or political connections. *Id.* These preferential admissions disproportionately benefit wealthy white applicants, and the number of admitted wealthy white applicants outpaces students of color admitted under affirmative action programs. *Id.* at 6. Examples of such preferential treatment include Harvard admitting Al Gore's son—despite his unimpressive record and Princeton accepting President George W. Bush's niece after she submitted her application a month late. *Id.* at 2, 4. Additionally, Harvard accepted a real estate developer's son with academic numbers below the school's standard, but where the develop-

action students and athletic program students outperform legacy admits.<sup>141</sup>

Sander suspects that grade inflation is more likely the culprit in law school admissions bias against poor students.<sup>142</sup> He observes that low SES students are more likely to attend public institutions than private ones. However, while he provides the data for that portion of the student population, he neglects to reveal the data regarding the proportion of the students of color attending private institutions—and thus enjoying the grade inflation preference. In fact, 21% of whites, 18% of Asian Americans, 17% of blacks, and 11% of Hispanic students attend private institutions. Perhaps more troubling is that blacks, more than any other racial group, specifically 15%, attend *private for profit* institutions.<sup>143</sup> These numbers suggest that minorities may not be the recipients of the advantages of grade inflation to the same degree that white students are.

One final area where typically wealthy students enjoy privilege is in the arena of early admissions. Indeed, seventeen of the top twenty-five law schools used early admissions programs.<sup>144</sup> Furthermore, these programs directly affect the pool of available undergraduates from prestigious schools who can apply to law school. Early admission programs have a far more significant impact on the make-up of the college classroom than affirmative action. Typically, elite schools will offer early undergraduate admission to students, sometimes with as much as one hundred-point lower SAT scores, to obtain a commitment from that student to attend the school. More affluent students are largely the beneficiaries of the program because early admission requires strong grades and SAT scores prior to receiving senior year grades. These students tend to go to schools with strong resources, have access to test prep programs, and are less likely to need financial aid. These programs disadvantage students of color because students of color are unable to take advantage of competing financial aid offers.<sup>145</sup> More importantly, it is not family income, but rather the advantage of wealth, i.e., the ability to deploy

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ment office liked some other numbers—namely his father's pledged contribution of \$2.5 million. *Id.* at 44–45. Other schools employing this practice include Duke, Brown, Notre Dame, the University of Virginia, Stanford, and Amherst. *Id.* at 54, 56, 117, 122–23, 288.

141. See generally RICHARD D. KAHLBERG, AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS (2010).

142. Sander, *supra* note 1, at 659.

143. For-profit colleges offer many more non-degree programs than legitimate degree programs. These non-degree programs take less time to complete and cost the college less to run (between hundreds and thousands of dollars), but do not yield gainful employment. In short, the costs of these programs are disproportionately higher than the income students can expect to receive upon graduation. See Aaron N. Taylor, "Your Results May Vary": *Protecting Students and Taxpayers through Tighter Regulation of Proprietary School Representations*, 62 ADMIN. L. REV. 729, 753 (2010) ("Proprietary school students tend to be poorer and older than students at traditional schools. They are also more likely to be first in their families to go to college, be female, and to belong to a racial or ethnic minority group." (footnotes omitted)).

144. Telephone survey with law schools. Data on file with author.

145. WISE, *supra* note 22, at 93.

assets to pay the tuition of an elite school that will be a determinative factor in accessing these programs. Sander's analysis ignores this important variable. Thus, while we may say with confidence, based on the data I have discussed above regarding wide disparities of wealth between whites and non-whites, the programs discussed here provide preferential treatment to the privileged white applicant. Therefore, I am less inclined to endorse Sander's view that his data prove that white lower SES students are denied access to law school precisely because of misused affirmative action programs that protect seats for high SES *minority* students. The data I provide implicate programs, like the ones I discussed above, as the culprit for wealthy white students' access at the expense of low SES *minority and non-minority* students. On one point I would agree with Sander: law school policies (and higher education admission policies) have the effect of creating barriers for low to moderate SES applicants.<sup>146</sup>

### III. WHY CLASS-BASED AFFIRMATIVE ACTION CANNOT REPLACE THE RACE-BASED VERSION

If only Sander had stopped there. I believe that Sander really is interested in finding "fair" and "class neutral" law school admission policies because this is the historic discourse of the post-race, reverse-discrimination crowd. He tips his hand when he writes that SES preferences could be at least a partial replacement for racial preferences.<sup>147</sup> In the discussion that follows, Sander employs his prior analysis to challenge affirmative action's relevancy and legitimacy by resorting to the now tired arguments of stigma and mismatch that would not exist with class-based preferences but, according to him, haunt race-based programs.<sup>148</sup>

In this section, I address three points. First, I endeavor to briefly explain why race and class cannot be even partially duplicative. They are cumulative because through a contextualized discussion of white preferences that allowed for the accumulation of wealth—a key variable to the access of education—minorities encounter a double bind. Next, I explore why the stigma argument is not relevant and why the mismatch argument is misguided. Finally, I address what I have come to call the "William James" problem: "There is nothing so absurd but if you repeat it often enough people will believe it."<sup>149</sup> The language, "In the age of Obama,"<sup>150</sup> is code for we are a post-race world in which racial equality

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146. Sander, *supra* note 1, at 659–60.

147. *Id.* at 664.

148. *Id.* at 664–67.

149. WILLIAM JOSEPH FEDERER, AMERICA'S GOD AND COUNTRY: ENCYCLOPEDIA OF QUOTATIONS 317 (2000).

150. Sander, *supra* note 1, at 668.

is “close enough.”<sup>151</sup> In this section, I argue why, regardless of SES, affirmative action is still necessary to create racial diversity. Yet, institutions must take care of how they treat students of color once they arrive.

*A. The Cumulative Effect of Class and Race*

Let’s begin with the theory of race and wealth and why wealth, more so than income, is most determinative of why we have the pipeline problem.<sup>152</sup> Sander is at least willing to acknowledge that certain racial groups still face some inequality, but in the context of education, he would rather focus on class to supplant race in an effort to employ ‘out-reach methods’ over affirmative action. Oliver and Shapiro point out why neither class nor race adequately addresses the problem at hand.<sup>153</sup> Focusing on race creates evidence problems. Concepts like institutional racism, implicit bias, and covert racism creep into the discourse, creating challenges and/or resistance for human observers as well as judges to understand how to redress these issues. On the other hand, focusing on class, as Sander does, purges race from the discussion. Oliver and Shapiro warn, “The materialist perspective that policy should address broad class groups as opposed to specific racial groups leaves the unique historical legacy of race untouched.”<sup>154</sup> Wealth attainment plays a central role in understanding the interactive effect of race and class that leads to our current state of racial inequality.

Following the Second World War, the United States adopted a number of social processes that intentionally or unintentionally provided a series of preferences for whites and relegated African Americans to subordinate positions. The Federal Housing Authority allowed for redlining practices in which white neighborhoods routinely had mortgages approved and black neighborhoods almost universally were excluded from homeownership.<sup>155</sup> Moreover, decisions on where to build high-

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151. The words of my gun toting, Palin loving, blue collar working, but ever so charming cousin echo in my ears: “For God’s sake, they got one of their own as President. What more do they need?”

152. Although I call the larger issue at hand here—who has access to law school or higher education—a pipeline problem, I don’t think that Sander would agree. He prefers to slice off the issue at the stage of applications and focus on who gets accepted to law school.

153. OLIVER & SHAPIRO, *supra* note 115, at 34–35.

154. *Id.* at 35.

155. WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 28 (2009).

ways came about in the midst of the great migration<sup>156</sup> and involved the demolition of inner-city black neighborhoods.<sup>157</sup>

The government also developed social service programs such as Social Security Income (SSI) benefits and Aid to Families with Dependent Children (AFDC). SSI benefits are available regardless of a recipient's assets, and given to the survivors of disabled or deceased workers. On the other hand, AFDC was originally designed for white women and children as a way to meet basic needs. The benefits are far less generous than SSI and require that the beneficiaries have minimal assets in order to qualify. Initially, women of color were routinely denied these benefits based on white normative "suitability" judgments on home and hearth. However, by the time President Clinton called for reform of AFDC in the early 1990s, the recipients were overwhelmingly minorities.<sup>158</sup>

Finally, the tax code offers one of the most effective preferences for wealth creation and preservation. Capital gains allow for reduced tax rates, and the deduction of mortgage interest and property taxes create special entitlements for whites more so than for blacks, even though the latter may have the same income as the former because of the differential asset portfolio each group carries. The subsidy for home ownership deductions amounts to \$54 billion, with the top 5% of taxpayers enjoying \$20 billion of it—the same group to get the tax reduction in capital gains from the sale of stocks, etc.<sup>159</sup>

The net effect of these policies meant that blacks have different access to labor markets, neighborhoods, education, housing, and, especially, wealth.<sup>160</sup> Whites had a path into a key means of wealth transfer—home ownership—from which blacks and Hispanics were excluded. This wealth is inherited by future generations, invested, and increased.<sup>161</sup> Blacks and Hispanics simply cannot catch up. Even assuming, *arguendo*, that Sander is right that some blacks and Hispanics are in the upper middle class SES bracket, Oliver and Shapiro's work reveals that by holding income constant (meaning comparing racial groups by the

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156. While other groups use an immigration narrative to explain that individual hard work and merit is the road to middle class, six million African Americans migrated from the South to the North and West in hopes of better opportunities between 1915 and 1970, but this story has been left largely as landscape. ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* 8–13 (2010). However, it is this migration that informed housing and transportation policy in the North and West. See WILSON, *supra* note 155, at 29–33.

157. WILSON, *supra* note 155, at 29–30 (pointing out that freeways allowing for white exodus to federally subsidized suburban neighborhoods, created barriers between black and white city neighborhoods, and blocked access for black neighborhoods to city business districts).

158. OLIVER & SHAPIRO, *supra* note 115, at 42.

159. *Id.* at 43–44.

160. In other words, black mobility is severely hampered by the neighborhood in which they live, their job prospects and stability, their job income disparity, and the quality of education available to their children. *Id.* at 169.

161. Most importantly, the inheritance of this wealth transmits cultural capital, provides cash at key milestone events (like a private school elementary and/or secondary education), and through traditional bequests that allow for investment and future wealth attainment. *Id.*

same income bracket), “[t]he highest earning black households possess twenty-three cents of [the] median net financial assets for every dollar held by [the] high[est]-income white households.”<sup>162</sup>

Their results are sobering and should be considered carefully when contemplating Sander’s conclusion and assertion that: (1) some blacks have achieved racial equality in the upper middle class based on their income measures; and therefore, (2) no longer need racial admission preferences. The social processes that allowed whites, but not minorities, to gain a foothold in accessing wealth created a racially stratified legacy still present today. Oliver and Shapiro paint a grave picture regarding the lack of access to wealth, which cannot be so easily ignored by comparing SES data, as they state:

[W]hites evidence a substantial ability to pass on status at the top and, in general, show some upward movement; blacks, by contrast display a comparative incapacity to transmit high occupational status to their offspring coupled with the relative stasis on the mobility ladder. We further observed dramatic variations in the financial payoff for mobility. No matter how high up the ladder blacks climb, they accumulate very few assets, especially in comparison to equally mobile whites. Asset poverty is passed on from one generation to the next, no matter how much occupational attainment or mobility blacks achieve.<sup>163</sup>

Ultimately, Sander’s analysis and conclusions create yet another vehicle of suspicion. They suggest that once again, minority students, particularly those at elite law schools, have gamed the system. His post-race diatribe reinforces the constant air of suspicion under which students of color must operate, no matter how much they accomplish.<sup>164</sup>

I agree with Sander that we need better data to solve the problem of over-representation of wealthy, rather than high SES, students in law school. Until that time, affirmative action that allows students of color from all economic backgrounds into law school plays an essential role. If affirmative action allows for more students of color to enter profes-

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162. *Id.* at 101. Recall that Sander’s data did not capture this variable.

163. OLIVER & SHAPIRO, *supra* note 115, at 169–70.

164. It reminds me of a certain Harvard Law Review editor who went on to be President of the United States. He has to be guilty of something. He has to have gamed the system. He is not really allowed to be president because he hasn’t proved his citizenship. In fact, a poll released on February 15, 2011 shows only 28% of likely Republican primary voters firmly believe that Obama was born in the United States. Scot Kersgaard, *Poll: 51 Percent of Republicans Think Obama Was Not Born in U.S.*, AM. INDEP. (Feb. 15, 2011, 6:19 PM), <http://www.americanindependent.com/169644/poll-51-percent-of-republicans-think-obama-was-not-born-in-u-s>. In fact, even after he released his long form birth certificate clearly revealing his birth on U.S. soil, detractors created new suspicions around Obama’s educational credentials. Josh Voorhees, *Trump Pivots from Obama’s Birth Certificate to College Grades: Says President Needs to Explain How He Got into Harvard*, SLATE. (Apr. 27, 2011, 2:22 p.m.), [http://slatest.slate.com/posts/2011/04/27/obama\\_s\\_college\\_grades\\_trump\\_wants\\_to\\_see\\_president\\_s\\_transcript.html](http://slatest.slate.com/posts/2011/04/27/obama_s_college_grades_trump_wants_to_see_president_s_transcript.html)

sions<sup>165</sup> that allow for the accumulation of wealth and narrow the racial gap, then it serves a noble purpose.<sup>166</sup> Once race is contextualized for the individual, as discussed in section one of this article, and contextualized at the institutional level, as discussed here, the compelling nature of the intersection of race and class becomes plain. Until that time, minorities remain in a double bind.

*B. Misguided Mismatch Theory and the Allegory of Stigma and Invisibility Part I*

I begin this section with a story from Charles Ogletree's book, *The Presumption of Guilt*.<sup>167</sup> Recall that Sander proposes a mild SES preference program and to illustrate the potential for success with his idea, he describes the UCLA experiment and the "remarkable" results that emerged with a diverse class, although mostly Asian American.<sup>168</sup>

When Mathews [a Harvard Law graduate, and currently an associate at a law firm in Washington, D.C.] was a freshman at UCLA in 1999 [during the same period when Sander's experiment was underway], he was having lunch in the dining hall with some friends from the dorms, all of whom were Black males. They had just settled down to recap the week's events and devour lunch when a White female student approached their table from across the room and asked, "So what sport do you guys play?" There was an assumption that if there was a group of Black male students at UCLA, they must be there on athletic scholarships because of the high admission criteria for "regular students." Although this was the first time Mathews had encountered such a stereotype in college, it wasn't the last. Each of them replied with the most nonstereotypical sport they could think of—badminton, lacrosse, golf, and table tennis—and then continued with their conversation.<sup>169</sup>

I tell this story to reintroduce the ideas discussed in Part I. This story illustrates the idea of one's master status—that regardless of SES, one's race becomes an abstract concept that others define.<sup>170</sup> In the case of the academy, minorities are under suspicion, presumed guilty if you will, for showing up at UCLA. The white girl in the story has created

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165. See THE WHITE HOUSE PROJECT, THE WHITE HOUSE PROJECT REPORT: BENCHMARKING WOMEN'S LEADERSHIP 28 (2009), available at <http://www.thewhitehouseproject.org/documents/Report.pdf> (reporting on the increased numbers of women of color in management and professional positions).

166. At minimum, I sincerely hope these students will be inspired to eliminate preference and institutional racism that occurs in the tax code, mortgage lending decisions, educational tracking, the criminal code, and employment settings to name a few. As Bowen and Bok found, students admitted under affirmative action were more likely to contribute to the communities from whence they came. BOWEN & BOK, *supra* note 102.

167. OGLETREE, *supra* note 5.

168. Sander, *supra* note 1, at 662.

169. OGLETREE, *supra* note 5, at 236.

170. GOFFMAN, *supra* note 42.

a narrative to explain their presence, to exonerate them of their guilt, after investigating her suspicions.

This guilt is articulated under the guise of concern through the harm students of color endure from the stigma that affirmative action inflicts upon them. In an article published recently, I demonstrate that students of color do, indeed, encounter stigma, but the stigma experience appears associated with *greater* rates at schools that do *not practice race-based admissions*.<sup>171</sup> Across the board, findings of internal stigma (self-doubt), external stigma (having others question one's qualifications), and reports of overt racism were higher in anti-affirmative action states.<sup>172</sup>

The story, still, is slightly more complex. Students reporting greater rates of stigma and overt racism in anti-affirmative action states were also more racially isolated than their counterparts in race-based admissions states.<sup>173</sup> Thus, stigma and hostility do not appear to be connected with affirmative action, but rather with racial isolation. Affirmative action appears to play a role in decreasing the chances that a student will find herself racially isolated in the classroom.<sup>174</sup> The key point is that eradicating affirmative action will not relieve students of color of the stigma they encounter because affirmative action does not appear to be the cause of stigma. Students of color are under suspicion whether they are admitted under a white normative meritocratic system<sup>175</sup> or affirmative action system. However, affirmative action might mitigate some of the risk of stigma by minimizing racial isolation.

Sander also indicts students of color under his mismatch theory. He does this earlier in his article with statements such as, “[Law schools] see nearly all of these [minority] applicants as already handicapped by low credentials.”<sup>176</sup> He does it again in the presentation of data about students admitted at the University of Missouri at Columbia (UMC).<sup>177</sup> Sander goes into great detail offering the gradation of scores and the odds that a white student was admitted within a certain range, but does not offer the same data regarding students of color.<sup>178</sup> He offers a cut off point under which UMC admitted all but one black student.<sup>179</sup> The reader is left to

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171. Bowen, *supra* note 49, at 1234.

172. *Id.*

173. *Id.* at 1227–29.

174. *Id.* at 1227. This study was exploratory and had a relatively small sample. However, it did cover students from 28 states, including the four states with anti-affirmative action policies. Most importantly, the study does not lay claim to making any causal statements. It suggests correlations and encourages more study. Nonetheless, it raises questions about the validity of the harm of stigma at affirmative action's hand.

175. *Id.* at 1234. Despite having achieved GPAs and SAT scores comparable or superior to their white counterparts, and most especially their legacy counterparts, minority students are more likely to encounter a stigma. *Id.* at 1227–28.

176. Sander, *supra* note 1, at 655.

177. *Id.*

178. *Id.*

179. *Id.*

wonder, how many black students applied? What were their scores? Were they all lower than the white students? Without providing this information, Sander gives an impression that all black students were mismatched or robbed more qualified white students of seats at UMC.

Finally, it comes as no surprise that Sander asserts that one of the key advantages of SES preferences is that they are based on individual circumstances, not group membership.<sup>180</sup> And with individuality comes the bonus of invisibility and the removal of stigma. Once again, colorblindness celebrates the individual and eschews group experience. Indeed, Gallagher notes, “In a post-race, colorblind world, race can be seen, but pointing out race-based inequities should not be heard.”<sup>181</sup>

Perhaps most disturbing in higher education and law school is the classroom setting where white individuals are so entrenched in colorblindness that “[i]t is now possible to define oneself as not being racist because of the clothes you wear, the celebrities you like or the music you listen to while believing that blacks or Latinos are disproportionately poor or over-represented in low pay, dead end jobs because they are part of a debased, culturally deficient group.”<sup>182</sup> In other words, whites can consume minority culture as a way of showing progressiveness without considering privilege or structural barriers because in a post-race society we are race mute.

We can already see the effects of eliminating affirmative action. Guerrero notes the sadness a student endures when the absence of minority students in a classroom permits white students to analyze minority communities on the basis of their own privileged experiences and to speculate wildly about how minorities should behave.<sup>183</sup> Silence due to

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180. *Id.* at 665. Sander also touts the invisibility of SES preferences. *Id.* at 666. I am not sure if those who lived in the type of poverty that Sander’s SES preferences are designed to help would necessarily agree. See generally Vivyan Adair, *Branded with Infamy: Inscriptions of Poverty and Class in the United States*, 27 *SIGNS* 451, 456–458 (2002) (highlighting a study showing the added stigma that those in poverty often bear through the physical signs of poverty throughout their lives. Scars, limps, missing teeth from lack of medical care, exhaustion, poor skin, emaciation or obesity from lack of proper nutrition, poor fitting shoes, insufficient winter clothing, and glasses taped together). In fact, I recall riding the NYC subway last summer when three young men entered the car. The two white males were dressed in quality suits, nicely tailored to fit their shapes, fancy ties, and shiny shoes. Their conversation clearly indicated they were interns at some sort of finance company. The third male, an African American, wore an ill-fitting suit, slightly worn, a tie that had seen better days, and scuffed shoes. His eyeglasses were held together in one corner by a paperclip. One of the white males jokingly inquired about what was on his eyeglasses. The black male tried to bat his hand away, but the white male insisted on inspecting his glasses and proceeded to mock him. Not being middle class, not being privileged is not invisible. Or perhaps Sander was thinking of the invisibility of white people receiving the preference in much the same way that legacy admits are mostly white and perceive themselves as invisible.

181. Gallagher, *supra* note 19, at 9.

182. *Id.* at 16.

183. ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* 163 (2002).

absence is one of the most grievous harms from dismantling affirmative action and most certainly would not be cured with a SES model.<sup>184</sup>

*C. Consider the Cause (Stigma) of Stereotype Threat and Effect (Underperformed Credentials) and the Tragedy of Mismatch Discourse Part II*

Regardless, others have challenged the mismatch theory in detail, and I do not intend to repeat their arguments here.<sup>185</sup> Instead, I raise two points. First, I remind the reader of Claude Steele's famous work on stereotype threat theory in which the most accomplished students of color appear most at risk for underperforming on tests.<sup>186</sup> Claude Steele points out that those whose social identity is attached to the domain of school, *i.e.*, either by privilege or by fighting the odds of poor education, unsafe neighborhoods, lack of family support, anomie, and low expectations, consequently possessing high confidence and strong academic skills,<sup>187</sup> will perform less than they are capable of on high stakes tests (like LSATs or Bar exams) when they fear the threat of confirming a negative stereotype.<sup>188</sup> In this case, the negative stereotype is the one that Sander repeats often—minorities have handicapped credentials.<sup>189</sup>

Therefore, social identities are a function of the situation in which a person finds oneself.<sup>190</sup> For people of color, the dominant group inflicts a social identity upon them at the micro level, with individual interactions, like the UCLA story above, but social identity imposes itself at the institutional, or macro level, too, when a person finds herself in a particular social setting and must function in it according to the stereotypes at hand.<sup>191</sup> Thus, Sander's attempt (and the attempts of others) to reduce

184. *Id.*

185. See *supra* note 3; see also Peter Arcidiacona et al., *Does Affirmative Action Lead to a Mismatch? A New Test and Evidence* 19–25 (Econ. Research Initiatives at Duke, Working Paper No. 27, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1384022](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1384022) (arguing that universities would have to have more private information not shared with students to create mismatch and highlighting studies that indicate that even with that information, no conclusions regarding mismatch can be made); Doug Williams, *Does Affirmative Action Create Educational Mismatches in Law Schools?* 11–14 (Apr. 13, 2009) (unpublished manuscript), available at <http://econ.duke.edu/~hf14/ERID/Williams.pdf> (arguing that bar passage data is too flawed to draw conclusive evidence). The data does not seem to support Sander's assertion that the evidence is mounting as to the existence of mismatch.

186. STEELE, WHISTLING VIVALDI, *supra* note 45, at 18–20.

187. Steele refers to these students as vanguard students. *Id.* at 58.

188. See generally *id.*

189. See generally Sander, *supra* note 1 (suggesting a variety of instances where minorities have handicapped credentials).

190. Steele refers to these as identity contingencies. Identity contingencies are conditions unique to your social identity that you must confront and cope with in a setting in order to function in it. They emerge from the racial hierarchy and stereotypes that occur in any given situation based on how it is organized. STEELE, WHISTLING VIVALDI, *supra* note 45, at 68.

191. Steele states:

The reality of stereotype threat also made the point that places like classrooms, university campuses, standardized-testing rooms, or competitive running tracks, though seemingly the same for everybody, are, in fact, different places for different people. Depending on group identity, different people would simply have different things to contend with in

students of color to a set of under-credentialed test scores robbing more deserving (white) students of their rightful place in law school ignores the social reality *and* effects under which all students of color, regardless of SES, must struggle. As Ross wryly stated twenty years ago:

In either legal rhetoric or artistic expression, the denial of the full humanness of the black person has been a central and tragic part of our discourse. Black abstraction functioned as a lens through which we remade the context in which our choices were played out. We abstracted away the pieces of reality that might have made those choices less comfortable.<sup>192</sup>

It is this discourse, which only contributes to the self-fulfilling prophecy that causes psychic harm and the vicious circle of underperformance.

Still, if we are to address the law school admissions of low SES students, as Sander articulates as his key goal in this article, we must address the minority college graduation rate that makes up the pool of available law school applicants.<sup>193</sup> Relying on mismatch here to explain the smaller numbers of graduates is also misguided. Instead, we might consider the research done on “undermatching,” in which minority students from lower SES tend to apply and enroll in schools less selective than where the students could actually succeed.<sup>194</sup> The same undermatching phenomena that put students at risk, both in terms of graduation rates and achieving the institutional support they may need, may also occur at law schools. Research suggests that more selective institutions have the resources to provide the appropriate support students of color may need.<sup>195</sup> Thus, a massive culture shift needs to occur in which we first humanize the students of color, stop indicting them, and confront the ways in which institutions of higher education must change to better serve the diverse student body (and its social contingencies) that these institutions congratulate themselves on acquiring. That is the subject taken up in this last section.

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these places—different stereotype threats, different ambiguities, about how to interpret their experience, different goals and preoccupations.

*Id.* at 60. Sander might be interested to know that top white male math performers underperformed in a challenging math test compared to a control group when the experimental group where faced with the stereotype that Asian Americans tended to do better on the test. *Id.* at 91–92.

192. Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 38 (1990).

193. Bowen et al. found that the majority of low SES college students were white. *See generally* WILLIAM G. BOWEN ET AL., *CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES* (2010) (giving a detailed account of education attainment in relation to such factors as race, gender, and SES).

194. *Id.* at 87–111.

195. Evan Thomas & Pat Wingert, *Minority Report*, NEWSWEEK, March 1, 2010 at 42.

*C. Post-Race Diversity Paradox*

One of the primary dangers of creating a racially and economically diverse student body is that institutions do so within a paradigm of “post-race.” The effect is that students of color and white students attend school with very different social contingencies. Although Sander does not mention it in his article, the Court in *Grutter v. Bollinger*<sup>196</sup> saw value in affirmative action because it could enhance the diversity of the student body for the twin goals of increasing racial understanding and eradicating racial stereotypes. Unfortunately, achieving these goals proves incredibly difficult when institutions of higher education generally, and academics such as Sander, specifically, espouse colorblindness.

In fact, a recent study I conducted, examining whether students of color in affirmative action versus anti-affirmative action schools enjoyed the benefits articulated in *Grutter*, revealed disheartening results. The study asked whether the *Grutter* goals were achieved using a series of measures, but asked the minority students to consider their answers in the context of a classroom with critical mass, *i.e.*, other students of the same racial or ethnic background attended the same classes.<sup>197</sup> On all measures, while more URM students in affirmative action states reported that the *Grutter* goals were met, barely a third of the URM students agreed or strongly agreed with any of the measures. Only two exceptions emerged, critical mass in affirmative action schools led about half the URM students to feel more welcome on campus and about 40% experienced increased self-confidence.<sup>198</sup> However, the most disturbing number was that only one-third of the minority students at affirmative action schools and about a quarter of the minority students at anti-affirmative action schools believed that a critical mass classroom led white students to engage in perspective-taking.<sup>199</sup>

The lack of white student perspective-taking is understandable if we consider the function of colorblindness for students and faculty alike in higher education. Most white Americans believe that blacks and whites have achieved racial equality.<sup>200</sup> This belief is a central tenet that allows the allegedly progressive discourse of the irrelevancy of skin color. However, Ruth Frankenberg prefers to call colorblindness color evasiveness because it allows whites to ignore their place of privilege. Whites

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196. 539 U.S. 306, 330 (2003).

197. Bowen, *American Skin*, *supra* note 40, at 5.. Critical mass was a key component of why affirmative action was needed. A certain number of students were needed in a classroom to ensure that others could see the variety of experiences and viewpoints that students in that racial or ethnic group held. *Id.*

198. *Id.* at 35–36.

199. *Id.* at 41. Gottfredson et al. have found that without perspective taking, it is difficult to diffuse racial stereotypes. Nisha C. Gottfredson et al., *Does Diversity at Undergraduate Institutions Influence Student Outcomes?*, 1 J. DIVERSITY HIGHER EDUC. 80, 82 (2008).

200. Charles M. Blow, *A Nation of Cowards*, N.Y. TIMES, Feb. 20, 2009, at A21. (discussing poll results that show a discrepancy in opinions about race and racism in the U.S.).

need not, under this model, acknowledge their social “location of structural advantage.”<sup>201</sup>

The concept of colorblindness is central to Sander’s thesis and discourse. As I have tried to argue throughout this paper, colorblindness demands de-contextualization of race. With de-contextualization, advocates of a class-based model of affirmative action do not have to acknowledge the identity implications of race and suspicion, the social contingency effects of race and stereotype threat, or the historical legacy of racial inequality through blocked access to wealth and the generational implications of this legacy on all levels of SES. David Theo Goldberg views this narrative as essential to claims of reverse racism<sup>202</sup> and denial of any claims of current redress.<sup>203</sup>

Furthermore, the theme of choice also appears in Sander’s article. He argues that “boundary groups” will only slightly partake in a particular racial identity.<sup>204</sup> However, it is this idea where Sander and others fail to grasp the contextualization of race. While a belief that one “partakes” in a racial identity may hold true for whites in their luxury of optional ethnicity,<sup>205</sup> such a paradigm conveniently allows for Sander and others to argue that “race no longer matters as an independent force which organizes social life, allocates resources, or creates obstacles to upward mobility.”<sup>206</sup> As discussed in the introduction and Part I, as well as in Charles Ogletree’s book *The Presumption of Guilt*,<sup>207</sup> regardless of SES, suspicion surrounds minorities in a whole host of social settings, including higher education. Again, the double bind rears its head.

#### CONCLUDING REMARKS

Naturally, despite the consistent and mounting evidence of *increasing* racial inequality,<sup>208</sup> a glaring question remains: why is Sander so tied

201. Ruth Frankenberg, *The Mirage of an Unmarked Whiteness*, in *THE MAKING AND UNMAKING OF WHITENESS* 72, 76 (Birgit Brander Rasmussen et al. eds., 2001).

202. A claim Sander certainly makes as to wealthy minorities against poor whites, as well as his assertion that race-based affirmative action is no longer relevant. See Sander, *supra* note 1, at 649, 660, 664–65.

203. DAVID THEO GOLDBERG, *RACIAL SUBJECTS: WRITING ON RACE IN AMERICA* 55 (1997).

204. Sander, *supra* note 1, at 665.

205. MARY C. WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* 6 (1990).

206. Ashley W. Donane, Jr., *White Identity and Race Relations in the 1990s*, in *PERSPECTIVES ON CURRENT SOCIAL PROBLEMS* 151 (Gregg Lee Carter ed., 1997).

207. OGLETREE, *supra* note 5, at 98–100.

208. Orlando Patterson, *For African Americans, A Virtual Depression—Why*, *THE NATION*, July 19, 2010 at 93. Patterson writes that while white America has experienced the Great Recession, most African-Americans have suffered something as desperate as the Great Depression. *Id.* Unemployment rates seem unimaginable in the double digits for African Americans. *Id.* Patterson finds the current economic crisis has served to open a deeper chasm between the socioeconomic wellbeing of blacks and whites. *Id.* He observes on nearly all measures, income, wealth, educational attainment, homeownership, foreclosures, the gains from the 1990s have been eradicated. *Id.* Income has declined. *Id.* Even more disturbing for Patterson is the *growth* in gulf between white and black wealth. *Id.* Black median wealth barely increased in the last 25 years stagnating at \$5000 in 2007. *Id.* White median wealth quadrupled during this time period, skyrocketing to \$100,000. *Id.*

to the colorblind ideal? As Cheryl Harris explains, property does not have to be physical. It just has to have value. Being white has value and provides rights. It is not just a privileged identity, but rather an objective vested interest legitimized by law long ago.<sup>209</sup> She points out that ‘whiteness’ receives protection because so much is contingent upon it.<sup>210</sup> And this is especially so in the racial hierarchy that is higher education. Whites have come to see education as their “right” even though it does not appear as such in the U.S. Constitution.<sup>211</sup> As Cornel West puts it:

The idea that affirmative action violates the rights of fellow citizens confuses a right with an expectation. We all have a right to be seriously considered and fairly considered for a job or position. But calculations of merit, institutional benefit, and social utility produce the results. In the past, those who were never even considered had their rights violated; in the present, those who are seriously and fairly considered yet still not selected do not have their rights violated but rather had their expectations frustrated.<sup>212</sup>

The heart of the matter is the frequently invoked use of the word “fair.” As expected, Sander argues fairness on the grounds that “[i]t is hard to justify giving large preferences to blacks and Hispanics from privileged backgrounds while ignoring the needs of low-SES applicants of all races.”<sup>213</sup> Allow me to unpack this statement in light of what I have argued above.

First, what Sander really means is it hard to justify giving preferences to a black applicant whose father is a neurosurgeon at the expense of a white applicant whose mother is a house cleaner. Second, it is unclear to me what Sander defines as privileged when wealth is excluded from the equation of his analysis. Third, I agree we should not ignore the needs of low-SES applicants of all races, but as the data shows, the paltry pool of minority college graduates as compared to low-SES white graduates demonstrates that we, collectively, continue to ignore low-SES minority students throughout their educational careers.

Thus, I propose three ideas: First, socioeconomic preferences must co-exist with affirmative action, not replace them—even incrementally. As established, minorities operate with a different set of social contingencies, even or perhaps especially, sons and daughters of privileged

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209. Harris, *supra* note 84, at 1724–26.

210. *Id.* at 1730.

211. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (finding no fundamental right to education).

212. West, *supra* note 67, at 34. And, as discussed in depth earlier, the consequences of not having access to a particular type of education or labor market, has generational effects in wealth and SES attainment. See *supra* Part III (enabling whites to maintain a higher SES because wealth is inherited by future generations, invested, and increased, while blacks and Hispanics, generally, are unable to catch up to the same level of wealth by the same means).

213. Sander, *supra* note 1, at 664.

minority parents.<sup>214</sup> Second, we develop a data collection system that measures wealth in addition to SES. In developing this information we can better understand who is privileged,<sup>215</sup> who is applying to law school, and who is enrolling. We can start developing need-based scholarships at a much more aggressive rate with these data in mind.<sup>216</sup> Third, we revolutionize our educational institutions by implementing color consciousness rather than just inviting diversity in. In doing so, we can acknowledge the different social contingencies under which our students operate. As administrators, professors, and fellow students, we can learn to respond accordingly.<sup>217</sup> We can work to change the settings and cues under which students operate, particularly those vulnerable to stereotype threat.<sup>218</sup> And as it turns out, all students are vulnerable to stereotype threat—even white students, who often will avoid interaction with minorities for fear of appearing racist.<sup>219</sup>

Sander posits that he sees no evidence that schools are putting into place plans to draw down their affirmative action plans under the timetable articulated in *Grutter*.<sup>220</sup> However, former Justice O'Connor recently called for more empirical evidence and action for affirmative action, not a withdrawal plan.<sup>221</sup> While I agree with Sander's assertion regarding the successes that have arrived in the wake of the civil rights revolution, it is

214. Not only do students of color have to worry about confirming a negative stereotype, which results in underperformance, they are still trying to master the concepts and skills a professor is teaching them. In other words they are multi-tasking in a high stakes setting. Steele states such a situation has serious consequences for minorities because it is a chronic situation in which cardiovascular and working memory effects occur. Overtime, enduring chronic negative stereotype threat can create serious health consequences for African Americans—even in the high SES group. STEELE, WHISTLING VIVALDI, *supra* note 45, at 108–25; see OGLETREE, *supra* note 5, at 98–101 (discussing the ongoing suspicion of even highly accomplished minorities in a variety of settings). Again, this is a chronic situation that all minorities confront. I recall sitting in a law conference that included recent minority law graduates describing how they navigated employment settings. One male sighed as he described his law firm experiences, and exasperatedly stated, “Being a Black male is a full time job!” Massey’s study on stereotype threat demonstrated that even privileged minority students have an extra pressure of identity threat working against their academic success. DOUGLAS S. MASSEY ET AL., *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMAN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES* 10–12 (2002). See also, Carbado & Gulati, *supra* note 49, at 1262.

215. Patterson, *supra* note 208 (observing that the 2007 Pew Foundation/Brookings Institution study found that the black middle class—the group Sander claims has arrived—is failing to reproduce itself). This means the fragile middle class discussed in Section Two is splintering to the point where its children are not only downwardly mobile, but finding themselves in the bottom of the income distribution. Thus, I believe we are at little risk of creating a trend where privileged middle class black children will game the system at the expense of poor white children.

216. See BOWEN, ET. AL, *supra* note 193, at 230–33 (finding this to be a key factor in maintaining and graduating low SES students).

217. See generally Bowen, *American Skin*, *supra* note 40.

218. STEELE, WHISTLING VIVALDI, *supra* note 45, at 164–80 (revealing a number of means by which schools can reduce identity threat).

219. *Id.* at 205–06, 213.

220. Sander, *supra* note 1, at 37–38.

221. Sandra Day O'Connor & Stewart J. Schwab, *Affirmative Action in Higher Education over the Next Twenty-five Years: A Need for Study and Action*, in *THE NEXT TWENTY-FIVE YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA* 58, 58–62, 71 (David L. Featherman et al. eds., 2010).

a limited achievement. As Patterson calls it, African Americans enjoy the inclusion and influence of the public sphere of American life with specific celebrity figures.<sup>222</sup> However, I take issue with Sander's pronouncement regarding middle class minorities. As Steele observed above, the avoidance of the "other" has led to profound racial segregation,<sup>223</sup> or as some call it "hypersegregation." Regardless, the effect is that African Americans live a dichotomy of public inclusion (symbolically) with private exclusion. All of this is to say that I am brought full circle in my critique. The data presented here do not capture the lost social networks, uneven educational training, missed social capital, and racial contextualization essential to educational and occupational success and ultimately the stability that comes with wealth. Until I see evidence in our social structures that stereotype threat has vanished and that desegregation and disparity have decreased, I will continue to advocate for affirmative action *and* class-based preferences that consider wealth.

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222. Patterson, *supra* note 208, at 93.

223. STEELE, *supra* note 45, 199–206.