ADDRESS

TAKING *GRUTTER* SERIOUSLY: GETTING BEYOND THE NUMBERS

*Dorothy A. Brown**

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> "[T]he educational benefits that diversity is designed to produce [are substantial]. . . . [T]he Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[1]

> "The Law School is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law. The Law School seeks only a façade—it is sufficient that the class looks right, even if it does not perform right."[2]

I. INTRODUCTION

Numerous articles have been written about *Grutter v. Bollinger*.[3] This Address seeks to analyze the competing views held about legal education by the majority and the dissent. While the majority viewed the University of Michigan Law School's ("Michigan Law School") actions as indicative of good faith, the dissent believes just the opposite. One of them must be wrong.

The Supreme Court upheld Michigan Law School's affirmative action program in *Grutter* because "student body diversity is a compelling state interest that can justify the use of race in university admissions."[4] Justice O'Connor's majority opinion assumes that the presence of students of color "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[5]

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1. Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (last alteration in original) (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (2003) (No. 02-241)).

2. *Id.* at 372 (Thomas, J., concurring in part and dissenting in part).

3. *See, e.g.*, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003); Gerald Torres, Grutter v. Bollinger/Gratz v. Bollinger*: View From a Limestone Ledge*, 103 COLUM. L. REV. 1596 (2003); David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

4. *Grutter*, 539 U.S. at 325.

5. *Id.* at 330 (alteration in original) (quoting Petition for Writ of Certiorari, *supra*

Justice O'Connor's opinion "deferred" to Michigan Law School's academic decisions. It did not require Michigan Law School to show that racial diversity in its student body actually promoted cross-racial understanding, helped break down stereotypes, or enabled students to better understand each other across racial boundaries.[6] There was, however, substantial evidence introduced that showed racial diversity yielded educational benefits for undergraduate students.[7]

Chief Justice Rehnquist's dissent argues that Michigan Law School's affirmative action policies should be declared unconstitutional because those policies are "a naked effort to achieve racial balancing."[8] Justice Thomas's opinion likewise articulates concern for the students of color admitted each year to Michigan Law School.[9] Justice Thomas is right to be concerned about the students of color and I share his concern. The question raised in my mind by the decision is to what extent are law schools using the diversity in their student body to actually break down racial stereotypes and promote cross-racial understanding, thereby improving the law school environment for all of their students? Put another way, are law schools "working" diversity?[10]

A recent study by Professor Frank Valdes shows that less than five percent of law students enroll in courses that expressly discuss race.[11] While Justice O'Connor presumes good faith on the part of Michigan Law School, will a post-O'Connor Court presume such good faith? More importantly, will the lower courts interpreting *Grutter* presume such good faith?[12]

The next challenge will not in all likelihood be decided by the Supreme Court. The next challenge will be decided by circuit courts interpreting strict scrutiny. *Grutter* provides that

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note 1, app. at 246a).

6. *See id.* at 328–29 (deferring to "the Law School's educational judgment").

7. *Id.* at 330 (citing Brief of the American Educational Research Ass'n et al. as Amici Curiae Supporting Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241)).

8. *Id.* at 379 (Rehnquist, C.J., dissenting).

9. *See id.* at 372 (Thomas, J., concurring in part and dissenting in part).

10. *Cf.* Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1304–05 (2000) (discussing various issues facing racial minorities in the employment context and the extent to which they accentuate or "work" their racial identity).

11. Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education—A Curricular Study with LatCritical Commentary*, 13 LA RAZA L.J. 119, 137 (2002); *see also* Kim Forde-Mazrui, *Learning Law Through The Lens of Race*, 21 J.L. & POL. 1, 2 n.5 (2005) ("The Committee on Curriculum and Research of the Association of American Law Schools found that a majority of schools responding to their survey had in recent years added at least one course on 'populations historically differentially affected by the law,' including Race/Ethnicity and the Law, American Indian/Native American Law, and Critical Race Theory." (footnotes omitted)).

12. I thank my colleague Ron Krotoszynski for making this point.

"attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"[13] How will a circuit court view the next law school that has no evidence diversity is being used in its institution to create educational benefits? Will this lack of evidence constitute "a showing to the contrary?"

If all a law school does is admit a racially diverse class, without ensuring that any cross-racial dialogue is taking place inside the classroom, will that be sufficient to prevail against the next challenge?[14] This Address suggests that law schools can and should do a better job to ensure that racial diversity in their student body is being used to benefit all students. Law schools at the very least must ensure that race-based discussions are incorporated into their classrooms. In this way, racial stereotypes held by students (as well as law professors) can diminish, cross-racial understanding can take place, and the law school environment will be far less alienating for all students—especially for students of color.

This Address also takes on an additional sensitive topic, following up on one of Justice Thomas's concerns—namely, how students of color are faring under this system. I focus on the academic performance of students of color in law school when compared with their white counterparts, using law review membership as a proxy. I argue (along with others) that part of the explanation for lower academic performance by students of color is the alienation they find once they attend law school.[15] This alienation can be a function of lowered expectations by law professors, outright hostility by certain law professors, as well as hostility of white law students (the white resentment that Justice Thomas describes).[16] By incorporating race-based discussions into the classroom, I argue that the classroom environment could be transformed into one more likely to improve the academic performance of students of color.

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13. *Grutter*, 539 U.S. at 329 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978)).

14. It is here that Dean Caminker and I part company. While he believes law schools should be concerned about what happens to the student body once they matriculate, he argues that it is not a legal requirement under *Grutter*. Evan Caminker, *Post-Admissions Educational Programming in a Post-*Grutter *World: A Response to Professor Brown*, 43 HOUS. L. REV. 37, 40 (2006).

15. *See infra* text accompanying notes 108–22.

16. *See Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part); *see also infra* notes 115–22 and accompanying text (discussing some of these challenges that students of color must face).

This discussion will proceed in three Parts. Part II briefly describes the pertinent portions of the majority and dissenting opinions in the *Grutter* decision and sets the backdrop for the balance of the Address. Part III discusses the various types of diversity and how having a diverse student body can impact educational outcomes. The Part begins with a summary of existing studies, which show the skill set that is developed when racial diversity is incorporated into class discussions, and concludes by noting the harm done to all students when racial diversity inside the classroom is ignored: the critical-thinking skill set is not developed, and an alienating environment is created for students of color as well as white students who recognize the reality of racism in America.

Part IV proposes a solution. It suggests that Critical Race Theory be integrated into all law school courses, especially the first-year curriculum, which is required for all law students. The discussion concludes by providing suggestions on how law school deans and individual faculty members can begin implementing this proposal immediately.

II. THE *GRUTTER* DECISION

The issue the Supreme Court decided in *Grutter* was "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[17] In holding that Michigan Law School has a compelling interest in attaining a diverse student body, the Supreme Court deferred to the law school's determination that diversity will yield educational benefits.[18] It should be noted that the issue of whether diversity yields educational benefits was not contested in *Grutter*. The Court observed that while Michigan Law School had "substantiated" its views that diversity will yield educational benefits, it gave "a degree of deference to [Michigan Law School's] academic decisions."[19] The Court noted that "numerous studies show that student-body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"[20] In the

17. *Grutter*, 539 U.S. at 322.

18. *Id.* at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

19. *Id.*

20. *Id.* at 330 (quoting Brief of the American Educational Research Ass'n et al., *supra* note 7, at 3).

business world, this is referred to as "cross-cultural competence."[21]

Justice Scalia discusses how the educational benefit of "cross-racial understanding" and "better prepar[ation of] students for an increasingly diverse workforce and society" are not anything that students are graded on either in their law school exams or when they take the bar.[22] Justice Scalia raises a good point—namely whether or not the desired skill set is being assessed. How does a law school know if it is actually creating the skill set it desires without some form of assessment?

Justice Scalia also notes that future lawsuits may challenge the institution's expressed commitment to the educational benefits of diversity, as well as the notion that "any educational benefits flow from racial diversity."[23] Justice Scalia even suggests that "[t]empting targets . . . will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies."[24] Justice Scalia ignores several points.

First, students are able to interact with other racial groups *inside* the classroom. Most students enter higher education after attending a racially segregated high school as well as living in racially segregated neighborhoods.[25] Continuing that pattern outside the classroom does not negate the potential for cross-racial learning and dialogue inside the classroom.

Second, diversity means that not all students of color will behave the same way. Not all students of color will join minority-only student organizations, live in separate minority-only housing, or frequent minority-only student centers.

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21. Wilkins, *supra* note 3, at 1576 ("General Motors' amicus brief in *Grutter* succinctly summarizes these arguments in urging the Court to recognize the business case for having a workforce with 'cross-cultural competence': 'Such . . . competence affects a business' performance of virtually all of its major tasks: (a) identifying and satisfying the needs of diverse customers; (b) recruiting and retaining a diverse work force, and inspiring that work force to work together to develop and implement innovative ideas; and (c) forming and fostering productive working relationships with business partners and subsidiaries around the globe.'" (quoting Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 12–13, *Grutter*, 539 U.S. 306 (No. 02-241)).

22. *Grutter*, 539 U.S. at 347 (Scalia, J., concurring in part and dissenting in part) (alteration in original) (citations and quotations omitted).

23. *Id.* at 348.

24. *Id.* at 349.

25. GARY ORFIELD & JOHN T. YUN, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., RESEGREGATION IN AMERICAN SCHOOLS (1999).

Third, where you choose to live your first year, before having any exposure to racial diversity in the classroom, does not predetermine where you are going to live in subsequent years. It is possible that students will choose to live in racially segregated housing in their first year, but share housing with members of other racial groups during later years.

Finally, what about the current whites-only student organizations? Are law schools subject to a race-based legal challenge because their law reviews are all white? Are undergraduate institutions subject to a race-based legal challenge because many of their fraternities and sororities are all white?

Next we turn to Justice Thomas's opinion, which has been the subject of numerous articles.[26] Justice Thomas questions the majority's deference to Michigan Law School's conclusion that its racial diversity yields educational benefits by citing to articles that (i) suggest that racial diversity "hinders students' perception of academic quality";[27] and (ii) racial heterogeneity "impairs learning among black students."[28] Justice Thomas also questions the reliance of law schools on the LSAT, which is known to disadvantage students of color.[29] He questions why law schools continue to rely on the LSAT when they know the median LSAT for students of color is lower than the median LSAT for white students.[30]

Justice Thomas continues by questioning Michigan Law School's commitment to its students of color. Justice Thomas states,

> The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of

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26. Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The* Grutter v. Bollinger *Opinion*, 7 U. PA. J. CONST. L. 787 (2005); André Douglas Pond Cummings, Grutter v. Bollinger, *Clarence Thomas, Affirmative Action, and the Treachery of Originalism: "The Sun Don't Shine Here in this Part of Town,"* 21 HARV. BLACKLETTER L.J. 1 (2005); Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113 (2005).

27. *Grutter*, 539 U.S. at 364 (Thomas, J., concurring in part and dissenting in part) (citing Stanley Rothman et al., *Racial Diversity Reconsidered*, PUB. INT., Spring 2003, at 25).

28. *Id.* at 364–65 (citing Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 35 (1992); Lamont Flowers & Ernest T. Pascarella, *Cognitive Effects of College Racial Composition on African American Students After 3 Years of College*, 40 J.C. STUDENT DEV. 669, 674 (1999)).

29. *Id.* at 369–70.

30. *Id.* at 369.

> the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. . . . Indeed, to cover the tracks of the aestheticists, this cruel farce of racial discrimination must continue—in selection for the Michigan Law Review, . . . and in hiring at law firms and for judicial clerkships—until the "beneficiaries" are no longer tolerated. . . . And the aestheticists will never address the real problems facing "underrepresented minorities," instead continuing their social experiments on other people's children.
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> Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race." "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[31]

Justice Thomas makes several complaints against Michigan Law School's admissions policies. First, admitting students of color with lower LSAT scores or lower grade point averages predestines these students to lose the competition with their "better qualified" white counterparts.

Second, in order to ensure that students of color are fully integrated into all of the Law School's activities, including membership on law review and equal employment opportunities, the same racially discriminatory policies used to admit them must continue to be used throughout their law school careers.[32] As a result, students of color will be dependent upon "the good graces of white folks."[33] When the whites in power decide to withdraw the extra help, students of color will be left out of law review and prestigious employment opportunities.

Third, in a footnote, Justice Thomas explains that one problem ignored by Michigan Law School is the dearth of black

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31. *Grutter*, 539 U.S. at 372–73 (Thomas, J., concurring in part and dissenting in part) (alteration in original) (citations and footnotes omitted).

32. *See id.* at 372.

33. *Cf.* Dorothy A. Brown, *Faith or Foolishness*, 11 HARV. BLACKLETTER L.J. 169, 174–75 (1994) (reviewing J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944 (1993)) ("Moreover, blacks who spoke out against the judicial system were not admitted to the bar, while blacks 'in the good graces of white folks' were admitted to the bar." (citation omitted)).

male law students when compared to black female law students.[34] He describes the problem as one of "black male underperformance."[35] Justice Thomas argues that Michigan Law School does not seem to care about the gender disparity,[36] more than likely because a black law student is a black law student, regardless of gender. As a result, Michigan Law School is not trying to address the gender disparity.

Fourth, Justice Thomas suggests that students of color will feel a backlash from white students (and perhaps white professors who oppose the admissions policies) because of the affirmative action they received.[37] As a result, white students will naturally think they are smarter than every student of color in class. Without the affirmative action, he argues, whites would not assume that all minority students were admitted with inferior qualifications, displacing more highly qualified white students.[38] There would be no resentment and no presumption that the white students were the intellectual superiors to the students of color.

Fifth, Justice Thomas worries that students of color will become dependent upon affirmative action and not try as hard as they might if they did not have affirmative action to fall back on.[39] In addition, they may mistakenly come to expect preferential treatment wherever they go and presumably be sorely disappointed when they do not receive it.[40]

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34. *Grutter*, 539 U.S. at 372 n.11 (Thomas, J., concurring in part and dissenting in part).

> For example, there is no recognition by the Law School in this case that even with their racial discrimination in place, black *men* are 'underrepresented' at the Law School. . . . Why does the Law School not also discriminate in favor of black men over black women, given this underrepresentation? The answer is, again, that all the Law School cares about is its own image among know-it-all elites, not solving real problems like the crisis of black male underperformance.

Id.; *see also* LAW SCH. ADMISSIONS COUNCIL & AM. BAR ASS'N, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 434 (Margolis et al. eds., 2005) (reporting that Michigan Law School currently has forty-four black women and twenty-eight black men).

35. *Grutter*, 539 U.S. at 373 n.11 (Thomas, J., concurring in part and dissenting in part).

36. *Id.* at 372 n.11.

37. *See id.* at 373 ("The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving.").

38. *Id.*

39. *Id.* ("'These programs . . . may cause [blacks] to develop dependencies or to adopt an attitude that they are "entitled" to preferences.'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in judgment))).

40. *Id.*

There are several responses to Justice Thomas's concerns. First, the LSAT does not equal merit.[41] At most, the LSAT predicts first-year law school grades.[42] The LSAT "predicts only about sixteen percent of the variation" of first-year grades.[43] While in social science literature this type of prediction (sixteen percent of the variation) is generally a valid predictor, there is a significant discrepancy between what the LSAT explains about first-year grades and what it does not explain.[44] Further, as far as black and latino students are concerned, the LSAT overpredicts their first-year grades.[45] This means that students of color are

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41. *See, e.g.*, Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 599–600 (2001) ("[T]he LSAT and other standardized tests simply are not very good at doing what they profess to do, namely predict first year grades."); William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 20–24 (2000) ("The premise that it is acceptable to rely predominantly on LSAT scores in choosing individuals . . . is flawed in several respects."); Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1071 (1997) ("The most disconcerting feature of the LSAT . . . is that, by itself and in conjunction with [undergraduate grade point averages], it predicts different groups' first-year graduate/professional school performances with varying success, and the accuracy of its predictions only improves slightly overall, beyond the first-year."); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1454–55 (1997) ("[Merit standards] are developed in a historically contingent social context and are authored by members of groups who have enough social power—which historically has been based in part on their race and ethnicity—to define what counts as social value.").

> British sociologist Michael Young . . . coined in 1958 the term *meritocracy* to satirize the rise of a new elite that valorized its own mental aptitude. Young argued that a meritocracy is a set of rules put in place by those with power that leaves existing distributions of privilege intact while convincing both the winners and the losers that they deserve their lot in life.

Lani Guinier, Commentary, *Confirmative Action*, 25 LAW & SOC. INQUIRY 565, 573 (2000).

42. Richard Delgado, *Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 144 (1998) ("LSAT scores do predict law school first-year grades."); Kristin Booth Glen, *In Defense of the PSABE, and Other "Alternative" Thoughts*, 20 GA. ST. U. L. REV. 1029, 1036 (2004) ("What [LSAT] scores do best, albeit still not very well, is predict first year law school grades."); David A. Thomas, *Predicting Law School Academic Performance from LSAT Scores and Undergraduate Grade Point Averages: A Comprehensive Study*, 35 ARIZ. ST. L.J. 1007, 1008 (2003) ("Nevertheless, the LSAC maintains '[t]he LSAT is a strong predictor of first year law school grades and compares very favorably with admission tests used in other graduate and professional fields of study.'" (footnote omitted)).

43. Delgado, *supra* note 41, at 600.

44. *See id.* (noting that by the third year of law school, the LSAT predicts "less than three percent of the variation in performance").

45. Cathaleen A. Roach, *A River Runs Through It: Tapping Into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 675 (1994) ("One author reports that the 'LSAT overpredicts first-year performance for minority students' but not for majority students, which suggests cultural barriers exist within the law school." (footnote omitted)); Linda F. Wightman, *The Threat to Diversity in Legal*

predicted to perform better academically during their first year of law school than they actually do. This unfortunate reality leads to an interesting question: What are law schools doing to students of color that hinders their ability to perform to their academic best?

Second, while blacks may be on law review at Michigan Law School as a result of affirmative action, racial diversity on law reviews generally remains a problem.[46] Having elite credentials such as law review membership while at elite law schools is often a prerequisite to obtaining the most prestigious legal jobs.[47]

Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions, 72 N.Y.U. L. REV. 1, 29 n.64 (1997) ("[M]ost studies show that LSAT and UGPA tend to overpredict minority group performance rather than under-predict." (citing Robert L. Linn & C. Nicholas Hastings, *Group Differentiated Prediction*, 8 APPLIED PSYCHOL. MEASUREMENT 165, 165–66 (1984))).

46. *See, e.g.*, Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity on America's Law Reviews*, 12 HARV. BLACKLETTER L.J. 59, 61 (1995).

As the following chart indicates, minority students are substantially underrepresented on law reviews across the country:

Minority Group	Law Journals with No Minority Members
African American	76%
Hispanic	69%
Native American	97%
Asian	85%

Id. (footnotes omitted); *see also* REPORT OF THE WORKING COMMS. TO THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL AND ETHNIC FAIRNESS IN THE COURTS (1997), *reprinted in* 1997 ANN. SURV. AM. L. 117, 221 ("Anecdotal evidence suggests that women and minorities obtain fewer prestigious law clerk positions than white males because they do not do as well academically and do not obtain as many editorial positions on the top law review of their law schools."); Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 48 (1996) ("For instance, the *University of Virginia Law Review* did not have an African-American member in its seventy-three year history until 1987 when it adopted an affirmative action policy."); Frederick Ramos, Note, *Affirmative Action on Law Reviews: An Empirical Study of Its Status and Effect*, 22 U. MICH. J.L. REFORM 179, 198 (1988) ("Absence of an affirmative action program effectively excludes minorities from membership on a large number of law reviews.").

47. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 555–56 (1996) ("As others have documented, by relying on sorting devices such as law school status, grades, and law review membership, firms systematically exclude the majority of black applicants, who do not have these standard signals. Thus, although blacks may be more likely to attend higher status law schools than whites, the schools with the largest black populations are not ones from which large firms typically recruit. Even black students with superstar credentials from lower status schools have little or no chance of being hired by a large firm. Those blacks who do attend elite schools face recognized barriers (e.g., poor primary and secondary school education, diminished expectations, hostile environments, and part-time work) to performing well in the classroom or in extra-curricular activities such as law review. Given these added pressures, it is plausible, as both conservative critics of affirmative action in elite schools and supporters of historically black schools frequently assert, that some black students who are currently

Justice Thomas is right that to the extent something is given, it can be taken away; however, for the period of time during which it is given, students of color are benefiting.

Justice Thomas ignores the issue of "stereotype threat," which, as discussed by Claude Steele and Joshua Aronson, can explain the racial difference in standardized test score results.[48] Stereotype threat exists when a negative stereotype about a group comes into play.[49] For example, the stereotype that blacks are not smart comes into play whenever a black student takes a standardized test that is used to judge intelligence. In that instance, stereotype threat causes blacks to score lower on the test than whites.[50] The lower score does not reflect intellectual inferiority.

Justice Thomas's position that affirmative action may hurt its beneficiaries finds some support when one examines facts surrounding *Virginia Law Review*'s affirmative action plan. At least one black student who was admitted onto the *Virginia Law Review* felt that the plan took away her victory of being admitted.[51]

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admitted to elite schools would be more successful (both academically and personally) if they did not attend these academic institutions. However, given the nearly dispositive role that the status of an applicant's law school plays in the recruiting process, black students who want to have the option of working at an elite firm have little incentive to choose this option. Those who have problems at elite institutions, however, risk being branded as unacceptable by prospective employers." (footnotes omitted)).

48. *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African-Americans*, *in* THE BLACK-WHITE TEST SCORE GAP 401 (Christopher Jencks & Meredith Phillips eds., 1998).

49. *Id.* at 401.

50. *Id.* at 422 ("Our experiments show that making African Americans more conscious of negative stereotypes about their intellectual ability as a group can depress their test performance relative to that of whites.").

51. Ramos, *supra* note 46, at 179.

> In its first seventy-three years of existence, the *Virginia Law Review* never had a black member. In an effort to eradicate this perceived injustice, the *Review* adopted in 1987 an affirmative action plan designed to increase minority membership. It invited third-year student Dayna Bowen Matthew, a black, to be a member. Matthew's admittance onto the *Virginia Law Review* was not a result of the affirmative action plan. Two other black classmates, however, were invited to become members as a result of the affirmative action plan. In this respect, the plan was successful; blacks had finally broken the barrier of what has been described as a white institution—the law review.
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> Matthew's response to her and her black classmates' admittance and the implementation of the affirmative action plan shed doubt on the plan's purported success. She explained: "Affirmative action was a way to dilute our personal victory. It took the victory out of our hands. I see this well-intentioned, liberal-white-student affirmative-action plan as an intrusion."

Id. (footnotes omitted).

Third, Justice Thomas raises the issue of the gender disparity in law school admissions between black men and black women.[52] Professor Roy Brooks describes this problem as the "black gender gap."[53] What Justice Thomas ignores, however, is the problem of the underrepresented black male in law school—a problem that is beyond Michigan Law School's grasp to remedy. For in large part the problem begins way downstream.[54]

There are far more black males in prison than in college.[55] The fueling force behind those incarcerations is Supreme Court precedent.[56] Justice Thomas as a member of the Supreme Court

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52. Grutter v. Bollinger, 539 U.S. 306, 372 n.11 (2003) (Thomas, J., concurring in part and dissenting in part) (pointing out the quantitative discrepancy between black male and black female law students).

53. Roy L. Brooks, *Affirmative Action: American Democracy and Higher Education for Black Americans: The Lingering-Effects Theory*, 7 J.L. & SOC. CHALLENGES 1, 56 (2005) ("One important internal cause of the enrollment deficiency is what can be called "the black gender gap." The overall increase in black enrollment during and since the Civil Rights Era has largely been driven by black women. The number of black women in higher education far surpasses that of black men. In 1965, when figures were first collected, 148,000 black women versus 126,000 black men attended college, a 22,000 student gender gap. Fifteen years later, in 1980, the gender gap increased to 163,000 students, 591,000 versus 428,000 (an increase in the gender of 740 percent). In 1992, over 300,000 more black women than black men attended college, 865,000 versus 537,000. For 1999, black women exceeded black men by 375,000, 923,000 versus 548,000. The black gender gap has grown by 212,000 students (or 130 percent) since 1980." (footnotes omitted)).

54. Here I build upon Professor Michael Olivas's apt metaphor of admissions being a river. *See* Michael A. Olivas, *Law School Admissions After* Grutter*: Student Bodies, Pipeline Theory, and the River*, 55 J. LEGAL EDUC. 16, 16–17 (2005) ("For the admissions process, I prefer the metaphor of the 'river.' It is an organic entity, one that can be fed from many sources . . . .").

55. *See* Jody David Armour, *Bring the Noise*, 40 B.C. L. REV. 733, 734 (1999) ("[N]ationally, nearly one-third of young black men are either in prison, on probation or on parole and more young black men are in prison than in college." (footnotes omitted)); Brooks, *supra* note 53, at 56 ("A significant factor is that an extremely high number of young black men are in jail—more than in college."); Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 707 (1999) ("These effects include the fact that more young black men are in prison than college . . . ."); john a. powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 611 (1991) (noting that "on any given day almost one in four . . . black men between the ages of twenty and twenty-nine in the nation is under the control of the criminal justice system").

56. *See, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 975–76 (2002); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 336–40 (1998); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 996 (2005) ("In the area of criminal law, Justice Thomas has earned a reputation as an unforgiving justice . . . ."); *see also* Atwater v. City of Lago Vista, 532 U.S. 318 (2001). In that case, the Supreme Court upheld by a 5-4 majority (with Thomas joining the majority) the power of the police to make a custodial arrest for failure to wear a seat belt even though the crime was only punishable by a fine. *Id.* at 323. The majority ignores the racial impact of the decision; however, Justice O'Connor does not. She writes "Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively

can do more to remedy the black gender gap than can Michigan Law School.

Fourth, Justice Thomas argues that affirmative action in admissions hurts students of color by causing their white peers to resent them and allowing their white peers to feel intellectually superior towards them.[57] What Justice Thomas ignores, however, is that the belief in black inferiority and white superiority predates affirmative action policies in higher education.[58] White

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minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest." *Id.* at 372 (O'Connor, J., dissenting). I acknowledge that the issue of racial disparities in the criminal justice context is complex. *See, e.g.*, Angela Davis, *Prosecution and Race*, 67 FORDHAM L. REV. 13, 16 (1998).

> For a discussion of race discrimination in the criminal justice system, see generally RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997) (exploring the history of race discrimination in the criminal justice system); CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR (1993) (studying discrimination in the criminal justice system against African Americans, Asian Americans, Hispanic Americans, and Native Americans); JEROME G. MILLER, SEARCH AND DESTROY (1996) (theorizing that so many persons have been run through jails and prisons that the violent ethos of the correctional facility has increasingly come to shape behavior on the streets and undermine respect for the law); KATHERYN K. RUSSELL, THE COLOR OF CRIME (1998) (noting that racism continues to undermine society's criminal justice system and skews the public's perception of its black citizens and crime); SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA (1996) (examining the racial and ethnic discrimination and victimization of minorities in the criminal justice system); Robert D. Crutchfield et al., *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIME & DELINQ. 166 (1994) (same); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660 (1996) ([reviewing] TONRY, *infra*, for trivializing the role of racial bias in the overrepresentation of African American men in the criminal justice system); Christopher Johns, *The Color of Justice*, ARIZ. REPUBLIC, July 4, 1993, at C1 (finding discrimination against minorities in arrest rates, prosecutorial discretion, and sentencing). *But see* MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 49 (1995) (arguing that, with the exception of drug offenses, higher representation of African American men in the criminal justice system is the result of disproportionate offending, not racial bias by police and other criminal justice officials); WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM (1987) (acknowledging racism in the criminal justice system but concluding that the bulk of racial disproportionality in incarceration reflects greater involvement by African Americans in serious crimes like homicide and robbery); Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743 (1993) (same).

Id. at 16 n.10; *see also* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN JUSTICE SYSTEM (1999); MARC MAUER, RACE TO INCARCERATE (1999).

57. *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part).

58. *See, e.g.*, Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370–71 (1988).

> Throughout American history, the subordination of Blacks was rationalized by a series of stereotypes and beliefs that made their conditions appear logical and

students resent affirmative action, which benefits students of color, because white students presume the inferiority of black students. This presumption is based largely upon conventional wisdom about LSAT scores. According to such wisdom, LSAT scores equal intellect and merit, and anyone with a lower LSAT score cannot be more qualified than someone with a higher LSAT score. There is no similar outcry against legacy admits.[59]

Fifth, Justice Thomas suggests that affirmative action will make blacks lazy and dependent, not trying to excel as they would be required to do in the absence of affirmative action.[60] One could argue that Justice Thomas has fallen into stereotypes about blacks. Nevertheless, does he have a point? Given what appears to be the very harsh realities facing law students of color in American law schools,[61] I do not think they ever forget the message of hard work.

> natural. Historically, white supremacy has been premised upon various political, scientific, and religious theories, each of which relies on racial characterizations and stereotypes about Blacks that have coalesced into an extensive legitimating ideology. Today, it is probably not controversial to say that these stereotypes were developed primarily to rationalize the oppression of Blacks.

Id. (footnotes omitted).

59. Derrick Bell, *Wanted: A White Leader Able to Free Whites of Racism*, 33 U.C. DAVIS L. REV. 527, 537–38 (2000) ("In other words, any time a black got a job that this particular student had sought, he suspected preferential, and therefore unfair, treatment. If a white who benefited from being born into an upper-class family got the job, however, the student did not presume the same unfairness. The latter phenomenon was acceptable and inevitable. This attitude is widespread. It explains why there is so much opposition to affirmative action in college admissions, but none to legacy admits—special consideration for the children of alumni, faculty, or large contributors. 'Affirmative action' based on family connections wins general approval even though more spaces are taken by such students than by those for whom race was considered. And the alumni children, as an aggregate, do not possess better academic credentials than the minority students."); Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 536 (2002) ("Ivy League colleges admit legacies at rates higher than the rates at which other applicants are admitted, ranging from more than double (Harvard, Yale, Princeton) to 20% (Cornell). In recent years, legacy admits at Harvard had average SAT scores thirty-five points below those of non-legacies, lower grade point averages, and fewer extracurricular activities in high school than other admitted students." (citations omitted)); Guinier, *supra* note 3, at 187 n.286. Professor Guinier cites Lawrence and Matsuda for this proposition, CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 96–97, 128 (1997), who "assert[ed] that legacy admits do not carry the same stigma that affirmative action admits carry, even though a 1990 Office of Civil Rights compliance review found that at Harvard University legacy admits had mean SAT scores that were thirty-five points below the mean scores for all admitted students." Guinier, *supra* note 3, at 187 n.286.

60. *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part).

61. *See infra* notes 108–22.

III. MAKING DIVERSITY WORK

A. Diversity Work

This section discusses the educational benefits of diversity. Dr. Patricia Gurin, one of several experts relied upon by Michigan Law School, has stated that there are three different types of diversity for our purposes: (i) structural diversity, (ii) classroom diversity, and (iii) informal interactional diversity.[62]

1. Structural Diversity. Structural diversity refers to the percentage of students from a nonwhite racial or ethnic group.[63] Structural diversity is important for several reasons. First, as Dr. Gurin stated, "it makes actual experience with diversity possible."[64] The greater the extent of racial or ethnic diversity, the more likely it will be that white students will socialize and develop friendships with members of racial or ethnic minority groups.[65] One study showed that at the most racially or ethnically diverse colleges, students of different races were most likely to eat together, study together, date, and interact with one another.[66]

Second, as a result of interacting with a racially or ethnically diverse group of peers, students will be exposed to a wide range of viewpoints.[67] Justice O'Connor eloquently made this point:

> The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with

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62. Patricia Gurin with Eric L. Dey, Gerald Gurin & Sylvia Hurtado, *The Educational Value of Diversity*, *in* PATRICIA GURIN, JEFFREY S. LEHMAN & EARL LEWIS, DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN 97, 116 (2004).

> Diversity has three meanings. First, there is "structural diversity," represented by the percentage of a student body that is from an ethnic/racial group other than white. Second, there is "classroom diversity," defined as exposure to knowledge about race and ethnicity in formal classrooms. Third, there is "informal interactional diversity," indicated by the extent to which students interact with peers from racial/ethnic backgrounds different from their own.

Id.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 116–17.

> only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.[68]

Thus, diversity enables students to see that members of the same group who share the same racial background don't necessarily share the same viewpoints.[69] Structural diversity without more, however, will not influence student learning outcomes.[70]

As Dr. Gurin stated, "[i]nstitutions of higher education have to make appropriate use of the racial and ethnic diversity on their campuses."[71] In other words, there must be interracial interaction among students—either inside or outside of the classrooms.

2. Classroom Diversity. Classroom diversity is "exposure to knowledge about race and ethnicity in" the classroom setting.[72] Classroom diversity is a critical component "in explaining how racial and ethnic diversity [create] educational outcomes for students."[73] In one national study, "classroom diversity" was measured by whether students took an ethnic studies course[74]—presumably because it was assumed that classroom discussion would include racial and ethnic identity issues.

While structural diversity creates the opportunity for interacting with peers of different racial or ethnic backgrounds, classroom and informal interactional diversity are the most essential elements in explaining how diversity influences student outcomes.[75]

Dr. Gurin describes research that shows that "[s]tudents learn more and think in deeper, more complex ways in a diverse educational environment."[76]

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68. Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (citations omitted).

69. *See infra* Part III.A.2 (discussing the value of classroom diversity).

70. Gurin with Dey, Gurin & Hurtado, *supra* note 62, at 117 ("Structural diversity may be thought of as a necessary but not sufficient condition for students to gain educationally from racial/ethnic diversity in higher education.").

71. *Id.* at 111.

72. *Id.* at 116.

73. *Id.*

74. *Id.* at 117.

75. *Id.* at 116–17 ("We contend, however, that it is classroom and informal interactional diversity that carries the critical causal role in explaining how diversity influences student outcomes.").

76. Expert Report of Patricia Gurin for University of Michigan, Gratz v. Bollinger,

> Complex thinking occurs when people encounter a novel situation for which, by definition, they have no script, or when the environment demands more than their current scripts provide. Racial diversity in a college or university student body provides the very features that research has determined are central to producing the conscious mode of thought educators demand from their students.[77]

This is why talking about race in a racially diverse setting provides educational benefits that talking about other subjects will not.

Race is a contentious subject. Everyone fears saying something wrong and being labeled a racist. It is far safer not to talk about race than it is to talk about race. Therefore, most students do not come to higher education with a developed skill set enabling them to have interracial discussions about race.

It is equally likely that most students have had discussions about race with members of their own racial group, or with friends who think like them. However many, if not most, of these students probably enter higher education without having had many interracial discussions about race—either inside or outside of the classroom. Students likely come to the discussion unprepared for what an interracial discussion looks like. To the extent they understand the value of diversity, they will be challenged by what they hear when they hear views different from their own. At that point, they are encountering a novel situation for which they have no current script. They will be required to think more critically.

Dr. Gurin goes on to declare that "[t]he University of Michigan . . . has created opportunities in classes and in the

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539 U.S. 244 (2003) (No. 02-516) & Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Expert Report], *reprinted in* 5 MICH. J. RACE & L. 363, 365 (1999).

77. *Id.*; *see also* Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 955–56 (2002) ("Most of what educators call 'thinking' is actually automatic and mindless action. Most of the time our 'thought' is based upon previous learning that is so routine that creative thinking is not required. Diverse educational experiences, however, can break through these mundane thought processes. When children grow up in a homogeneous environment and continue to live and learn in a similar environment, their intellect is not challenged and thus often remains in the mindless state. But when people encounter new diverse environments, they learn to think in deeper and more complex ways. They are forced to face novel situations in which their previous thought processes may not be helpful, thus requiring them to find creative new ones. Colleges and universities are the best places to engage in this learning, because students at this age are at a critical developmental stage in which they are most suited to making the leap of becoming conscious learners and critical thinkers. In fact, racial diversity in higher education creates the exact variables that research has determined are vital in developing the critical thinking that is expected of students." (footnotes omitted)).

informal student environment for structural diversity to affect student learning and preparation for participation in a democratic society."[78] What we learn from these studies is that a university must tie its commitment to diversity into educational benefits for all of its students if it wants to impact educational outcomes. Does a university simply state a commitment to diversity in a brochure, enroll a racially diverse class, and do nothing else? Does the university walk the talk?

Classroom features that maximize diversity make use of the diverse student body in order to enhance interaction and learning.[79] Gurin notes that "[s]tudents said that dialogues work best when they can 'ask difficult questions,' 'when they can disagree,' and 'when they are helped to work with the conflict.'"[80] One study found "four types of positive change: increased comfort, increased connection with students of other groups through friendship ties, increased understanding of different perspectives, and increased understanding of different identity group experiences."[81]

"A majority of the participants reported *only* positive changes," but almost a third reported at least some negative changes.[82] The study concluded that "the most important, distinguishing experience" between positive and negative changes "was whether or not students had found dialogues a place where they could *share personal experiences*."[83] "Disclosure of personal experiences provided the means for the deepest levels of intergroup understanding because personal experiences provided illustrations and explanations for group differences . . . [and] revealed what being a member of a different identity group was like."[84]

This data supports the views of Professors Angela Harris and Marjorie Shultz. They state that

> acknowledging the role of emotion in intellectual endeavors, including the classroom experience, can enrich debate. [The] point is not that people should express their feelings for the sake of self-expression. Rather, when emotions are

78. Expert Report, *supra* note 76, at 377.

79. Expert Report of Patricia Gurin for University of Michigan app. B, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) & Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Expert Report Appendices], *available at* http://www.umich.edu/~urel/admissions/legal/expert/gurinapb.html.

80. *Id*.

81. *Id*. (citations omitted).

82. *Id*.

83. *Id*.

84. *Id*.

> acknowledged and rigorously examined, they can serve as a guide to deepening intellectual inquiry; they can make participants in a debate more keenly aware of the importance—or unimportance—of an insight or dialogue. Emotions are part of thought, not its antithesis. Thus, the attempt to stifle rather than utilize them exacerbates the felt thinness and irrelevance of much discussion in the law school classroom.[85]

It is this type of learning that results in "the conscious mode of thought educators demand from their students."[86] Students are questioned; their assumptions challenged. Students question each other. They become critical thinkers. Critical thinking is something that law schools pride themselves on producing in their alumni.

Negative outcomes as a result of diversity in the workforce can provide useful information.[87] The extent to which "group members do not value 'diversity as a resource for learning how to do the group's . . . work'" determines whether the group members are going to benefit from diversity.[88] Where group members do not value diversity as a resource for learning how to get the job done, they are "less likely to benefit from their [group's] diversity and may even perform less well than homogeneous groups that do not have to negotiate the kinds of conflicts and communication issues that often beset diverse groups."[89] Therefore, the commitment to diversity must come from the administration and must be explained to students. They must be taught, if necessary, the value of diversity, and the downside of "groupthink." Given that law school is supposed to teach students to argue both sides—and anticipate arguments—to assess strengths and weaknesses, making the connection should be easy. Getting the administration committed to such a strategy, however, may be far more difficult.

3. Informal Interactional Diversity. The third type of diversity is "informal interactional diversity," which is the extent to which students interact outside of the classroom with peers of different racial or ethnic backgrounds.[90] This too is a critical part of producing educational outcomes for students. Justice Scalia expressed concerns about informal diversity when he suggested that minority-

85. Angela P. Harris & Marjorie M. Shultz, *"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1774 (1993).

86. Expert Report, *supra* note 76, at 365.

87. *See* Wilkins, *supra* note 3, at 1587.

88. *Id.*

89. *Id.*

90. Gurin with Dey, Gurin & Hurtado, *supra* note 62, at 116.

only organizations hinder opportunities for cross-racial understanding.[91]

B. Diversity: Unemployed

Recently Professor Richard Sander created quite a firestorm when he argued that affirmative action was bad for blacks for a variety of reasons, one being that their academic performance was poor.[92] Professor Sander argued that affirmative action was allowing blacks to get into higher ranked schools, which in turn caused them to face stiffer competition, resulting in lower grades and lower bar passage rates.[93] Professor Sander argued that without affirmative action, black students who were not otherwise qualified for higher ranked schools would go to lower ranked law schools where their credentials would be more evenly matched with their white counterparts. This, he ultimately concluded, would be better for black law students than the current system.[94] While Professor Sander's statistical analysis and his ultimate conclusion have been largely refuted,[95] he has highlighted the problem of poor academic performance of blacks in law school.[96] Professor Sander has exposed a family secret that is rarely talked about, and it is hurting all of our students. It hurts students of color because they

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91. Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part).

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

93. *Id.* at 478–79. Recall, this is one of the concerns expressed by Justice Thomas. *See supra* note 31 and accompanying text.

94. *Id.* at 482–83.

95. *See, e.g.*, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers*?, 57 STAN. L. REV. 1807, 1809 (2005) ("We find no persuasive evidence that current levels of affirmative action have reduced the probability that black law students will become lawyers."); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1857 ("We conclude that if affirmative action was ended, there would be a substantial net decline in the number of African Americans entering the bar rather than the 7.9% increase that Sander forecasts."); Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1902 (2005) ("[R]eality is very likely precisely the opposite of what Sander claims."); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1919 (2005) ("[R]ather than improving conditions for black lawyers, Sander's proposal runs the risk of making many of the problems he identifies worse.").

96. Ayres & Brooks, *supra* note 95, at 1807–08 ("Richard Sander's study of affirmative action at U.S. law schools highlights a real and serious problem: the average black law student's grades are startlingly low. With the exception of traditionally black law schools (where blacks still make up 43.8% of the student body), the median black law school grade point average is at the 6.7th percentile of white law students. This means that only 6.7% of whites have lower grades than 50% of blacks. One finds a similar result at the other end of the distribution—as only 7.5% of blacks have grades that are higher than the white median." (footnotes omitted)).

are not graduating with the same elite credentials that their white colleagues are receiving. And, it hurts white students because it supports the racist stereotype that students of color are not their intellectual equals.

Law schools will not have lived up to the debt they owe their students of color who are providing structural diversity until they are as likely to be a member of law review or order of the coif as they are to be the president of the student bar association. The academic performance of students of color should be a concern of all law schools. I consider the data on law review membership as a proxy for academic performance. While not a perfect proxy, given that some law reviews allow members onto law review without any reference to grades, it certainly provides useful information. Although this section should discuss data concerning all students of color, most of the available data concerns blacks on law review.[97] Therefore, the balance of this section will only consider the evidence concerning black law students and law review membership.

In addition to receiving the academic prestige of having served on law review, and thus eligible for prestigious clerkships and elite law firms, an additional benefit of having blacks on law review is that it increases the likelihood that student notes will be written about racial inequality.[98] While one would not expect all blacks to write about racial inequality issues, many will.[99]

The first black served on a law review in 1921.[100] The question that law schools must now ask is whether things have changed in the eighty-four years since the first black was a member of law review, or whether Justice Thomas was correct when he said that "[Michigan] Law School seeks only a façade—it is sufficient that the

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97. *But see* Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117 (1994) (providing a plethora of statistical information, but focusing mainly on Latinos).

98. Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161, 166 (1994) ("The arrival of blacks on law reviews was more than just a symbolic victory against discrimination. It also led to publication of student notes and articles chosen by students that raised questions about racial inequality."); *see also* SMITH, *supra* note 33, at 39–40 (discussing the earliest black members of law reviews and the articles they published).

99. *See* Finkelman, *supra* note 98, at 166–67. In 1933, when William Robert Ming, Jr. became a member of the *University of Chicago Law Review*, he published his article *Constitutional Law—Validity of Party Resolution Depriving Negro Rights to Vote in Party Primary*, 1 U. CHI. L. REV. 142 (1933). In 1921, the first year that a black served on a law review, three black men became the first at their respective schools to serve on law review: Jasper Alston Atkins (Yale), Charles Hamilton Houston (Harvard), and William Edwin Taylor (Iowa). Finkelman, *supra* note 98, at 166. In 1924, Clara Burrill Bruce of Boston University became the first black woman to serve on a law review. In 1925, she became its editor in chief. *Id.*

100. SMITH, *supra* note 33, at 39.

class looks right, even if it does not perform right."[101] I argue that this applies to all law schools and that until all students of color are as likely to serve on law review as their white counterparts, law schools are not performing right.

One could anticipate the objection that blacks not being on law review is to be expected given that they are being admitted with lower scores than their white counterparts.[102] However, if you believe, as I do, that the LSAT's overpredicting first-year law school grades of students of color strongly suggests the law school environment has a negative impact on their grades, then changes can be made that will lead to more students of color serving on law reviews.[103]

What I am not talking about is additional academic support programs. Numerous law schools currently have academic support programs—programs focused primarily on retention and graduation, not academic excellence.[104] Law schools have an incentive to focus on retention and graduation because poor graduation rates for its students of color will indeed hurt future recruitment efforts. What I am talking about is rigorous academic programs designed to produce academic excellence.

Studies show that expectations set by professors have a dramatic impact on the academic achievement of students of color.[105] Studies of kindergarten through twelfth-grade students show that fact[106] as do studies of law students.[107]

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101. Grutter v. Bollinger, 539 U.S. 306, 372 (2003) (Thomas, J., concurring in part and dissenting in part).

102. *See supra* text accompanying notes 29–30 (describing the disparity between the LSAT scores of white students and students of color).

103. I can describe efforts that I made during the years 1997 through 2001 to work with students of color on academic excellence issues in my home on Saturdays. At least two students of color each year made law review during those years. One eventually became the editor in chief of the law review. Prior to my Saturday sessions, it had been five years since a black was on law review.

104. Chris K. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 IND. L. REV. 737, 760–61 (2000).

105. Roach, *supra* note 45, at 675 ("Additionally, a 'message of incompetence' or failure can be telegraphed to the student in a myriad of ways, including actions by professors who have lower expectations of minority students." (citing Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443, 579 (1983))); *see* Wilkins, *supra* note 95, at 1958 n.159 ("Geoffrey Cohen suggests that black students may be especially sensitive to negative expectations." (citing Geoffrey L. Cohen et al., *The Mentor's Dilemma: Providing Critical Feedback Across the Racial Divide*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1302 (1999))).

106. *See, e.g.*, Pamela J. Smith, *Looking Beyond Traditional Educational Paradigms: When Old Victims Become New Victimizers*, 23 HAMLINE L. REV. 101, 131–32 (1999) (discussing how the stereotype that black males are less intelligent than others "becomes a self-fulfilling prophecy in the classroom").

107. Wilkins, *supra* note 95, at 1957–58 ("Sander's account of discouragement and

A study by Professor Timothy Clydesdale shows that while black students have the highest levels of self-confidence upon entering law school, "they report the lowest level of social capital (i.e., fewest lawyers in the family), and describe nearly twice as many experiences of race discrimination during law school as any other minority group."[108] "Mexican American law students enter law school with low levels of social capital . . . [and] report the second highest level of race discrimination during law school."[109] "White American law students have the highest social capital, . . . [and] they have average rates of part-time attendance, employment, and family responsibilities."[110] Professor Clydesdale further states, "*All* minority law students . . . have consistently lower [first-year] GPAs . . . than their white classmates."[111] He posits that "[s]omething intrinsic to the structure or process of legal education affects the grades of all minorities; [law school first-year] GPA differences are not explained by differences in academic ability . . . , differences in entrance factors . . . , or first-year experiences . . . ."[112] Professor Clydesdale also finds that final law school GPAs of minority students are "significantly lower" than final GPAs of white law students.[113]

Professor Clydesdale's analysis shows that you cannot attribute these results to any of the following: (i) "differences in academic preparation, effort, or distractions"; (ii) "differences in

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disengagement is entirely internal. Black students in his view realize that they are overmatched and become frustrated and withdrawn, thereby diminishing their chances of succeeding even further. Strangely absent from this account is any acknowledgement of how the expectations of others contribute to this deadly cycle. Any plausible theory of motivation, however, must begin with an understanding that such feelings are profoundly interactive. People are more likely to do well when they are *expected to do well*. More to the point, they are much less likely to succeed when they are expected to fail. Unfortunately, this is precisely the message that has often been conveyed to entering black students. Sometimes the message has been express. As a respondent who entered a top ten law school in the early 1980s reports, '[T]he first week of law school, . . . the dean of our law school came to a BLSA [Black Law Students Association] meeting and said, "You guys won't do as well as the other people here." I mean, he just said it!' Other times the message is the unintended but nevertheless powerful consequence of diverting all black students into academic support programs. Still others have felt the sting of low expectations when professors fail to call on black students in class. For another group, it has been the presumptions expressed by fellow students." (footnotes omitted)).

108. Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711, 727–32 (2004).

109. *Id.* at 732.

110. *Id.*

111. *Id.* at 736–37.

112. *Id.* at 737.

113. *Id.* at 740.

instructional quality or law school resources"; (iii) "social class differences"; or (iv) "willingness to accept an elitist, pro-business law school ethos."[114]

Professor Clydesdale also provides interesting data about the experiences of students based upon the type of law school they attended. For example, law students attending elite, first-tier, mainly private law schools have the lowest dropout rate after the first year as well as the highest rate of bar passage; they also "report the highest level of gender discrimination and high levels of race discrimination."[115] "Law students attending public ivy (i.e. first-tier) law schools have low first-year dropout rates (5%), high [graduation] rates (93.8%), and high bar examination passage rates (82.2%)."[116] These students report "relatively low levels of race or gender discrimination during law school."[117] Law students attending both public and private second-tier law schools have similar experiences.[118] However, private second-tier law schools are more gender diverse, and their students report fewer incidents of racial discrimination than those in public second-tier law schools.[119]

Professors set the tone for the classroom. Are all students equally likely to be called upon?[120] Equally likely to receive tough questions? Or are students of color likely not to be called on? Or given softball questions? Are students of color only called on in Constitutional Law when a "race" case is being discussed?[121] Or are these students likely to be called on no matter what the question?

How are students of color treated by their peers? Students of color can be made to feel like affirmative action students.[122]

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114. *Id.* at 753.

115. *Id.* at 734.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Cf.* Wilkins, *supra* note 95, at 1958 (stating that some black students "have felt the sting of low expectations when professors fail to call on black students in class").

121. *See* Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33, 40–44 (1994) ("This [subjectification] is experienced by minority students when, after learning to leave their race at the door, their racial identities are unexpectedly dragged into the classroom by their instructor to illustrate a point or to provide the basis for a command performance of 'show and tell.'").

122. Brian Owsley, *Black Ivy: An African-American Perspective on Law School*, 28 COLUM. HUM. RTS. L. REV. 501, 515 (1997) ("I and many of the other Black students knew that we were also tokens. Admittedly, we were not alone, but most of us never felt as if it was our law school. We were made to feel as interlopers in this precious experience who should be eternally grateful. Despite our credentials and academic records, some students

Yet grades are not the only issue for black law school graduates; Harvard Law Professor David Wilkins eloquently makes this point in his response to Professor Sander.[123] For black lawyers, graduating from an elite law school in many ways is more important than their grades. As Professor Wilkins said, "[I]t does appear that black lawyers are taken *more* seriously if they have elite educational credentials."[124]

Professor Clydesdale makes several suggestions for improving the academic climate for all students, which will be discussed below. First, law schools should not rely on the LSAT as much.[125] Second, law schools should do more to support their students of color during their first year of law school.[126] Third, law schools should hire more women and minority faculty members.[127] Professor Clydesdale's analysis shows that increased gender and race diversity on the faculty translates into better academic performance by *all* students.[128] Professor Clydesdale states that this is not because women and minority faculty are easier graders, but because increased diversity helps the educational experience for all students.[129] Fourth, law schools should support groups that assist women, minorities, and other "atypical" students to encourage one another and to work with alumni who have successfully navigated the law school process.[130] I close this Part by proposing a fifth suggestion, namely that law schools should incorporate a racial perspective of the law into all law school classes. In this way, law schools will become more welcoming, thereby encouraging all of our students to excel academically.

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still viewed us as thieves stealing a more qualified and talented white student's rightful place. These views became apparent through passing comments and classroom discussions."); *see also* Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237 (2001) (reporting the results of a study about the racial climate at the University of Michigan Law School); Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93 (1991) (relating author's experience as a black, female law student).

123. *See supra* note 107.

124. Wilkins, *supra* note 95, at 1937.

125. Clydesdale, *supra* note 108, at 762.

126. *Id.*

127. *Id.*

128. *Id.* at 763.

129. *Id.* at 762–63.

130. *Id.* at 763.

IV. CRITICAL RACE THEORY AND THE LAW SCHOOL CURRICULUM

This Part considers the question of how law schools should take advantage of their structural diversity to ensure positive educational outcomes for all of their students. I argue that integrating Critical Race Theory across the law school curriculum—not leaving it for upper level Critical Race Theory seminars that most students never take—will ensure that classroom discussions create opportunities for cross-racial understanding and break down racial stereotypes. The integration of Critical Race Theory also allows an institution to show its students that its commitment to diversity is real. If the law school clearly articulates its reasons for integrating Critical Race Theory, the students will be more likely to believe that diversity is an important part of the learning process. As a result, students will be more likely to reap positive benefits from their classroom experiences.

When Justice Oliver Wendell Holmes stated that "[t]he life of the law has not been logic: it has been experience,"[131] he recognized that legal decisions were not the result of the application of neutral, objective principles, but of the principles created and applied in the context of the legal decisionmaker's lived-out experiences, whether the legal decisionmaker is a judge, juror, or legislator. Given the importance of race and racial discrimination in the history of American society, it should come as no surprise that one would observe the lived-out experiences of legal decisionmakers to have a racialized element. Critical Race Theory picks up on Justice Holmes's observation.

Critical Race Theory "'analyze[s] law and legal traditions through the history, contemporary experiences, and racial sensibilities of racial minorities in this country.'"[132] Professor Charles Lawrence puts it this way:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists.[133]

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131. O.W. HOLMES, JR., THE COMMON LAW 1 (1881).

132. DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS 2 (2003) (quoting Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 85 (1994)).

133. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with*

"'The question always lurking in the background of [Critical Race Theory] is . . . [w]hat would the legal landscape look like today if people of color were the decision-makers?'"[134] Critical Race Theory examines how the race of the parties—and the decisionmakers—has an influence in crafting the applicable rules and in determining the outcome of the case.[135]

What classroom opportunities for cross-racial understanding are available at most law schools? Professor Frank Valdes's study shows that about 20 law schools offer Critical Race Theory seminars or courses "to enrollments ranging from 9 to 40 students."[136] His study also reveals that "85 law schools reported offering another 113 law courses on Race, Racism, and/or Race Relations."[137] By Professor Valdes's calculation, "less than 5% of all law students in the 1999–2000 and 2000–01 academic years" were enrolled in race-related courses.[138] Most law students therefore are not taking specialized Race and the Law courses and are probably not getting the opportunity to break down racial barriers. While it is conceivable that law students are getting these opportunities in their generic courses, my anecdotal experience suggests otherwise.[139] I believe that the vast majority of law schools that use racial diversity as a factor in their admissions decisions are not using their classrooms to promote "'cross-racial understanding,'" are not using their classrooms to help "break down racial stereotypes," and are not enabling their students "'to better understand persons of different races.'"[140] Was Justice Scalia right? Are law schools that use race as a factor in their admissions decisions walking targets? What should law schools do to take full advantage of the racial diversity within their four walls?

Promoting cross-racial understanding benefits white students as well as students of color. While it is likely that because most law students of color have already navigated their way—successfully—through four years of a majority white

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Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987) (footnote omitted).

134. BROWN, *supra* note 132, at 2 (quoting Brooks, *supra* note 132, at 85–86).

135. *Id.* at 1.

136. Valdes, *supra* note 11, at 135.

137. *Id.*

138. *Id.* at 137.

139. Professors Allen and Solórzano have described anecdotal evidence similar to my observations. *See* Allen & Solórzano, *supra* note 122, at 252 ("Overall, students described a very tense racial climate pervasive in their departments, their classrooms, and in their course curriculum.").

140. *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (quoting Petition for Writ of Certiorari, *supra* note 1, app. at 246a).

undergraduate school, they bring a certain racial expertise with them. They are providing a service for their white counterparts, by helping to break down stereotypical notions of race. To be sure, law students of color come away from the experience learning about their white counterparts as well, with their learning curve enhanced; however, the learning curve for the law student of color will not be nearly as steep as it is for the white law student. Nevertheless, to the extent their white peers are forced to confront stereotypes they hold about students of color, the students of color will benefit.

Critical mass benefits students of color as well. Critical mass is necessary not only because it allows opportunities for interactional diversity,

> but also because having too few students from underrepresented groups can produce negative effects for members of these minority groups. In environments that lack a diverse work force or population, underrepresented groups are regarded by majority group members as symbols rather than individuals, or as "tokens." . . . Additional studies confirm that severely underrepresented groups are more likely to underperform or think about dropping out of college, regardless of racial background and gender. For example, even white students on predominantly black campuses are found to undergo academic difficulties that some researchers attribute to their "minority status."[141]

A critical mass "is important for the academic success of African American and Hispanic college students as demonstrated in several national studies."[142] Those studies show that underrepresented racial and ethnic minorities "find the college environment more comfortable, experience less stereotyping, and are able to achieve progress when they are adequately represented on college campuses" in numbers enabling them to move beyond their token status.[143]

What is the best way to manage diversity in a way that leads to a positive outcome? Studies show that in terms of "managing" diversity, if students of color think "they [a]re valued at the institution, they perceive[ ] less racial tension."[144] "Both organizations and individuals stand to gain a great deal when diverse individuals and diverse perspectives are present, but effective management of cultural diversity is necessary to

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141. Expert Report Appendices, *supra* note 79, app. B (citations omitted).

142. *Id.*

143. *Id.*

144. *Id.*

enhance its benefits to the organization and individuals."[145] Having students of color present but without a voice will not solve the problem. They must be involved in every part of the law school's activities. They must become student bar presidents and editors in chief of law reviews.

Managing diversity includes considering many different factors. Which casebook will the professor use? For example, are racial issues present in the case excluded from the excerpted opinion? Are racial slurs included in casebooks ignored, which will tend to upset students of color?[146] It is extremely difficult for students of color to ignore racist remarks and to pick up their studying as if nothing happened.[147]

Are there certain subjects that are suited to race-based discussions and others that are not? Professor Jeffrey Rosen wrote, "[T]here are many subjects—tax law, for example, or

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145. *Id.*

146. *See, e.g.*, Owsley, *supra* note 122, at 520.

> One specific problem developed over some language in an opinion that was in one of the commonly used Contracts casebooks. The problem began when two different professors were teaching a lesson on breach of contract and the parol evidence rule using a casebook they themselves had written. At one point the lesson turned to *Hicks v. Bush*[, 180 N.E. 425 (N.Y. 1962)]. In both classes, students were troubled by a passage which read
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> > Thus, one witness, the president of the defendant Bush Company, declared that everyone "understood" that the writing was not to become operative as a binding contract until the specified equity expansion funds were obtained. Indeed, his expressive and colorful testimony leaves no doubt as to the nature of the agreement arrived at: "*I used the Chinese slang phrase of 'No tickie, no shirtie.'*"
>
> Although the use of the [sic] this "Chinese slang phrase" may not be central to the understanding of the parol evidence rule, the phrase bothered some Asian-American and African-American students. As a result, they attempted to focus some discussion on the phrase itself and its role in legal reasoning. Both professors hemmed and hawed before refusing to discuss the issue. One professor went so far as to say that he would not discuss the editorial process of his casebook during class, as if racially offensive language was acceptable if the professor did not view it relevant to the ultimate outcome of the case. The situation created an uproar in both classes with some students walking out, and both professors becoming even more hostile and adamant in their position. Although I did not have either professor, I knew about it immediately and it became a huge topic among first year students, especially students of color. "There is all this uproar about some racist comments against Chinese-Americans in the [contracts] casebook. Both classes had the case today, and neither professor handled it well, so I discussed that with a bunch of people before getting into the library." The discussion became even more tense as some white students came to the defense of the professors, arguing that they had done nothing wrong and that the offended students merely overreacted.

Id. at 520–21 (last alteration in original) (citations omitted).

147. *Id.* at 524 ("'It's funny how whites can turn on and off this whole dialogue, but once I get started, I'm so screwed up and freaked out by it I can't concentrate or study.'" (quoting Owsley's personal journal that he kept in law school)).

organic chemistry—in which the connection between racial and intellectual diversity is hard to fathom."[148]

Professor Rosen was making the argument that he could understand how having a racially diverse class and having black law students express their views on the "driving while black" phenomenon would enhance the classroom discussion in a Criminal Procedure course, but he could not see how blacks could view tax law, for example, differently from whites. I would put the inquiry differently: namely, do tax laws impact blacks differently than whites, and if so, should that not be a part of any tax discussion?

I teach Federal Income Tax, and I also write in the area of federal tax policy from a Critical Race Theory perspective.[149] When I teach Federal Income Tax, I integrate Critical Race Theory into the class. In fact, I try to integrate Critical Race Theory into every course that I teach. The tax casebook that I use, which is written by Professor Joel Newman, incorporates racial issues in the text.[150] In some areas of the law, however, there will not be a casebook that integrates racial issues, and you will need to use supplementary materials. There is a wealth of material published applying Critical Race Theory to many subjects—especially the first-year curriculum.[151]

What Professor Rosen's quote hints at is that there are law school subjects that are obviously associated with race and where Critical Race Theory seems to be a logical fit, and other subjects where race plays no role. Areas where race plays an obvious role include constitutional law, criminal procedure, and criminal law. Tax law, or bankruptcy law, does not appear to have an obvious role for race. Most law school students, however, do not get exposed to Critical Race Theory in areas other than the obvious subjects—and many are not exposed to

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148. Jeffrey Rosen, *How I Learned to Love Quotas*, N.Y. TIMES MAG., June 1, 2003, at 52, 52–54.

149. *See, e.g.*, Dorothy A. Brown, *The Marriage Bonus/Penalty In Black and White*, *in* TAXING AMERICA 45 (Karen B. Brown & Mary Louise Fellows eds., 1996); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501 (2004); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1472, 1479–81 (1997); Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111 (2004); Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755 (2005).

150. JOEL S. NEWMAN, FEDERAL INCOME TAXATION 35 (3d ed. 2005) (discussing race and gender issues in imputed income); *id.* at 489 (discussing racial and ethnic dimensions of the marriage penalty associated with the joint return).

151. *See e.g.*, BROWN, *supra* note 132; AMY HILSMAN KASTELY, DEBORAH WAIRE POST & SHARON KANG HOM, CONTRACTING LAW (3d ed. 2005); Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242 (2004).

Critical Race Theory even in those classes.[152] Critical Race Theory or Race and the Law specialty courses are only taken by a few students, which gives students the impression that race issues are not relevant to other "mainstream" courses. What about the rest of the curriculum? Does Critical Race Theory have anything to say with respect to those courses? Are the vast majority of students who do not enroll in those specialty "race" courses missing anything? According to the evidence presented at trial in *Grutter*, the answer is yes. They are missing the opportunity to learn how to think critically. They are missing the opportunity to be better prepared for the workforce. They are missing the opportunity to have their racial stereotypes challenged.

One might ask, what about other courses, especially business courses, given Professor Rosen's comment. Achieving economic empowerment for people of color, in my opinion, is the battle of the twenty-first century.[153] Articles analyzing the racial implications of corporate laws[154] and bankruptcy laws[155] exist, to name a few.

Professor Cheryl Wade has written eloquently about incorporating race into the basic Corporate Law course. Professor Wade discusses in her Corporations class that Item 103 of Regulation S-K of the Exchange Act requires "disclosure of legal

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152. Allen & Solórzano, *supra* note 122, at 279–80.

153. Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1493 (2004).

154. *See, e.g.*, Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 ST. JOHN'S L. REV. 785 (2003); Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. RICH. L. REV. 819 (2003); Carbado & Gulati, *supra* note 10; Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85 (2000); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837 (2003); Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127 (2000); Cheryl L. Wade, *Comparisons Between Enron and Other Types of Corporate Misconduct: Compliance with Law and Ethical Decision Making as the Best Form of Public Relations*, 1 SEATTLE J. FOR SOC. JUST. 97 (2002); Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461 (2002); Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER RACE & JUST. 213 (2003); Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389 (2002); Cheryl L. Wade, *"We Are an Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541 (2004).

155. *See, e.g.*, A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2004); A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, __ MO. L. REV. (forthcoming 2006) (on file with author); David A. Skeel, Jr., *Racial Dimensions of Credit and Bankruptcy*, 61 WASH. & LEE L. REV. 1695 (2004); Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777 (2004).

proceedings that arise under environmental law" and are economically significant.[156] She continues,

> After discussing environmental disclosure rules as a way of encouraging compliance with the law, I ask students to consider the mandatory disclosure of material proceedings [required by Item 103] that relate to civil rights matters. I ask students why there is no civil rights analogue to the requirement that potential environmental expenditures be disclosed under Item 303. In other words, why doesn't the SEC require the disclosure of potential civil rights expenditures? This leads to an interesting discussion about the differences between social commitment to improving the environment and its commitment to helping in the enforcement of the civil rights of women, minorities, and the disabled.[157]

She also raises the race issue when discussing the *Caremark* decision, "which held that directors owe a duty to make a good faith attempt to install an adequate monitoring system to ensure corporate compliance with the law."[158] She asks "the students to consider whether the Texaco directors breached their duty of care when they failed to adequately monitor alleged racial discrimination, which resulted in over $175 million paid to settle the race discrimination class action."[159]

I truly believe, as I told one of my colleagues, that if I can find the racial implications of tax law, then the sky is the limit. I challenge you to find racial implications in your teaching and practice areas. In many instances you will not even have to re-invent the wheel, but merely go to your printer and read what others have written.

Let us say, for instance, that you are a law professor and are convinced that you want to integrate Critical Race Theory into your course. Where do you start? Start with selecting a casebook that incorporates these issues. If there is not one available, you can put together supplementary materials for your students. Ideally, you would not be the only one at your law school incorporating a race-based perspective into your classes, and you would have the support of your administration—especially if students complained that you were pushing a political agenda.

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156. Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN'S L. REV. 901, 911–12 (2003).

157. *Id.* at 912–13.

158. *Id.* at 914.

159. *Id.*

Let us say that you are a law dean who wants your faculty to integrate Critical Race Theory into your course. Where do you start? First, have your faculty tell you which other critical perspectives are currently being used in their classes.[160] Then provide teaching grants for those interested in learning how to facilitate a cross-racial dialogue. Perhaps pay for an outside speaker to come and talk with the faculty. It is understandable that professors new at facilitating an interracial dialogue would be nervous and therefore shy away from incorporating race into classroom discussions. In order for the students to truly benefit from the experience, the professor should agree that integrating the perspective into the classroom is a worthwhile exercise. If not, the students will mirror the lack of support. So work must be done to increase the comfort level of faculty members, especially faculty members who may not regularly have cross-racial dialogues with their colleagues.

If done properly, the students will come away with enhanced critical thinking skills as well as a better understanding of members of different races. That skill set will travel with them wherever they go. I anticipate that students of color would feel less alienated as a result of learning in such an environment and their academic performance would improve.

V. CONCLUSION

So as I conclude this Address, I want to reach out to my colleagues in law teaching. I want to encourage you to take *Grutter* seriously—to take racial diversity and the law seriously. I want to encourage each of you to stretch the limits of your imagination. It will energize you as well as empower your students. Taking diversity seriously means you must take diversity seriously *inside* the classroom. I guarantee you, no two classes will ever be the same and your students will reap immeasurable benefits.

I will make one final argument as to why discussing race in your classes is important. Consider the following quote from the late Justice Thurgood Marshall at the Bicentennial Celebration of the U.S. Constitution in 1987:

> What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They were enslaved by law, emancipated by

160. This should address Evan Caminker's concern that introducing Critical Race Theory into the law school curriculum will cause a court to think that all you care about is racial diversity. *See* Caminker, *supra* note 14, at 50.

> law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law.[161]

In order to make racial equality more of a reality under the law out there, that conversation should and must begin in here—in our law school classrooms.

161. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).