Pepperdine Law Review

Volume 35
Issue 3 *Symposium: Post-Grutter: What Does Diversity Mean in Legal Education and Beyond?*

Article 5

4-20-2008

Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body

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I. INTRODUCTION

This article flows from remarks made during a panel discussion on the issue of "Diversity in the Retention of Students" at the Pepperdine Law Review 2007 Symposium, entitled "Post-*Grutter*: What does Diversity Mean in Legal Education and Beyond?" The retention panel addressed both the benefits and burdens of promoting, enhancing, and retaining diversity in higher education, and examined various views of what it means to "pursue" or "retain" diversity.[1]

A brief primer on the constitutional law issues is necessary background for these remarks. The Fourteenth Amendment of the United States Constitution prohibits states from denying equal protection of the laws.[2] The United States Supreme Court has determined that race-based classifications violate the equal protection clause if they do not pass "strict scrutiny,"[3] and since *Adarand Constructors, Inc. v. Pena*, all affirmative action programs that involve race-based classifications must be evaluated under the strict scrutiny standard.[4] In order to pass strict scrutiny, an affirmative action program must serve a compelling government interest, in a way that is narrowly tailored.[5]

In *Grutter v. Bollinger*, the United States Supreme Court addressed the issue of whether diversity is a sufficiently compelling government interest to justify an affirmative action program that considered race and ethnicity in allocating law school admission offers.[6] The Court determined that diversity was a compelling interest, resolving the conflict in the federal

1. The Symposium was sponsored by the Pepperdine Law Review on March 31, 2007 in Malibu, California.

2. U. S. CONST. amend. XIV.

3. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224, 227 (1995) (holding that all racial classifications imposed by federal, state, or local government actors are subject to strict scrutiny).

4. *Id.* at 224.

5. *Id.* at 227.

6. Grutter v. Bollinger, 539 U.S. 306, 328-29 (2003). The Court further stated: "Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that 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.'*" *Id.* at 329 (emphasis added).

circuits on that issue.[7] This ruling also quieted the debate over whether the *Regents of the University of California v. Bakke* plurality opinion statement on diversity as a compelling interest was binding precedent.[8]

The *Grutter* court left some ambiguities about the interpretation of the compelling interest that the court was recognizing. On the one hand, the *Grutter* opinion states that "diversity" is the compelling interest.[9] The Court's majority opinion gave deference to the university's own description of its institutional mission in holding that "the Law School has a compelling interest in attaining a diverse student body."[10] Then, on the other hand, the majority opinion later states that the compelling interest is in the "educational benefits that diversity is designed to produce."[11] The majority opinion articulates these benefits as including the promotion of "cross-racial understanding" and learning outcomes that "better prepare[] students for a . . . diverse workforce and society," as well as deconstructing racial stereotypes.[12] These benefits and others will be addressed more fully below.[13]

The courts must examine the tightness of the fit between the goal of either achieving diversity or of realizing the benefits that flow from a diverse student body, and the means used to try to accomplish either of those particular goals.[14] The Court found that the Michigan law school admissions program satisfied the narrow-tailoring requirement because it relied upon an individualized assessment of the applicant, with race and ethnicity being one factor of many that are considered in the selection process.[15]

The Court also noted an example of a program that was not sufficiently narrowly tailored—that of the Michigan undergraduate college in the *Gratz v. Bollinger* companion case—because an automatic set point value was added to each candidate from the underrepresented races and ethnicities.[16]

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7. *Id.* at 328. *See* Smith v. Univ. of Wash., 233 F.3d 1188, 1199-1201 (9th Cir. 2000) (finding that diversity was a compelling interest). *But see* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (finding that diversity did not constitute a compelling interest).

8. *Grutter*, 539 U.S. at 321-22; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plurality opinion).

9. *Id.* at 328.

10. *Id.* at 308.

11. *Id.* at 330.

12. *Id.* at 330-31.

13. *See infra* Part II.B.

14. *See Grutter*, 539 U.S. at 333-34.

15. *Id.* at 334.

16. *Id.* at 337.

For many applicants, these extra points were sufficient to put a qualified applicant of color over the threshold to admission.[17] The dissenting Justices in *Grutter* did not see a significant distinction between the two programs on this issue. They cautioned that the law school's efforts to enroll a critical mass could result in the implementation of quotas and thus would be impermissible under the *Gratz* ruling.[18] The majority opinion of the Court rejected the quota characterization, stating that "[r]ather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce."[19] Those educational benefits are not merely the result of numbers or percentages. Instead, these benefits can accrue when the environment results in a "safe place" with sufficient "other" voices so that the diverse students can feel comfortable both speaking out and also joining in.[20]

To further guide future decision-makers, the Court provides some explanation of how diversity factors can be used in the affirmative action context.[21] The opinion explains that simply avoiding a quota is not sufficient to "satisfy the requirement of individualized consideration[s]," stating:

> When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.[22]

By allowing an admissions program that evaluates applicants individually, the majority apparently hoped to avoid the criticism that African Americans, for instance, are interchangeable in an admissions program. In addition, courts will look at whether the burden on non-minority students is sufficiently diffuse to avoid overburdening them.[23] Another factor to consider is whether the educational institution regularly reexamines the use of race and ethnicity and periodically tests whether that

17. Gratz v. Bollinger, 539 U.S. 244, 270-72 (2003).

18. *Grutter*, 539 U.S. at 346-47 (Scalia, J., concurring in part and dissenting in part); *id.* at 383 (Rehnquist, J., dissenting).

19. *Id.* at 330.

20. *Id.* at 320.

21. *See id.* at 333-34.

22. *Id.* at 336-37.

23. *Id.* at 341 ("To be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'" (citing Metro Broadcasting Inc. v. F.C.C., 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting))).

use remains necessary.[24] As with any narrowly tailored program, any use of race must be limited in extent and duration, so the courts will also examine whether less extensive or less intrusive means are available.[25] Thus, programs that look more like the law school program are likely to pass constitutional scrutiny, and programs that look more like the undergraduate program are not likely to pass constitutional scrutiny.

Part II of this article begins from the perspective that diversity, and the benefits that flow from that diversity, are worth pursuing now that its stature as a compelling interest continues to hold a majority of the United States Supreme Court. Recognizing the critiques of the diversity rationale, as provided by another panelist and other scholars, Part II also will summarize and respond to some of those critiques.[26] Part III of this article presents concrete strategies for faculty to use in the classroom to help maximize the benefits of any existing diversity, to help retain that existing diversity, and to promote a higher appreciation of diversity within a law school community.[27] Part IV concludes the article with a call to action to maximize these benefits of diversity before the doors to access shut further.[28]

II. EVALUATING THE BENEFITS THAT FLOW FROM A DIVERSE STUDENT BODY

A. The Benefits that Flow from Diversity

As noted above, the *Grutter* opinion defined the benefits that flow from diversity with a non-exhaustive list, including: (1) promoting "cross-racial understanding," (2) promoting learning outcomes that "better prepare[] students for an increasingly diverse workforce and society," and (3) deconstructing racial stereotypes.[29] Understanding and dismantling racial stereotypes are furthered when the educational setting includes a critical mass of diverse students, and *Grutter* recognizes the importance of this critical mass.[30] Maintaining a critical mass of diverse students helps to

24. *Id.* at 342 (requiring "periodic reviews to determine whether racial preferences [in admissions] are . . . necessary to achieve student body diversity").

25. *Id.* at 342.

26. *See infra* Part II.C.

27. *See infra* Part III.

28. *See infra* Part IV.

29. *Grutter*, 539 U.S. at 330-31.

30. *Id.* While some note that the concept of "critical mass . . . defies simple definition, and leads

create an environment in which the diverse students feel comfortable. If the students are comfortable, then they are likely to have higher levels of engagement and participation in classroom conversation, which results in all students learning more. This interaction helps to break down racial stereotypes as well,[31] but only when there is more than token representation from various diverse groups. This environment relies upon interaction that includes reciprocal communication as well as contact, and not merely access.[32] These three benefits of diversity articulated by the *Grutter* court cannot meaningfully be pursued without a critical mass baseline of diverse students.

There are other important benefits of diversity which the *Grutter* Court did not list, but which nevertheless are useful to consider in this discussion. Professors Lani Guinier and Susan Sturm talk about a "critical reframing," focusing on diversity education as a means of ferreting out the assumptions and values underlying conventional approaches to controversial issues.[33] They suggest that an important goal of diversity education is to step away from "zero-sum thinking" and "stretch for new paradigms."[34] Another professor, Okianer Christian Dark, explains that "[o]nce students use a multidisciplinary approach to evaluate or diagnose a problem, more complete and varied solutions are likely to result. Sometimes the solution may be not to resolve the problem exclusively through the judicial system but, rather, through use of other fora."[35] When students hear "all professors address[ing] diversity issues," it leads to a "[s]hared [o]bligation for [s]eeking [j]ustice in [s]ociety."[36] Thus, addressing and approaching issues in different ways is another concrete benefit of diversity in education.

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inevitably to imbalances in representation of racial and ethnic groups," the need to remain flexible to avoid the quota prohibition remains important. Jonathan R. Alger, *Unfinished Homework for Universities: Making the Case for Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 73, 89-90 (1998).

31. Alger, *supra* note 30, at 80.

> Of great significance is the fact that diversity in the classroom is the most effective of all weapons in challenging stereotypical preconceptions. When studying side by side, in a diverse setting, students grow to understand and respect the differences among them as they share life in a complex, pluralistic society.

Id. (citing Wessman v. Boston Sch. Comm., 996 F. Supp. 120, 128 (D. Mass. 1998)).

32. *Id.* at 81 (cautioning against focusing solely on admissions and financial aid to give students access to a diverse education because universities that do so "run[] the risk of failing to create the type of environment in which the diversity it seeks can have its greatest educational impact on campus").

33. Susan Sturm & Lani Guinier, *Learning from Conflict: Reflections on Teaching About Race and Gender*, 53 J. LEGAL EDUC. 515, 530-31 (2003).

34. *Id.* at 531.

35. Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 555 (1996).

36. *Id.* at 556.

Dark provides several rationales for teaching students about diversity, which all relate to how a diverse environment provides an ideal training ground to prepare students to work in a diverse society. She explains that knowing the vocabulary of diversity discussions is important in the real world.[37] She continues that "[a] multiple-perspectives approach enables students to develop more effective arguments on behalf of their clients,"[38] thus helping students learn how to better represent those clients. In addition, Dark notes that "discussion about diversity issues can help students become better listeners," which also helps students to better serve their future clients' needs.[39]

Developing tolerance is another benefit of diversity in education.[40] However, it seems that the goal should be something more than mere tolerance when we are talking about racial, ethnic, gender, economic and religious diversity. To tolerate is simply to endure, to grudgingly accept, which may be a good starting point, but the challenge is to strive to surpass this minimal baseline. Seeking empathy may be the next benchmark for progress along that path. That way, we can truly put ourselves in the shoes of another and treat others in the manner that we might wish to be treated.

One illustration of the importance of developing empathy and understanding involves making students aware of the privileges that they enjoy. Until those privileges are made visible, or until the students are compelled to acknowledge and confront the privileges they benefit from daily, they cannot fully understand the nature of the power imbalance between themselves and people from diverse groups. Stephanie Wildman describes an "aha experience"[41] when she tried to find a point of comparison for white students trying to understand racial harassment that included verbal racial epithets, but she could not think of an equivalent reference to

37. *Id.* at 553 ("Students who plan to live and practice in that [diverse and multicultural] world simply will have to find a way to talk about diversity issues. Simply stated, if lawyers have a problem discussing these issues, how can anyone else raise these issues within the legal system?").

38. *Id.* at 553-54 ("Furthermore, students with such an approach may be more able to identify and respond to lawyers who employ conscious, purposeful discrimination as a strategy for success.").

39. *Id.* at 554 ("They may be more able to hear what clients, who come from different perspectives than theirs, are really saying.").

40. For instance, Dean Christopher Edley states that "inclusion and diversity correspond to the moral virtue of tolerance, which is a fundamental element in American political and civic cultural ideals." CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES 130 (1998) (emphasis omitted).

41. Stephanie M. Wildman, *Privilege and Liberalism in Legal Education: Teaching and Learning in a Diverse Environment*, 10 BERKELEY WOMEN'S L.J. 88, 89 (1995)

one's core identity for the Anglo students.[42] The closest reference, suggested by one colleague, was to be wrongly accused of being gay or lesbian.[43] Wildman explains:

> The problem with using the analogy method to teach about racial oppression is that the comparison does not work. Racial oppression is unique. Comparing oppressions may lead to a false sense of understanding. The lesson about subordination would come at the expense of implicitly validating oppression on the basis of sexual orientation.[44]

The validation implicit in comparing negative characterizations of two discrete groups may not achieve the goal of developing understanding, but nevertheless can be a step towards increasing empathy.

Another benefit of diversity is based on the notion that diversity enhances democratic freedom when law schools graduate more lawyers of color, because lawyers are critical players in our political and governmental systems.[45] Identifying with the decision-makers is an important consideration when addressing issues of political accountability and the appropriate exercise of political power.[46] If people of color have more trust in the government, then the government becomes more legitimate in their views. In addition, Pratt recognizes that "by empowering individuals from subordinated groups, we empower those subordinated groups, and in doing so, we enhance their freedom which strengthens our democracy."[47] Increasing diversity in law schools leads to more diverse participation in our democracy, the potential for representation of more diverse viewpoints, and the potential to create a more democratic leadership for the future.[48] The *Grutter* court recognized the importance of access to legal education as the first door on the path to fuller participation in our democratic process, because a diverse pool of candidates equipped to deal with issues facing

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42. *Id.* at 90.

43. *Id.*

44. *Id.*

45. Carla D. Pratt, Commentary, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 HOUS. L. REV. 55, 77 (2006) ("The visual presence of lawyers of color serving in leadership positions in our democracy assures people of color that they belong to the political community and that their group interests are being represented in governmental debates and decisionmaking.").

46. *Id.* at 77. Pratt explains that "[b]y fostering more positive minority attitudes toward government we enhance the trust that our minority citizenry places in our government." *Id.*

47. *Id.*

48. *Id.* at 78. Pratt concludes that "[i]f law schools collectively adopt racial and other forms of diversity in the legal profession as part of the law school mission, we will enhance our democracy by embracing with more strength the democratic principles of self government, liberty, and equality with the potential for maximizing justice for all." *Id.* at 79.

subordinated groups is an important step towards legitimizing the legal system.[49]

Implicitly, if not explicitly, the *Grutter* majority opinion seemed to rely upon wider access, or more diverse access, to help retain and foster the legitimacy of the legal system.[50] If doors of access appear to be closed based on racial inequities, then people of color will continue to criticize, and perhaps take steps to de-legitimize, the legal system itself.[51] Only when some diversity is taken away, as happened at UCLA and Boalt Hall in the late 1990s after the implementation of Proposition 209, or with other schools with year to year fluctuations or admissions policy changes, does the loss truly become recognizable to many.[52] In either case, it is difficult to get students to accept and appreciate the benefits of diversity when they have not yet experienced any significant diversity in their lives.

It is crucial to examine the institutional goals for diversity in the classroom. There are many different potential goals, and different faculty, students, and administrators may have different goals for diversity. Devon Carbado and Mitu Gulati suggest that there are seven functions of diversity: "(1) inclusion; (2) social meaning; (3) citizenship; (4) belonging; (5) colorblindness; (6) speech; and (7) institutional culture. Each function derives from the relationship between race and social experiences."[53] These professors suggest that these functions "can be employed as a set of criteria for determining what kinds of diversity universities should pursue."[54]

For some, the purpose of diversity in the classroom is to make society better in the long run, because it will have trained lawyers to appreciate and understand diverse voices. This conception of diversity ties into the

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49. Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (discussing the role of lawyers in society and the importance of legal training for senators and other policy makers).

50. For a more detailed discussion of this view, see, e.g., Chris Chambers Goodman, *A Modest Proposal in Deference to Diversity*, NAT'L BLACK L.J. (forthcoming 2008).

51. *Id.*

52. *Id.*

53. Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149, 1154 (2003) (reviewing ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION (2002)).

54. *Id.* at 1164. They do not purport to have an answer or to make a value judgment for universities at large. Rather, they claim that:

> [O]nce we have a set of criteria, we can move to debating whether the criteria are appropriate and whether the particular kind of diversity being pursued adequately satisfies those criteria. We hope that the taxonomy of diversity functions we provide moves the literature and the political conversations surrounding diversity in this direction.

Id. at 1165.

"citizenship" and "belonging" aspects of Carbado and Gulati's definition.[55] For others, the classroom experience can serve as an end in itself, helping people to learn more about diverse cultures and backgrounds now, regardless of what they do with that knowledge later in life. This goal fits more readily with the "institutional culture" conception.[56] Each institution should evaluate its diversity goals, intentionally to pursue the aspects of diversity that are most central to the institution's mission in line with the *Grutter* Court's reasoning.

B. Some Critiques of the Benefits of Diversity

1. Does Diversity Actually Benefit Students of all Colors?

One commentator summarizes the differing results in studies about diversity by concluding that while diversity may be beneficial in some educational institutions, it also may be less beneficial in other educational institutions.[57] He also criticizes studies that focus on the impact of diversity education, as opposed to the benefit of such education because something can be impactful in a non-beneficial way.[58] Lizotte cites several studies to support his conclusion that no actual benefits have been proven to result from diversity,[59] in part because "studies of the relationship between college

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55. *Id.* at 1155-57.

56. *Id.* at 1162-64.

57. Brian N. Lizotte, Note, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 637-38 (2006). Lizotte concludes:

> [M]uch like a positive correlation between diversity and educational achievement does not imply that diversity caused such achievement, a negative correlation between diversity and educational outcomes does not imply that diversity is to blame. Nonetheless, contrary research illuminates a diversity *counter*-rationale, or at least creates suspicion of the diversity rationale. If racial diversity breeds interracial understanding and cooperation at one school, is it so hard to believe that it might breed antagonism at another? If you doubt that diversity actually depresses Black students' writing skill, should you not also be skeptical that diversity improves their critical thinking skill?

Id.

58. *Id.* at 652 ("[I]t is questionable whether some outcomes, if genuinely produced by diversity, are actually beneficial. Too often, the research in the Education Brief [an amicus brief in *Grutter*] focuses on impact, not benefit. For instance, the Michigan and Harvard Law Schools study asked students whether they thought their discussions with diverse peers would 'impact' the legal and community issues they would encounter as professionals, with no identification of whether such impact would steer students toward more, or less, multicultural involvement. Impact is not synonymous with benefit, nor are 'benefits' universal commodities to all intended beneficiaries. For instance, 'preparing students for a global marketplace' would seem of greater consequence to a would-be businessman or diplomat than a would-be physicist or poet.").

59. *Id.* at 648-49. Lizotte determines that:

> [W]hen diversity is measured too generally (e.g., by the proportion of minorities in a student body), no attention is paid to how individual students interact, or how an institution manages the education of its students to realize the purported educational

student body diversity and educational benefits are comparatively sparse."[60] The note explains that the "observation that students exposed to multiculturalism through course work increase their racial understanding is virtually redundant, akin to observing that students who take mathematics classes learn mathematics."[61] The author also states that many studies show neutral results, demonstrating that "diversity neither harmed nor benefited college students' academic performance."[62] In addition, he cites at least one study for the proposition that "college retention for both Blacks and Whites diminished with increasing campus diversity."[63] Still another study noted that "higher proportions of Blacks or Latinos in a student body were associated with less satisfaction with one's education and the work ethic of one's peers, as well as more frequent claims of discrimination."[64]

2. Does Stereotype Threat Interfere with the Benefits of Diversity?

One factor that may be contributing to the negative results in these studies is the concept of "stereotype threat" operating in the educational environment. While some believe that the threat only occurs in high stakes testing, such as standardized entry tests for college and graduate schools, there is research to suggest that the threat can also occur in other evaluative situations.[65]

Stereotype threat is the theory that a person who identifies herself as being a member of a particular group, when negative stereotypes exist about the abilities, attitudes, or performance of members of that group, may feel so threatened by the existence of the stereotype that she tends to perform worse

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> benefits of those students' diversity. Although structural diversity on campus as a whole might set the stage for more particularized classroom and interactive diversity, only the latter two types are theorized to produce educational benefits, and Gurin presents no evidence that structural diversity actually has such a trickle-down effect. In contrast, when diversity is measured too narrowly (e.g., by enrollment in ethnic studies courses), researchers risk studying the effects of a proxy far removed from the underlying construct it seeks to represent. Absent a showing that enrollment in such courses is meaningfully correlated with any "true" measure of campus diversity, the proxy is of shallow, if any, worth.

Id.

60. *Id.* at 634.

61. *Id.* at 635.

62. *Id.* at 636.

63. *Id.* at 637.

64. *Id.*

65. *See* Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 47.

in situations that implicate the stereotype.[66] While much of the literature on stereotype threat focuses on examinations, it also has implications for oral discussions in class. Oral discussion is the primary way that students repeatedly are evaluated throughout the semester in law school classes prior to the final examinations, and thus it is important to discuss here.[67]

Professor Steele began his study with Stanford undergraduate students, giving them a portion of the Graduate Record Examination ("GRE").[68] When primed with the information that the test was one of ability, which spotlighted the "blacks as inferior intellectually" stereotype, black students with credentials equal to white students did much worse than the comparably credentialed white students.[69]

On the other hand, when primed with the message that the test was simply to address problem-solving skills, which did not implicate a negative stereotype of African Americans, the similarly credentialed students did not have substantially different scores, when controlling for pre-test SAT scores generally.[70] Stereotype threat is not merely a racial concept, because it can

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66. *See id.* at 46.

67. For example, people often assume that an African American student is not the brightest student in the room. When a complicated hypothetical requiring an analytical response is proposed by a professor, and the African American student is called on, she may feel greater anxiety, thinking, "this is really hard, and so I might mess it up, even though I am well prepared. If I do mess it up, then everyone will think that I am not that smart, and if I can't respond to the professor's follow-up questions, then they will think that I don't deserve to be here, and only got here because of affirmative action." So when she attempts to answer the question she stutters, or stumbles over some of her words. She may forget a line of the logic and realize later that her reasoning, as she articulated it, is not tight or clear. And when she finishes speaking, she resigns herself to the fact that she has confirmed the unspoken, but ever-present stereotype that she is not intelligent enough to compete with her fellow students. The next time the complicated question comes up, this student may decide to pass, or will not volunteer to answer the question. Stereotype threat has silenced her, and eventually will impact her class participation, which can have an impact on her final grade as well. In addition, stereotype threat can impact her examination grades, if the threat is triggered and causes her additional anxiety about her performance on the written test.

68. Claude M. Steele, *Expert Report of Claude M. Steele*, 5 MICH. J. RACE & L. 439, 443-44 (1999).

69. *See id.*; *see also* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 614 (1997). Steel explains that stereotype threat is a

> social-psychological threat that arises when one is in a situation or doing something for which a negative stereotype about one's group applies. This predicament threatens one with being negatively stereotyped, with being judged or treated stereotypically, or with the prospect of conforming to the stereotype. Called *stereotype threat*, it is a situational threat—a threat in the air—that, in general form, can affect the members of any group about whom a negative stereotype exists (e.g., skateboarders, older adults, White men, gang members). Where bad stereotypes about these groups apply, members of these groups can fear being reduced to that stereotype. And for those who identify with the domain to which the stereotype is relevant, this predicament can be self-threatening.

Id.

70. *See* Steele, *supra* note 68, at 680; *see also* Claude M. Steele, *Stereotyping and Its Threat Are Real*, 53 AM. PSYCHOLOGIST 680, 680-81 (1998) (explaining that the "central point of this research

apply whenever there are stereotypes associated with a group based on other factors, such as gender with women in math and engineering courses.[71]

Now some may argue that this is not a "phenomenon," but rather a common situation called stress that affects many people who have Type-A personalities or who try to be the best in everything that they undertake. But Steele and Aronson assert that the "threat is not borne by people not stereotyped in this [manner]."[72] Thus, the threat results in a special, additional anxiety on top of the normal stress those high achievers may endure.

Stereotype threat is a complicated phenomenon, and it does not occur in every situation. From the prevailing research thus far, it seems that the threat only manifests itself when one is in the "field of the stereotype" enduring a "spotlight anxiety."[73] There must be a concurrence of a negative stereotype about one's group, and the stereotype must be implicated in the current situation—such as taking a test.[74] It occurs whether or not the individual believes in the truth of the stereotype, and has the most profound effect on those individuals who are most invested in the situation.[75] In addition, Steele notes that "the detrimental effect of stereotype threat on test performance is greatest for those students who are the most invested in doing well on the test."[76] For instance, high-achieving African American

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is that what lowered the test performance of these highly school-identified Black students was not low motivation but the extra pressure of stereotype threat").

71. *See* Steele, *supra* note 70, at 680.

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

73. Steele, *supra* note 69, at 616; *see also* Steele & Aronson, *supra* note 72, at 798 (stating that a person "need not even believe the stereotype. He need only know that it stands as a hypothesis about him in situations where the stereotype is relevant").

74. Steele, *supra* note 69, at 616; *see also* Steele & Aronson, supra note 72, at 798 ("This is not to argue that the stereotype is necessarily believed; only that, in the face of frustration with the test, it becomes more plausible as a self-characterization and thereby more threatening to the self.").

75. Steele, *supra* note 68, at 446-47. Steele continues:

> A person has to care about a domain in order to be disturbed by the prospect of being stereotyped in it. So all of our earlier experiments had selected participants who were identified with the domain of the test involved—Black students identified with verbal skills and women identified with math. But we had not tested participants who were less identified with these domains. When we did, what had been beneath our noses hit us in the face. None of these disidentified [sic] students showed any effect of stereotype threat whatsoever.

Id. at 446; *see also* Steele & Aronson, *supra* note 72, at 798-99 ("[F]or Black students who care about the skills being tested—that is, those who are identified with these skills in the sense of their self-regard being somewhat tied to having them—the stereotype loads the testing situation with an extra degree of self-threat, a degree not borne by people not stereotyped in this way.").

76. Steele, *supra* note 68, at 446; *see also* Lu-in Wang, *Race as Proxy: Situational Racism and*

students are more significantly affected by stereotype threat when they are taking an intelligence test than are African American students who merely get by and have no higher hopes than to pass with a C average.[77]

Stereotype threat has implications for not only entry tests, but also for final exams, particularly multiple choice exams, where the negative stereotype is spotlighted for African Americans.[78] It also reminds us to consider the sometimes hostile learning environment for many diverse law students and how that spotlights the stereotypes in more learning situations, such as when academic support faculty emphasize that the LSAT score has a forty percent predictive value toward their first year grades and that first year grades predict bar passage and overall success in law school.[79] Every time these students speak up in class, they are under the spotlight, either helping to confirm or to disprove the applicability of the stereotype

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Self-Fulfilling Stereotypes, 53 DEPAUL L. REV. 1013, 1052-53 (2004). Wang explains:

> [W]hen an individual from a stereotyped group cares enough about the ability supposedly being measured to want the stereotype of low ability to be untrue, the test becomes a "high-stakes endeavor." The individual then feels apprehensive, anxious, and distracted—emotions that interfere with performance on the test. In other words, even when an individual's abilities do not conform to the stereotype—and especially when he or she wants to prove that the stereotype is invalid—making the stereotype salient alters the *testing situation* by placing an extra psychological burden on the individual.

Id.

77. Steele, *supra* note 69, at 617 ("This means that stereotype threat should have its greatest effect on the better, more confident students in stereotyped groups, those who have not internalized the group stereotype to the point of doubting their own ability and have thus remained identified with the domain—those who are in the academic vanguard of their group."); *see also* WILLIAM G. BOWEN, MARTIN A. KURZWEIL, & EUGENE M. TOBIN, EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 84 (2005) (noting that "while the effects of stereotype threat certainly seem to contribute to the preparation gap between underrepresented minorities and other students, the extent of the impact may be limited to the top end of the distribution, and then only to a fraction of this group"); *see also id.* at 117 ("Claude Steele argues that the effects of stereotype threat are more likely to occur when students care deeply about their academic performance, and Douglas Massey's work confirms this hypothesis. Thus, the academically oriented minority student at these highly selective colleges and universities may be among the students most vulnerable to stereotype threat.").

78. For instance, there is evidence that on average, African Americans get lower scores on the SAT and LSAT than do Anglo students, across the board, at most levels of income and education quality. *See* Benjamin H. Barton, *The ABA, the Rules, and Profesionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 463-64 nn. 199-200 (2005). When a student sits down to take the standardized test, the first thing she does is note her name, and race or ethnicity if those questions are part of the identifying information. Now, she has been reminded of her race twice, if her name is particularly associated with her ethnic or racial group, and then she must answer the examination questions. The additional stress and anxiety of trying not to conform to the stereotype, or of proving that she can get a high score as an African American female, makes many invested, overachieving students perform at lower levels than they otherwise would.

79. *See* Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluation Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41, at 57-59 (2006).

and generalizations about the intellectual abilities of students of that particular race or ethnicity.

In the classroom environment, tokenism increases the salience of the stereotype, and the risk that it will be applied to a particular student, thus heightening the threat in situations where there is no critical mass of minority students.[80] In addition, tokenism can lead to an effort to prove and re-prove one's non-conformance with the stereotype, which leads to additional stress that can exacerbate the negative impact on performance. Steele explains:

> The effort to overcome stereotype threat by disproving the stereotype—for example, by outperforming it in the case of academic work—can be daunting. Because these stereotypes are widely disseminated throughout society, a personal exemption from them earned in one setting does not generalize to a new setting where either one's reputation is not known or where it has to be renegotiated against a new challenge. Thus, even when the stereotype can be disproven, the need to do so can seem Sisyphean, everlastingly recurrent. And in some critical situations, it may not be disprovable.[81]

Some suggest that mentoring and coaching may help to alleviate the effects of stereotype threat,[82] in part by encouraging greater classroom attendance.[83] However, if the learning environment is not receptive or welcoming to diversity, then the students will not attend as often as needed to help mitigate the threat.[84] Making the space safe for these diverse student voices then becomes even more necessary.

Not all agree that this threat is real or has any real effects. Some scholars also have considered the concept of "stereotype lift," which is the theory that white students actually do better in homogeneous environments,

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80. *See* Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2258-59 (2000).

81. Steele, *supra* note 69, at 618.

82. *See* Dr. Roy Freedle, *How and Why Standardized Tests Systematically Underestimate African-Americans' True Verbal Ability and What to Do About It: Towards the Promotion of Two New Theories with Practical Applications*, 80 ST. JOHN'S L. REV. 183, 220 (2006) ("[A]fter mentoring or coaching, stereotype threat may well be mitigated with greater classroom attendance likely, therefore yielding higher classroom grades (from the classroom testing component).").

83. *Id.*

84. *Id.* ("[M]inority students who feel threatened may fail to show up for many classes, leading to lower grades.").

and that Asian males do better on math tests, when primed with the stereotype and a need to live up to the expectations of the positive stereotype.[85] A discussion of this material is beyond the scope of this article.

3. Does the Environment Hamper Realization of the Benefits of Diversity?

Some other criticisms of diversity education suggest that too much racial diversity leads to the problem of balkanization, which increases racial tensions and thus detracts from the benefits that diversity otherwise would bring to a particular campus.[86] For instance, Rachel Moran points out:

> Taken together with the work on tokenism and academic achievement, these findings pose an interesting paradox. When the proportion of racial and ethnic minorities increases at a campus, the salience of racial and ethnic differences grows. The resulting sense of balkanization may harm the academic performance of students of color by making them feel isolated or at odds with the university's commitment to cosmopolitanism.[87]

It seems that there is a fine line between the stress of being a token, who speaks for the entire race in the minds of some Anglo students and faculty, and being part of a growing critical mass that is self-segregating and thereby accused of exacerbating the "race problem."[88]

Moran suggests that this paradox might be a false one, however, based on the results from one study which found that "while 90% of students believed that there was racial balkanization on campus, over half had racially diverse friendship groups. That is, many students reported that relationships on campus were racially segregated, while they themselves enjoyed the benefits of interracial contact."[89] From follow-up interviews, the researcher concluded that "widely shared perceptions of balkanization stemmed in part from the presence of racial and ethnic organizations on campus. Though stigmatized as divisive, these organizations and activities offered a critical source of comfort and support as students of color adjusted to campus life."[90] Universities need to work more proactively to adjust their

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85. *See, e.g.*, Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997, 2004 (2005) (briefly discussing the concept of "stereotype lift").

86. Moran, *supra* note 80, at 2264.

87. *Id.*

88. *Id.* at 2254.

89. *Id.* at 2264 (internal citations omitted).

90. *Id.* at 2265.

climates in ways that will recognize the importance of diverse student organizations without de-legitimizing the need for integration.

Rachel Moran evaluates the merits of some studies on diversity education and its impacts, and concludes:

> [The] research generally finds that Powell's vision has been imperfectly realized because nontraditional perspectives remain marginalized and because perceived balkanization has a chilling effect on student interaction. Faculty have not altered the formal or hidden curriculum, and administrators have not done enough to create opportunities for interracial contact. This work concludes that the benefits of diversity can be achieved only when institutions, and not just students, are expected to change.[91]

Moran recognizes that without a critical mass, the benefits of diversity are more attenuated and more difficult to realize.[92] For instance, she notes that "empirical research has demonstrated the harmful effects of token status."[93] Some have noted that token status "can inhibit one's memory for what is said during a group discussion."[94] Increasing the numbers to avoid tokenism is subject to decreasing rewards, however. Moran notes that "once a threshold number of previously underrepresented students is reached, studies do not demonstrate any uniform improvement in achievement due to further increases in representation."[95] In fact, hostility of majority students can increase, thus resulting in an overall detriment to students of all colors.[96] This is similar to the "tipping point" phenomenon of housing segregation. Moran explains that the "challenges of achieving the critical mass that avoids the harms of tokenism without succumbing to the balkanization that accompanies increased racial diversity could explain why integration does not always lead to improved academic performance."[97] Thus, it may be that the optimal level of diversity is not achieved,[98] and the imbalances in many

91. *Id.* at 2241, 2271-72.

92. *Id.* at 2259.

93. *Id.*.

94. Steele & Aronson, *supra* note 72, at 798. For a full explanation of the concept of "stereotype threat" and its potential effects, see *supra* Part II.B.2.

95. Moran, *supra* note 80, at 2259.

96. *Id.*

97. *Id.*

98. *Id.* Moran explains that in order to "maximize the benefits of diversity, reformers have urged university administrators to encourage interracial contact inside and outside the classroom.

educational institutions lead to this instability critique by some authors. Nevertheless, other studies validate the educational benefits of diversity in education.[99]

C. *Addressing Criticisms of the Diversity Rationale Itself*

While some proclaimed *Grutter* to be a victory for those concerned about racial justice, others categorized it as a defeat, and so it is important to consider the potential negative impacts of pursuing diversity in education. Professor Derrick Bell explains that the pursuit of diversity distracts us from solving the problems of which a lack of diversity simply is one manifestation.[100] He identifies four specific problems with the diversity rationale:

> 1) Diversity . . . avoid[s] addressing directly barriers of race and class . . . ; 2) Diversity['s] [similarity to rejected affirmative action policies] invites further litigation . . . ; 3) Diversity serves to give underserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants; and 4) [Diversity] diverts concern and resources from . . . [addressing] poverty . . . .[101]

1. Similarity to Rejected Policies

On the issue of its similarity to previously rejected policies, Bell explains that the *Grutter* and *Gratz* decisions will not result in affirmative action policies being modeled after the law school holistic policy because the court opinions do not provide consistent guidance, and any attempts to walk the fine line may be met with resistance and lead to further litigation.[102]

Cooperative learning activities, faculty-student contact, and multicultural centers offer opportunities to create a positive racial climate on campus." *Id.*

99. *See, e.g.*, BOWEN ET AL., *supra* note 77, at 145 (discussing Gurin's conclusions that "show a wide range of educational benefits when students interact and learn from each other across race and ethnicity," and concluding that "the presumed educational benefits of diversity have been strongly affirmed").

100. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

101. *Id.*

102. *Id.* at 1628 ("The results in the two Michigan cases with their multiple opinions, concurrences and dissents, further confuse rather than clarify Justice Powell's opinion in *Bakke*. It will likely encourage affirmative action opponents to mount more litigation challenges as well as exert pressure for the appointment of judges opposed to affirmative action in any form. Rather than try to steer a course between the law school decision approving a holistic review of each application and the granting of points on an admissions scale struck down in the undergraduate case, many schools will opt to abandon any overt mention of race and move toward maintaining their minority student enrollments through the 'winks, nods, and disguises' that Justice Ginsburg deplores.").

Instead of clearing up the law on race-conscious affirmative action, these decisions muddied the waters in his view.

2. The Merit Paradigm

Bell explains that because the diversity rationale continues to place a premium on convenience and efficiency, it justifies retaining LSAT scores as an appropriate measure of merit.[103] This criticism is an appealing one. Imagine the scales of justice with movement. The left hand opens outward, palm extended, to permit diversity, as a way to open doors of access and spread the benefits of higher educational opportunities. Meanwhile, the right hand is tightly clenched, holding onto the traditional notions of merit as measured by LSAT scores and undergraduate GPAs from prestigious institutions. Perhaps it is worse to pay homage to diversity, because to give deference to diversity may blind us to the reality that the concept of merit is not changing in the ways it should. As long as merit is measured the same way, broader access will not be guaranteed, and we must continue to rely upon courts, administrators, and admissions committees to ensure that some meaningful diversity exists.

A re-evaulation of the notion of merit is addressed in other literature (and thus will be only briefly outlined here), and as one author notes, "[r]eexamination [sic] of the concept of merit in education is one of the most useful byproducts of the affirmative action discussion, and should yield educational benefits regardless of how the case law on affirmative action turns out."[104] If the notion of merit were turned on its head, and if broader measures of talent and indicia of potential success as attorneys were included in the admissions criteria and explicitly pursued, evaluated, and justified, then the access problem would disappear because law schools would no longer be excluding such large numbers of students of color with an initial screening. Rather, law schools would be able to choose from a larger pool of "qualified candidates" who also happen to be diverse.

Why is merit for law school defined the way it is? A brief review of history provides an answer. As facially discriminatory policies were

103. *See id.* at 1625-26. "Because many schools receive so many more applications than positions, and because our society is fascinated or intimidated by 'hard figures,' the standardized tests are retained for the convenience of the schools even though they privilege applicants from well-to-do families, alumni children, and those born into celebrity." *Id.* at 1631.

104. Alger, *supra* note 30, at 83 (writing years before the United States Supreme Court decision in *Grutter*).

curtailed, African Americans were permitted to enter into white educational institutions.[105] As the number of qualified applicants increased faster than admissions slots, some universities and graduate schools decided that they needed to become more selective in their admissions processes, and standardized tests became increasingly relied upon.[106] However, over time, using the apparently non-racial characteristic of "merit," racial diversity levels decreased from their post-*Brown* desegregation levels.[107]

This first period of post-*Brown* re-segregation led to the rise of affirmative action programs. Despite numerous studies reaching contrary conclusions,[108] some critics of affirmative action believe that it results in the admission of unqualified students. In any event, some courts have held affirmative action programs to constitute "reverse discrimination," in violation of the Fourteenth Amendment.[109] But it is useful to realize that our quantitative threshold is getting higher. As policy analyst William Kidder notes, the average LSAT score for the top schools used to be lower than it is now and yet those lawyers who graduated from Harvard and Stanford and Yale were qualified to attend those schools and graduated to become good lawyers or even law professors.[110] Their LSAT scores would not be competitive in the current market for those top law schools, yet these lawyers have succeeded in their practice with those scores, and thus those numerical scores did not render those students unqualified to practice law. Similarly, as the Bowen and Bok study confirmed, students of any color with lower LSAT scores than the current competitive range for top schools are not necessarily, by virtue of their score, unqualified to attend those law schools, and can succeed, as earlier lawyers did, in spite of their LSAT scores.[111] Many have debated the usefulness of the LSAT and undergraduate GPAs for predicting success in an eventual legal career, and that debate is beyond the scope of this article.

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105. Sweatt v. Painter, 339 U.S. 629, 636 (1950).

106. William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 216 n.216 (2000); Brief of Amici Curiae Association of American Law Schools at 9-12, 66, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) [hereinafter AALS *Bakke* brief] (evidencing the increase in competition for spots in law school classes that results in heavy use of LSAT scores).

107. AALS *Bakke* brief, *supra* note 106, at 35.

108. Steele, *supra* note 68, at 447 ("All of these findings then, taken together, constitute a powerful reason for treating standardized tests as having limited utility as a measure of academic potential of students from these groups.").

109. *See Bakke*, 438 U.S. at 271-72, 279, 289-90, 311-12, 319.

110. William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 19 (2003).

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

As the world becomes more competitive, standards of quality and expectations will rise so that the average qualifications may be higher from one decade to the next, but the minimum line of qualification does not necessarily rise with the average. The definition of "qualified" should be an evolving one, and thus no one conception of merit will be right forever. Consider the example of the San Francisco fire fighter litigation two decades ago, where women argued that they were being discriminated against because of their gender and the fire fighters argued that women were not able to meet the physical requirements of the job.[112] When those criteria were re-examined, it became clear that brute strength and a large athletic body were not the only skills needed to fight fires effectively.[113] With a smaller frame and greater agility, many female fire fighters were able to get into spaces that many men could not reach, and sometimes crawling through a window is more effective in a rescue situation than ramming down the door.[114] Strength and athletic build were not removed from the list of positive firefighter attributes, but agility and a small frame were added to the list, thus expanding the definition of merit for firefighters of both genders. Similarly, our notion of merit should be expanded to include more than the LSAT and UGPA, as *Grutter*'s approval of the holistic review process indicates.[115]

3. Race and Class

One way to expand the notion of merit is to make room for class and poverty evaluations in the equation. The first and fourth principles that Bell articulates both address the issues of race and class.[116] Bell explains that part of what convinced Justice O'Connor to vote as she did in *Grutter* was that the affirmative action plan minimized the importance of race, in contrast to the plan in *Gratz*.[117] In addition, Bell notes that financial policies have a

112. *See generally* Shauna I. Marshall, *Class Actions as Instruments of Change: Reflections on* Davis v. City and County of San Francisco, 29 U.S.F. L. REV. 911 (1995) (explaining how firefighters adapted when females joined their ranks).

113. *Id.*

114. *Id.*

115. Grutter v. Bollinger, 539 U.S. 306, 337 (2003).

116. *See supra* note 101 and accompanying text.

117. Bell, *supra* note 100, at 1625. Bell explains:

> [I]t was diversity in the classroom, on the work floor, and in the military, not the need to address past and continuing racial barriers, that gained O'Connor's vote [in *Grutter*]. Once again, blacks and Hispanics are the fortuitous beneficiaries of a ruling motivated by

particularly large impact on students of color from lower socio-economic backgrounds.[118] By failing to address the economic barriers to education, the *Grutter* decision to uphold diversity as a compelling interest will not truly ameliorate the access problems for those who have class barriers in addition to racial barriers.

UCLA law did a bold experiment about a decade ago to expand the conception of merit to include socio-economic status more explicitly in its admission consideration, as well as other factors that sought to re-diversify the law school after voters passed Proposition 209.[119] Other schools have made similar efforts, but the success of any such program has been minimal.

The reasons for this failure of socio-economic diversity to increase racial diversity are two-fold. First, despite the addition of socio-economic and other diversity factors, the culture in the legal academy has not really changed to embrace these factors as truly meritorious. In a sense, the legal academy does not believe that students with these factors are more qualified for a legal education. Rather, the legal academy believes that there may be other students more deserving of the opportunity, particularly when there are limited enrollment spots, thereby leaving a large number of disappointed applicants. Until the culture changes to truly embrace the merits of these non-LSAT and non-GPA factors, the gated community will still be partially closed to outsiders. Only a few diverse applicants from lower socio-economic backgrounds will have the proper access code to obtain entry on their own. Meanwhile, the other applicants still have to convince the gatehouse guard that they are worthy of admission.

Second, there is a problem faced by those who succeed in persuading the guards to admit them, as the "inside security" continues to keep a watchful eye over these admitted students in ways that do not foster retention. Moran, Orfield, and others pose the question in a different way: "whether higher education is successfully adapting to the demands

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> other interests that can and likely will change when different priorities assert themselves. When she [Justice O'Connor] perceived in the Michigan Law School's admissions program an affirmative action plan that minimizes the importance of race while offering maximum protection to whites and those aspects of society with which she identifies, she supported it.

Id.

118. *Id.* at 1632 ("With government at every level struggling to manage huge deficits, many colleges are suffering deep budget cuts that mean higher tuition and less money available for financial aid. A Century Foundation study estimates that if the nation's most selective colleges abandoned affirmative action and looked only at grades and test scores, about 5,000 fewer black and Hispanic students would make the cut each year; but next year, officials estimate that because of budget cuts at least 20,000 black and Hispanic students will be shut out of California's 108 community colleges. One can easily imagine the nationwide attrition figures." (internal citations omitted)).

119. Richard Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 472 (1997).

of a diverse student body and society,"[120] because "the value of diversity in practice depends on the kind of institution minority students gain access to and the degree to which those schools adapt."[121]

The necessary adaptation includes "increased faculty diversity and leadership that alters the campus climate."[122] In addition, realizing the benefits of diversity "is enhanced by faculty who build diversity into the teaching and research missions of the university."[123] Proactive retention strategies to maintain whatever existing diversity a law school has been able to obtain are discussed in Part III below.[124]

D. Illustrations of Existing Diversity Education Programs

UCLA Law provides a shining example of a diversity-conscious program, in light of the limitations of Proposition 209 in California. The Critical Race Studies program attracts diverse students and students who care about diversity, both as an intellectual pursuit and from an activist role.[125] This innovative program provides both the educational legitimacy of a top tier law school and the expertise of numerous well respected scholars in the field of race and the law.[126] Students can select the specialization at the conclusion of their first year of law school and are permitted to participate in program activities even during that first year, as well as throughout their three years of law school.[127]

As an example of a program at the other end of the spectrum, McGeorge School of Law ran a diversity education program that included a short lecture along with small group sessions on identifying cultural programming, to examine how culture affects choices and assumptions.[128] After evaluating this program, the school determined that it needed to

120. Moran, *supra* note 80, at 2342.

121. DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 234 (Gary Orfield & Michal Kurlaender eds. 2001).

122. *Id.*

123. *Id.*

124. *See infra*, Part III.

125. *See* Overview of the Critical Race Studies Program, http://www.law.ucla.edu/home/index.asp? page=2599 (last visited Feb. 6, 2008).

126. *See* CRS Research: Meet the Critical Race Studies Faculty, http://www.law.ucla.edu/home/index.asp?page=1087 (last visited Feb. 6, 2008).

127. *See* Frequently Asked Questions About CRS, http://www.law.ucla.edu/home/index.asp?page=1088 (last visited Feb. 6, 2008).

128. Julie Davies, *Teaching Diversity Skills in Law School: One School's Experience*, 45 J. LEGAL EDUC. 398, 405-06 (1995).

sponsor more programs and increase the presence of diversity discussions on campus, as well as the numbers of diverse students.[129] The article recognized the importance of diligent planning about the type of diversity program—not just any program will have the desired impact—and concluded that the "next time we undertake a diversity skills program, we need to be sure that we give students a forum for hard thinking and meaningful discussion. Otherwise we run the risk of appearing hypocritical and superficial, and perhaps making the law school community *less* receptive and tolerant."[130] For example, students resented that attendance was required and thus manifested lower receptivity, even though many ignored the mandate to attend.[131]

The University of North Dakota experimented a few years ago with promoting diversity discussions in their quite homogeneous student body, which was comprised of almost 90% Anglos, 3.1% Native Americans, and less than 2% each of Asians, Blacks and Latinos.[132] They conducted small group exercises about considering diversity in undergraduate admissions and looking at the SAT score differentials across racial lines.[133] In debriefing the exercises, the study focused on several student responses.[134]

The students perceived a prevalence of race neutrality,[135] perhaps based on the absence of any critical mass of diversity students and the monolithic culture of North Dakota. Thus, there seemed to be no reason to consider race and "most white students diligently avoid[ed] discussion of race or, if it [was] raised, assert[ed] that it should not be taken into account and that [was] that."[136] Discussions about race amongst mostly white students seemed to "reinforce the preexisting opinions and perceptions that the white students share[d]."[137] The researchers also found that "[w]ithout the 'robust exchange of ideas' in a racially diverse classroom, students are less likely to achieve 'cross-racial understanding' or to dismantle racial stereotypes,"[138] two of the benefits of diversity articulated by the Court in *Grutter*. This school found that:

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129. *Id.* at 412-13. Also, it was important to remove sources of stress such as the minority support program, which bred resentment in Anglos because it was not based on who had demonstrated a need for assistance. *Id.* at 413.

130. *Id.* at 413 ("I would be more enthusiastic about a program designed to encourage thinking abut diversity issues in a meaningful context over a longer period of time.").

131. *Id.* at 407.

132. Kathryn R.L. Rand & Steven Andrew Light, *Teaching Race Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale*, 54 J. LEGAL EDUC. 316, 319 (2004).

133. *Id.*

134. *Id.* at 325-29.

135. *Id.* at 327.

136. *Id.* at 331.

137. *Id.* at 330.

138. *Id.*

> [t]he value to white students of classroom diversity is undermined by the absence of a critical mass of students of color: without much exposure to differing perspectives, they are ill-equipped to critically examine stereotypes and ill-prepared to work in diverse environments and to appreciate the value of multiple perspectives and differing experiences. At the same time, without a critical mass the value of diversity to students of color is undermined: they do not have the support of classmates with similar experiences, they face the possibility of being treated as racial or ethnic spokespersons, and they may experience racial insensitivity or even backlash in the classroom.[139]

Nevertheless, the authors of this North Dakota study concluded that the "short-term benefits of diversity in the classroom are less important than the long-term benefits to society. This approach to diversity focuses less on the benefits accruing to all students in the classroom setting and more on the role of diversity in higher education as necessary to overcome social inequality."[140] They acknowledged that the main function of diversity education was in its impact on the real world outside of the classroom.[141]

The University of California at Berkeley's Institute for the Study of Social Change conducted a Diversity Project to examine the effect of diversity on undergraduates.[142] In analyzing the results of the project, Rachel Moran noted that "[a]lthough stereotyping and balkanization did accompany high levels of diversity, most students valued the opportunity to have interracial contacts and were sometimes frustrated by their inability to reach out across racial and ethnic boundaries."[143]

Listed below are a number of other law school programs and institutes that focus on issues of race and ethnicity. Some are directed towards specific races or ethnicities, while others address more universal racial issues, such as race and justice, and race and poverty. A partial listing of these programs includes the following: The University of Colorado has an

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139. *Id.* at 332.

140. *Id.* at 333.

141. *Id.* (citing the views of Jack Greenberg and Charles Lawrence, who "advocate a diversity rationale more firmly rooted in 'the world outside' the university classroom. There diversity's most important benefits are the integration of elite power structures and continuing efforts against racism and social inequality").

142. *See* INSTITUTE FOR THE STUDY OF SOCIAL CHANGE, UNIVERSITY OF CALIFORNIA, BERKELEY, THE DIVERSITY PROJECT, FINAL REPORT (1991) [hereinafter DIVERSITY PROJECT].

143. Moran, *supra* note 80, at 2270.

American Indian Law Program;[144] Harvard University has the Charles Hamilton Houston Institute for Race and Justice;[145] The University of Minnesota has an Institute on Race and Poverty;[146] Ohio State University has the Kirwan Institute for the Study of Race and Ethnicity;[147] Boalt Hall at U.C. Berkeley has the Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity;[148] Northwestern University has a diversity education and outreach office;[149] The University of North Carolina has a Center for Civil Rights;[150] The University of Arizona has the Indigenous Peoples Law and Policy Program;[151] and The University of Florida has the Center for the Study of Race and Race Relations.[152]

III. THREE STRATEGIES FOR MAXIMIZING THE BENEFITS THAT FLOW FROM DIVERSITY

A. Strategy Number One: Making the Learning Useful in Every Way You Can.

Mary McLeod Bethune, an African American educator at the turn of the 20th Century who was the first child born free to her former slave parents, prized education from the moment an Anglo girl snatched a book from her hand and yelled, "You can't read that."[153] Little Mary did not know that it had been illegal to teach slaves to read, and she wanted to read more than

144. *See* American Indian Law Clinic, http://www.colorado.edu/Law/clinics/ilc/ (last visited Feb. 6, 2008).

145. *See* Charles Hamilton Houston Institute for Race & Justice, http://www.charleshamiltonhouston.org/Home.aspx (last visited Feb. 6, 2008).

146. *See* University of Minnesota Institute on Race & Poverty, http://www.irpumn.org/website/ (last visited Feb. 6, 2008).

147. *See* The Ohio State Kirwan Institute for the Study of Race and Ethnicity, http://kirwan.gripserver3.com/ (last visited Feb. 6, 2008).

148. *See* The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, http://www.law.berkeley.edu/centers/ewi/index.html (last visited Feb. 6, 2008).

149. *See* Northwestern University School of Law: Diversity Education and Outreach, http://www.law.northwestern.edu/minorityaffairs/ (last visited Feb. 6, 2008); *see, e.g.*, Rand & Light, *supra* note 132, at 319.

150. *See* UNC School of Law Center for Civil Rights, http://www.law.unc.edu/centers/civilrights/default.aspx (last visited Feb. 6, 2008).

151. *See* The University of Arizona James E. Rogers College of Law Indigenous Peoples Law & Policy Program, http://www.law.arizona.edu/Depts/iplp/ (last visited Feb. 6, 2008).

152. *See* Center for the Study of Race and Race Relations, http://www.law.ufl.edu/centers/csrrr/ (last visited Feb. 6, 2008).

153. The Florida Memory Project, Interview with Mary McLeod Bethune, http://www.floridamemory.com/OnlineClassroom/marybethune/interview.cfm (last visited Feb. 6, 2008).

anything.[154] She said, "From the very first, I made my learning, what little it was, useful in every way I could."[155] Bethune's statement is a foundational approach to using knowledge, and one that should underlie all diversity education efforts. Retaining knowledge is easier for many students when that knowledge is put to a practical use or application. Teach them in ways that they remember, excite them with their abilities to use their newly acquired knowledge, and challenge them to continue to make use of that knowledge in practical and important ways. When we talk about teaching students in a way that helps us to maintain and retain diversity, making the learning useful in every way we can is an important first step.

To promote enthusiasm for diversity education and educating in a diverse environment, it is important to value, and even celebrate, the contributions of different cultures, communities, races and ethnicities. Take opportunities to acknowledge the contributions of various cultures to a particular field of inquiry or topic. For instance, when I talk about the concept of retaliation as a justification for punishment, I discuss the concept of "an eye for an eye." Many students are familiar with the Bible as a source,[156] but are not aware that this maxim is also found in the ancient Code of Hammurabi, the seventeenth century B.C. Babylonian ruler.[157] Providing this information subtly reminds the students that the Judeo-Christian tradition is not the only contributor to our legal system.

Educating in a diverse environment about diverse people is crucial in this era of globalization. Priming students to be receptive to this education builds the foundation for realizing the full benefits that can flow from a diverse educational environment. Receptivity requires demonstrating the relevance of diversity, and also generating an enthusiasm for diversity.

Establishing the relevance of diversity to students of the current generation can be done in all sorts of classes. For instance, in a criminal law course, when discussing the Bernard Goetz subway shooting case,[158] sometimes students do not mention that the youths were African American when identifying the reasons why Goetz was or was not in reasonable fear for his safety. Moran explains that we must remember that "[r]ace is not

154. *Id.*

155. Lakewood Public Library, Women in History: Mary McLeod Bethune, http://www.lkwdpl.org/wihohio/beth-mar.htm (last visited Feb. 6, 2008).

156. *E.g.*, Exodus 21:23–27; Matthew 5:38-39.

157. The Avalon Project at Yale Law School, The Code of Hammurabi, *available at* http://www.yale.edu/lawweb/avalon/medieval/hammenu.htm (last visited Feb. 6, 2008) ("If a man put out the eye of another man, his eye shall be put out.").

158. People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

merely an add-on to legal pedagogy, but rather one component in a larger debate about the meaning of law, legal education, and the legal profession."[159] To remind the students how important race is in this case, professors can ask several small Anglo women to stand up around a large male student and ask him if he feels threatened. Then, have other students stand up to replace these students to slowly make a point about reasonable fear. Of course this gender substitution is not a perfect analogy, but it opens the door to a conversation about when people do feel threatened by others, and when they are reasonable in having those fears. As the discussion progresses, it becomes easier to address the racial component of reasonable fear.

However, professors must take care when making substitutions of this kind. For instance, one law professor continually changed the hypotheticals in a criminal law case by substituting Jews for African Americans whenever possible.[160] This is an interesting approach, which demonstrates how perception changes the equation.[161] The substitution may not always work, and emphasizes different perspectives and rationales. Still it can be a simple and effective way to illustrate to the students the salience of race.

In an evidence course, consider a situation in which a defendant of Columbian descent has been accused of smuggling drugs in the past and now is charged with homicide. To the extent that the courts admit the prior bad drug acts as non-character evidence to show motive or common plan, the jurors likely will use the "Columbian drug smuggler" stereotype to conclude that this Columbian defendant likely is a "Columbian drug smuggler" and is therefore more likely to have committed the murder, even with less direct evidence that he committed the murder.[162] The drug smuggler stereotype is not triggered when the defendant is Anglo, and thus, the jury is less likely to over-rely on the prior bad act evidence of drug smuggling admitted for a non-character purpose.[163]

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159. Moran, *supra* note 80, at 2329.

160. *Id.*

161. *See id.* at 2288, 2291 (discussing race and class and how the lack of diversity hampers the discussion of certain cases, such as one on the issue of "white flight" and another professor who simply "recast blacks as Jews" in every hypothetical). One student explained that "[w]henever there was a Black person, he [the professor] would make the person Jewish because he's Jewish." *Id.* at 2291.

162. *See* Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 401(b) Evidence*, 25 LAW & INEQ. 1, 24 (2007) ("However, the stereotypes that jurors already hold become pernicious when the charged offense corresponds to a stereotype associated with people of the defendant's racial group. These propensity inferences are more likely to occur when the crime charged in some way conforms to the racial stereotype of the defendant's racial group.").

163. *See generally id.* (addressing the impact of racial stereotypes on jurors' use of character evidence in criminal trials and explaining how evidence of a defendant's prior bad acts can have a more detrimental effect when the prior bad act is something associated with people of the

There are several other general practices that help foster and promote diversity in and through education. These practices are more passive approaches to diversity education, where the lesson is learned from the subtleties, not from the explicit message conveyed orally by the faculty member. These practices demonstrate how to promote discussion in a (somewhat) diverse environment. The list may appear to contain only minor things, which each make only a small difference, but can add up over the years to a change in the culture or climate of a law school.

1. Calling on students.

Be sure to hear from a diverse group of students in every class. Never call on all women, all men, all Anglo, or all of any other student category in a particular day or week. Do what you can to allow the different voices to be heard by welcoming them into the conversation. Recognize that some students need to reply thoughtfully.[164] The constant movements from a question, to an instant answer, to a brief discussion, and then moving on to repeat the cycle does not leave room to include these students' voices in the classroom conversation.[165] Some of these students may still be writing down the question and answer and miss the discussion completely, without any real opportunity to participate along the way.

2. Understand Silence.

"Silence can signify nothing, or it can communicate a great deal, all depending on context."[166] Give students a moment to gather their thoughts, or let them know that it is safe to do so.[167] An awkward pause may further distress the already nervous student, but a thoughtful and intentional period of silence, initiated by the Professor, conveys a very different message.[168]

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defendant's race).

164. *See infra* note 168 and accompanying text.

165. *See infra* note 168 and accompanying text.

166. Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 295 (2000).

167. *See infra* note 168 and accompanying text.

168. Montoya, *supra* note 166, at 297-98. Professor Margaret Montoya announces to her classes that:

> Despite the conventional wisdom that overvalues quickness, I announce that I will wait for those who do not think aloud and who need more time to collect their thoughts before speaking. My purpose is to give those who need more time the opportunity to pause and process their thoughts without having to fear that they will be interrupted by those who are quicker to speak (the 'crowders'). I want to help the students hear each others [sic]

Professor Montoya proposes that "silence is a pedagogical tool that can be used effectively to normalize the different communication styles that are present in a classroom with racial, ethnic, and gender diversity, and to de-emphasize the dominant language patterns of the White majority."[169] Blurting out an answer or raising one's hand repeatedly are behaviors more heavily associated with certain types of privilege, and any professor who relies solely upon volunteers, or worse yet, the first to volunteer, is not likely to maximize the benefits that flow from diversity in education.

3. Avoid Silencing.

Silencing occurs just as assuredly when the professor skips over certain topics, as when she fails to call on particular students, or repeatedly cuts their comments short. While there are pedagogical reasons for using silence and even silencing at some points in the classroom,[170] its use must be carefully mediated to preserve learning and to maintain a safe space that encourages greater learning about one another.

There is a misconception among some law faculty members that "political correctness" demands that we avoid addressing certain topics in class, even when the topics are related to, and arise from, the materials we are teaching, and thus professors with this belief will stifle discussions of such topics. This author wholeheartedly disagrees with this notion. Civility requires that we be sensitive to differences, and recognizing underlying assumptions and presumptions that may poison or at least curtail the most effective communication with those who do not share our views, perspective, ideas, backgrounds or experiences is an important component of that sensitivity. However, civility does not require us to avoid discussion of pedagogically important issues. Rather, civility counsels us to behave respectfully as we address areas of disagreement.[171]

Professors who skip over the controversial topics time after time give the students the not-so-subtle message that those topics are not worth

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silences and defeat the tendency to reach negative conclusions about pauses and hesitancy.

Id.

169. *Id.* at 272. Montoya also explains that "[i]ndigenous [p]eoples have been identified as one group having a greater tendency towards silence than the dominant Euro-Americans norm. This image has been formed both through the studies of linguists and ethnographers as well as through widespread stereotypes and caricatures (the 'silent Indian') propagated by the media." *Id.* at 280; *see generally id.* at 279-88.

170. Some common reasons for moving along are that the class time is running out or that too much time indeed has already been spent on a particular topic.

171. STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY 132-36 (1998). In his discussion of the concept of civility, Carter states that "civility assumes that we will disagree; it requires us not to mask our differences but to resolve them respectfully." *Id.* at 132.

addressing, that they are not worthy of discussion in a law classroom, or that they simply are not a firm basis for the construction of any good legal argument. Recognize that failing to address a point of view, or omitting any mention of a particular fact, can be another form of silencing. The omission or oversight tells students that this fact or point of view does not matter in the legal analysis or in their legal education. This often happens when professors avoid discussing uncomfortable cases or topics.[172] When the issues avoided always seem to involve gender, race, or socio-economic class, a subtle message and subtext is conveyed that these voices and forms of diversity lack value. Students who come from the unrecognized race, gender, or socio-economic class will feel less engaged and less able to participate in the conversation. As a result, these students will self-silence from the conversation, which further degrades the learning opportunity in that topic area and denies the benefit of diversity in that context.[173]

4. Acknowledging Privilege.

Recognizing and acknowledging power differences and the many ways in which we are privileged is a first step towards making learning useful in every way. However, it is not enough to merely examine cultural differences. Inquiry must include a focus on the "dynamics of power and oppression."[174] This focus includes an analysis of one's own power and relative privilege, as well as one's own biases, prejudices and expectations of different groups.[175] Faculty teaching these types of courses must address issues of power and oppression, because "programs that do not focus on the dynamics of power and oppression cannot facilitate genuine cultural

172. For instance, running out of time and avoiding teaching the crime of rape in a criminal law course may convey the message that rape—a crime that largely affects females—is less important than conspiracy, which is a crime that few criminal law professors would run out of class time to discuss. Holding a conversation about the difficulties of proving the crime of rape in a class of 80 or 90 students of both genders can be intimidating and difficult, and requires a substantial degree of sensitivity, gentle listening and sometimes prodding. Nevertheless, it is important to acknowledge that crime, as well as the difficulties with prosecuting it.

173. *See* Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data With the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS 221, 271 (2003) ("Marginalized groups may therefore self-silence or be discouraged when they do speak because, even if politely heard, they may be ignored.").

174. Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH U. J.L. & POL'Y 133, 176 (2004).

175. *See id.*

competence."[176] Recognizing power first requires recognizing privilege. Some of the transparent privileges that many take for granted are being Anglo, male, Christian, heterosexual, upper-middle class, or all of the above. Faculty must watch how the conversation takes these transparent privileges as a given. To the extent that faculty members do not make visible these privileges, they are being complicit in the power imbalance that decreases the comfort and increases the frustration of students of color, or students of modest financial means, or students who are not Christian, or any students who do not enjoy these transparent privileges.

Answer the questions below for your own institution, to examine just a few of the ways in which class privilege operates in your law school environment.

How much do the books cost?

How often do you update your casebook with a subsequent edition, which prevents students from relying upon less expensive used copies of the textbooks?

How many books are required or recommended for each of your courses?

Can students who cannot afford to buy all of the required books check out current editions to prepare for class?

Can they check out these reserve books to bring to class to be able to follow along?

If so, how many copies are available for this purpose?

Faculty often take for granted the increasing costs of a law school education, without acknowledging the smaller ways to reduce some of those costs and make things easier on students of the most modest financial means. Financial privileges are just one of the many privileges that law schools need to consciously address.

B. Strategy Number Two: Mediating the Tug of War in the Quest for Equilibrium—Increasing Comfort and Decreasing Frustration, and Decreasing Comfort and Increasing Frustration

Many courses that explore diversity issues, or even particular class sessions of other courses that merely occasionally touch on diversity issues, often lead to a Tug of War mentality—where students and even sometimes the faculty member struggle over who has the floor and for how long. Who do we coddle, or feel sorry for, or try to make feel better, if anyone? Which views do we praise and consider, and which do we ignore, reject, or simply marginalize?

176. *Id.* at 176.

Learning about other groups involves acknowledging both the good and the bad of their histories. The inquiry into the "bad," however, makes most students uncomfortable, regardless of their race or ethnicity. Wealthy students may feel attacked if we focus on the dearth of opportunities for a low income person of color as a justification for differential treatment in a theft case, for instance. Because the discussion of Anglo oppression of other groups is so seldom addressed in the standard law school courses, this conversation is a jarring one for all students. It becomes a struggle for the professor to mediate the space to provide some challenges and to discuss the hard questions, but also to engage all of the students in the conversation, so no one feels too demoralized to speak.

For instance, when discussing the primary property interest of the Founding Fathers, some Anglos feel attacked, or even resentful that the sins of their forefathers are focused on, while many minority students come to relish such discussions because they shift the focus away from the current problems highlighted in minority communities. Now some students will feel that it is fine if the Anglos feel demoralized sometimes because students of color often feel that same way in law school classes such as Constitutional Law, when the notion of separate but equal is debated, or Criminal Law, where many defendants are identified as black or of Hispanic descent. The proverbial "two wrongs do not make a right" is a useful guiding principle in this area, so we need to strive to provide ways to make a safe space that still addresses the hard questions. For this reason, the conversation of race should include a conversation about Anglos, about whiteness, and what that means. We spend a week on this topic in my Race and the Law seminar as well, and the conversation often is a difficult one, in part because as Stephanie Wildman suggests, "[w]e have not given white people the vocabulary to talk about whiteness. We need to begin to develop this political discourse."[177] Addressing this concern is important to decrease the frustration and increase the comfort of Anglo students in a class such as Race and the Law.

While that tension on the tug of war rope is important to help everyone work to her full potential, and to have views rigorously presented, the point of this intellectual tug or war, unlike the children's game, is not to win, but rather to maintain equilibrium. How do we keep the rope generally in the middle, so that no one side gets dragged through the mud?[178]

177. Wildman, *supra* note 41, at 93-94.

178. We must recognize of course that each side might get close to getting dirty at times, and the point person may get a little grimy. Still, the anchor person holds firm, and keeps her team from

Increasing comfort must be addressed on a sliding scale. In some conversations, the professor may want the students of color to feel especially safe to speak their minds and let their voices be heard. At those times, the professor may tolerate a higher level of discomfort in Anglo students, in an effort to make sure the diverse voices are heard. In other conversations, the professor may need to quiet down the students of color, at the risk of increasing their discomfort somewhat, to allow the "solo" from an otherwise privileged student to be heard and really listened to. By moderating the safe space, everyone feels safe to speak sometimes.

One question that inevitably arises from this type of orchestration is how to prevent student emotions or classroom "explosions" when difficult or sensitive topics are addressed. Part of the answer to this question is that emotions should not be stifled; only excessive or inappropriate manifestations of such emotions should be stifled. Race-consciousness-raising is difficult and emotionally taxing, and some students will rise to the challenge more readily than others. What should a professor do about students walking out of class because they are upset by the discussion of the class material? Not much. Sometimes we have all felt the need to walk away, to disengage from a particularly painful conversation. Running after the student, or sending someone after him or her only forces him or her to confront you, or another student, in addition to the painful emotions that student is having trouble experiencing. Instead, give them the time and space to come back on their own, and if not later during the class session, then perhaps in your office, or in the next class.

C. Strategy Number Three: Conducting a Symphony

1. Pulling Diverse Voices into the Classroom Conversation

A symphony contains many different instruments, which have different uses, strengths, weaknesses, and sizes. What they have in common is that all make music, and their musical scales interrelate to form a glorious sound when properly managed and conducted. Learning to conduct a symphony is a critical skill for faculty teaching about race, ethnicity, gender, economic, cultural, and/or religious diversity.

Making students better listeners makes them better musicians who produce a more beautiful sound. Similarly, when diverse students feel that their voices are heard more often, not simply overlooked and relegated to the third part of the harmony instead of the melody, those students are more engaged and can add their own nuances to the musical sound, which can have the effect of producing a better song. Outside the classroom, students

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getting pulled too far into the quagmire.

who have learned to really listen to diverse viewpoints, backgrounds and perspectives will be better able to hear what their clients and others really are saying, and to understand the subtext more quickly than students who only know people like themselves.[179]

These different voices also encourage a multi-faceted approach to problem solving; with no one right answer, but a series of ways to accomplish the goals, students develop a "shared obligation" for seeking justice, as Dark points out.[180] A critical mass is crucial to show that different perspectives come from people of similar races and ethnicities, because the lack of a critical mass is detrimental to the students of color who end up being seen as, or feel like they are, the spokesperson for the race. The generalizations in those situations can be stigmatizing and create a more stressful environment that discourages those students from participating.

2. Coaxing the Occasional Solo

How do you get the diverse voices to speak, even when there are only a few of them? When a view is present in the room but not represented in the conversation, the professor needs to coax the solo. Solos take practice individually, and with the conductor or coach, and this same need for practice can apply in law school classrooms as well. One teaching tool that provides this practice of sorts is reaction or reflection memos.[181] The memos provide a chance for students to vent, or to express areas of concern, unanswered questions, or challenges and critiques of the assigned materials. Other professors have commented on the importance of reflection memos as a means of making a safe place for conversations about difficult issues.[182] The professor's comments can be very effective in coaxing a solo. If that student is called on during the class session, the student is more likely to share her views that have already been vetted by the professor in writing.

179. Dark, *supra* note 35, at 554.

180. Dark, *supra* note 35, at 554-57.

181. For example, each week, students in my Race and the Law seminar must provide 2-3 pages on their reactions to some of the readings for that week on the first class meeting of that week. Then, I review those memos, and give short comments, suggestions and other questions to consider, and hand those back to the students at the beginning of the next class period, while recognizing that they will read my comments while they are sitting there. But the small bit of inattention more than pays off when they participate later in the class session. Sometimes my comment explains, "this is a perspective that I don't think the class has considered. Perhaps you wish to raise it today." Very often, students take me up on my suggestion, and will raise that point during the class session. At other times, I will tell that student that "I know you felt strongly about this topic," and ask the student if she would like to share her views with the class.

182. Wildman, *supra* note 41, at 95.

An even more subtle use of reaction memos is that it helps the professor to be more receptive to a tentatively raised hand, or to a quizzical look that suggests that the student would like to say something. While it is difficult to coordinate at first, as the trust builds, and the solos are spread out amongst the students, this mechanism becomes even more effective for getting diverse views into the classroom.

3. Quieting, without Silencing, the Prima Dona

We have all experienced class sessions (or entire semesters) where one or two students attempt to dominate the conversation. There is the view that those students who wish to participate should do so and if other students wish to participate, then they can raise their hands and join the conversation. However, diversity in education requires recognition of the importance of different learning and speaking styles. Unfortunately, too many students have learned to speak whenever they can, regardless of the merit, usefulness or even uniqueness of their view.[183] For other students, there must be silence before they even attempt to speak, in an effort to be polite, and to avoid interrupting another person. In some classes, just as in some conversations, there is no silence, and thus no chance for the polite student to participate. That student only gets her chance when the rest of the class is stumped. And if that person is also shy, the stumped silence of her usually vocal peers will be unlikely to encourage a contribution at that stage. Thus, providing a safe place for silence, and having pauses within the classroom conversation are an important strategy for fostering participation by a more diverse group of students.

In a seminar course, one can use reaction memos to quiet the prima dona. The professor comments may provide additional information or questions to consider, which the students will ponder before bringing up the point in class on their own. In addition, when a view is very well represented among the reaction memos, the professor can note this as well, with a comment like the following: "From our discussions thus far, this seems to be the dominant view in the class. What potential criticisms do you see of this view, and how would you respond to those criticisms?" In that way, the student can be more thoughtful in presenting his or her view and can anticipate potential challenges, which furthers the learning for all. Also, it avoids monopolizing the conversation with a point of view that a majority of the class agrees with. Instead, students are challenged to critique

183. From my own law school experience, I understand and empathize with those students who do not wish to burden the rest of the class with their own comments, unless they have something particularly insightful, useful or different to say.

and test that view, and use the class time for places where they differ, and where the greatest learning can occur.

IV. CONCLUSION AND CALL TO ACTION: MAXIMIZING THE BENEFITS NOW (WHILE WE STILL CAN)

A. The Curriculum Conversation: Mediating between Open Enrollment v. Self-Selection

There are some curricular constraints that may frustrate the efforts of faculty members to employ the strategies described above. One significant concern is the appropriate use of faculty resources, which include faculty time for course preparation, as well as the student-faculty ratio at the school, or in a particular field. It is important, therefore, for faculty to consider which selection mechanism works best to satisfy the institutional goals for diversity education. For instance, if the goal is to better society in the long run by graduating lawyers who are culturally competent, and understand and appreciate races and ethnicities different from their own, then diversity education should be a part of many courses in the curriculum. Hartley and Petrucci suggest an infusion approach, incorporating diversity throughout the curriculum, instead of merely in particular courses, because that provides "a greater opportunity to develop cultural competencies."[184] On the other hand, if providing concrete skills to new lawyers is the institutional goal, then more individualized attention, through small group seminars focused on particular aspects of diversity, with students who self select the course, would better meet the institution's objectives.

There are substantial justifications for the pervasive method, as well as for the focused small-course method. For instance, studies have shown that perceptions regarding how different one perceives minority group members to be from oneself affects Anglo support for policies, practices, laws and approaches that benefit, or appear to benefit, minorities.[185] The Anglo perception of these differences between themselves and members of

184. Hartley & Petrucci, *supra* note 174, at 175.

185. *Id.* at 164-65 (citing the study of Link and Oldendick and the conclusion that "decreasing social construction differentials between whites and other racial groups is needed because these differentials, particularly how whites perceive racial groups in relation to their own race, have a strong impact on determining whites' attitudes towards particular issues associated with minority groups").

minority groups is lessened when they are schooled together, and lessened even more when they not only learn together, but learn about one another.[186]

In particular courses, such as seminars, self selection plays a huge role in student receptiveness to open up to discussions of difficult issues. But self selection can lead to a less rigorous intellectual pursuit of issues, particularly if everyone in the class has the same social, political or economic theories or perspectives.

In specific courses, such as an obvious diversity education course like a Race and the Law seminar, seeking diversity in the form of Anglo students can better serve society by breaking down some of the myths, stereotypes and generalizations that exist about people of color. To the extent that those particular Anglo students go out into the world with a changed perspective, they are helping to slowly change societal perceptions, presumptions and prejudices.

Another consideration is which selection mechanism better serves the individual students involved in the course. The answer to this question will be different for different students, so there necessarily will be some judgment calls and ranking of priorities in selection criteria when this question is considered. For instance, students who participate also will benefit from the added presence of Anglo students in a course focused on race. Taking time to teach someone else about yourself can be useful for her, because she learns, and for you, because you make a new ally or friend. On the other hand, diverse students may find that they spend all their time explaining things or "educating" the Anglos in the class, and therefore it may not be the best course for the diverse students, in terms of learning about others, as opposed to teaching about oneself, if the education and listening aspects are not properly balanced. Thus, faculty must develop a "cultural competency curriculum that is not designed exclusively for white students, and does not place unfair burdens on students of color to educate white students about racial issues."[187]

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186. *See id.* at 175-76 ("Changes in social constructions of race require, at a minimum, exposure to experiences with different racial groups. However, infusing content into the curriculum that supports and encourages students to explore and challenge their racial perceptions and reach more mature levels of understanding about perceptions of their own race and of other races would be best. There are, no doubt, some barriers to how much of this content can be taught in law school. A significant barrier is that many law schools have an already overburdened curriculum thus faculty may resist infusing such content into the curriculum, because they are preoccupied with concerns about coverage.").

187. *Id.* at 174.

B. Small Steps: Increasing Diversity in a Particular Elective Course by Targeting Students for Enrollment

One strategy that law professors teaching electives sometimes employ is to recruit students for their seminars. We try to recruit students we really like, students who are rigorous in their studies, students who seem smarter than our average students, and students who might have some special experience or background to make a useful contribution to the subject matter. This recruitment can be targeted to diversify small classes in law schools, to provide additional opportunities for small group interaction and discussion to broaden exposure and foster understanding and empathy with people of different races, ethnicities, and backgrounds, even when the subject matter of the course is not specifically directed at race. This is a strategy that all faculty members who teach seminars and other small courses can employ to try to make better use of the existing diversity in their law school.

C. Expand Race or Other Diversity Seminar Offerings, or Increase the Course Size

For those who teach in the field of race and the law, or critical race theory, there is the option to expand the number of such courses offered, or the number of places for students in the existing courses, to expose a larger group of students to the important discussions, ideas, and legal authorities addressed in those courses. Simply increasing the class size will expose more students to the materials, but will offer fewer opportunities to interact. The quantitative difference caused by the larger numbers likely would lead to a qualitative difference as well.[188]

D. Open the Dialogue in Classes that are not Specifically Focused on Diversity Topics

There is room in the conversation for those who do not teach on diversity topics, and who do not have or take the opportunity to engage in

188. When I was a student at Stanford Law School, there was a Racism and American Law seminar that had a limited enrollment by instructor approval based on a brief written application. Students denied admission protested the discretionary admission policy, and then Dean Paul Brest created a civil rights course with open enrollment, so that all students who were not admitted to the seminar would have the opportunity to engage similar material, ideas and authorities. As was to be expected, the discussion in a class of fifty or sixty students was different from the discussion in a class of twenty.

discretionary student enrollment for diversity purposes. Schools committed to diversity in education may wish to pursue an infusion approach throughout the curriculum as an effective alternative. The infusion approach interweaves discussions of race, discrimination, power and oppression in every course, and thus may be the most effective manner of maximizing the benefits that flow from a diverse educational environment. As one scholar states, "[i]nfusing and reinforcing cultural competency content throughout the curriculum is needed, because an 'infusion approach' offers a greater opportunity to develop cultural competencies."[189]

If an infusion approach is more than a particular institution is willing to commit to, then the following strategies will provide some opportunity to increase the benefits that flow from the institution's existing diversity:

Acknowledge the professor's own background and biases.[190]

Acknowledge the predispositions and biases of students as well.

Listen to the students, using active listening techniques, as well as giving them a voice that can be heard.

Welcome conflict and dissonance and show students how to resolve it.[191]

Watch personalization and de-objectify, when possible, harsh statements.

Mediate the tug of war that different students may engage in.

Make effective use of silence to encourage more participation by other voices.[192]

V. CLOSING

There is one additional justification for retaining a diverse group of law students that is worth addressing at the conclusion of this article. For many students, college or perhaps graduate school is their first opportunity to learn in a diverse environment, given the high degree of residential and educational "so-called de facto" segregation that still exists in many places throughout the United States.[193] Most children go to school with those in

189. Hartley & Petrucci, *supra* note 174, at 175 ("An infusion approach is also more effective in helping students overcome their resistance to examining cultural competency content on racism, discrimination, and oppression.").

190. *See id.* at 178 ("[A] critical aspect of cultural competency education and training must include a self-exploration of one's own racism, which will challenge the fear on which racism thrives and facilitate interpersonal learning that builds connections between diverse groups.").

191. *Id.* at 174 ("[W]hat is needed, is a support/challenge model of teaching in which the 'support' lowers students' resistance to examining difficult topics, and 'challenge' is used to confront racist, sexist or ethnocentric comments.").

192. *See supra* notes 166-69 and accompanying text.

193. Moran, *supra* note 80, at 2265 (citing Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, http://www.law.harvard.edu/groups/

their neighborhood, they play sports with those in their neighborhood, and they worship with their local community of faith.

Whatever biases young people have acquired thus far in their lives, through their parents, friends, schools, teachers, classmates, neighborhoods, and of course, the media, are already imprinted upon them when they begin their higher education. When they get to college or graduate school, they finally have the opportunity to really interact with different people from different places, cultures, races, religions, and socio-economic backgrounds. In higher education, they will learn the lessons that will shape their behavior for the rest of their lives.[194] Without exposure to a diverse group, diverse perspectives and diverse ideas, those imprints will remain, and become ever more embedded in these students. This is "the last stop for gas for a thousand miles,"[195] and if we don't take the time to amend these imprints, "to smoke out" these implicit biases, and to provide students with the opportunity and ability to challenge and change their views, then law professors have lost one of our best options for reducing biases, minimizing the effect of stereotypes, and striving for the true equality to which all people are entitled.

Law faculty must act now, and must act decisively to *maximize* the *benefits that flow from diversity* now. Take full advantage of the opportunity that *Grutter* presented and make tireless efforts to retain diverse student bodies once they are admitted through the diversity maximizing strategies and approaches outlined in this article. Then researchers can measure the true benefits that flow from a diverse student body, to acknowledge and celebrate them, in the hopes of convincing the majority of the Supreme Court and society that the interest in diversity remains a compelling one.

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civilrights/publications/lawsurvey.html (last visited Sept. 17, 1999)). In fact, a study conducted by Gary Orfield and Dean Whitla "found that approximately 40% of students at Harvard's and Michigan's law schools had little or no contact with members of different racial or ethnic groups while growing up or in high school." *Id.*

194. *Id.* at 2265-2266 ("Higher education significantly broadened the students' exposure to people from different backgrounds: only 20% reported such limited interracial contact in college.").

195. This phrase is borrowed from a former colleague, Assistant Professor Marci Smith, Esq.