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MICROAGGRESSIONS: WHAT THEY ARE AND WHY THEY MATTER

CATHARINE WELLS¹

I. INTRODUCTION

Dr. Chester Pierce, the first African-American psychiatrist to join the faculty of the Harvard Medical School, invented the term “microaggression” during the 1960’s.² In trying to capture the distorted relationship between the races, he explained the concept of microaggression this way:

Most offensive reactions are not gross and crippling. They are subtle and stunning. The enormity of the complications they cause can be appreciated only when one considers that the subtle blows are delivered incessantly. Even though any single offense can . . . be relatively innocuous, the cumulative effect to the victim and to the victimizer is of an unimaginable magnitude. Hence the therapist is obliged to pose the idea that offensive mechanisms are usually a microaggression, as opposed to a gross, dramatic, obvious macro-aggression such as lynching.

He then went on to underscore the importance of addressing this form of subtle offenses:

The study of microaggression by whites and blacks is the essential ingredient to the understanding of in what manner in the process of interactions must be changed before any program of action can succeed.³

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2. CHESTER PIERCE, OFFENSIVE MECHANISMS (1970), *reprinted in* THE BLACK SEVENTIES 265, 265–266 (Floyd Barbour ed., 1970).

3. *Id.* at 266.

Fifty years later, writers on race have rediscovered the term and made it a part of their vocabulary. It seems like a simple term – easily grasped and assimilated. Examples include such common statements as:

- I don't think of you as Black
- You don't look Jewish
- Where are you from? No, where are you *really* from?

Such comments may seem well-intentioned but, each of them is based on a stereotype that carries a negative message. “I don't think of you as Black” suggests that there might be something wrong with being Black. Similarly, “you don't look Jewish” suggests that looking Jewish is not looking good. Further, both of these comments suggest a degree of “passing” that the target might find uncomfortable. The final comment – “where are you *really* from” – suggests that the foreign-looking recipient cannot possibly be a fellow American. Individually, as Dr. Pierce suggests, none of these comments are devastating. However, it is not hard to see that constant repetition of these comments would become more than annoying.

There is an internet video that captures this point by likening microaggressions to mosquito bites.⁴ The video begins by stating that mosquito bites are annoying. It then suggests that mosquitoes bite some people more than others, illustrating the point by showing a series of such bites accompanied by common microaggressions. Then it proceeds:

- *Getting bit by mosquitoes every god damn day, multiple times a day is fucking annoying and makes you want to go ballistic on those mosquitoes* (showing an African American woman with a machine gun and a white person nearby saying, “another angry black woman”)
- *Which seems like a huge overreaction to those who only get bit once in a while.*
- *Of course, beyond just being truly annoying, some mosquitoes carry threatening diseases* (a picture of a white college counselor suggesting that an African American choose a less challenging major)
- *And other mosquitoes carry strains that can even kill you.* (A picture of a mosquito armed with an assault rifle saying “He looked like he was up to trouble. I felt threatened.”)

In less than two minutes, this video covers all the salient points, explaining why repeated microaggressions are oppressive; and why, in some circumstances, they threaten serious harm. But not everyone is convinced. The following two comments are typical of the negative commentary on Facebook:

4. Fusion Comedy, *How Microaggressions are like Mosquito Bites • Same Difference*, YOUTUBE (Oct. 5, 2016), <https://www.youtube.com/watch?v=hDd3bzA7450>.

- Liberals love labels. Lol. I mean micro aggression? Seriously? That's stupid. What are you, a 5 year old child? Go cry in your safe spot. Grow up. The worlds a cold place. Stop with your stupid labels. Liberalism is a disease.
- If you're affected by microaggressions, then your level of strength and maturity is microscopic. Real adults worry about real aggressions.

At first glance, this last statement seems to make a forceful point. Hate crimes against minorities are on the rise. Recently, for example, a lawless group assaulted the African American husband of a mixed-race couple, made death threats and burned a 6-foot wooden cross in their front yard.⁵ This was all done to chase the couple out of their neighborhood.⁶ Compared to this, it is not surprising that some see microaggressions as relatively harmless. But if we are tempted to dismiss them, we need only remember that human beings can be harmed in many ways and that a deadly poison can be concealed in a seemingly innocuous piece of cake.

In this paper, I will talk specifically about the way in which microaggressions affect our students. Law schools are competitive places, and we need to understand microaggressions in this context. In the first section, I will examine some of the harms that microaggressions cause. In the second, I will discuss two forms of microaggression that are present in the law school environment. In each case, I will offer some brief comments about what law schools and law teachers could do to provide a more favorable environment in which all students – and especially students of color – can flourish.

II. THE HARMS CAUSED BY MICROAGGRESSIONS

In any form of social interaction, the responses of individuals will vary. Microaggressions are no exception. Depending on the day, on the context, or even on a person's mood, the effect of a microaggression may be severe, merely annoying, or nothing much. Nevertheless, each microaggressive comment has the potential to do real damage. To see why this is so, we begin with the idea that we live in a racially divided world. It is not only that advantages like wealth, education, healthcare, etc., are unequally distributed. It is also that so many people – consciously or unconsciously – associate darker color skins with many ostensibly negative characteristics. Social scientists have demonstrated time and again that these stereotypes are very powerful. They distort our perception of reality and lead to mistaken

5. Sara Nealeigh, Florida Man Pleads Guilty to Burning Cross in Interracial Couple's Yard, *MIAMI HERALD*, Mar.12, 2017, <http://www.miamiherald.com/news/local/crime/article138044718.html#storylink=cpy>.

6. *Id.*

judgments of people based upon their membership in a disfavored group. For example, in an early study, subjects were shown a picture of a white man in working clothes threatening a black man, dressed in a suit, with an open straight razor. The subjects were asked to describe the picture to a third party; the third party to a fourth party; and so forth. After a few rounds, many participants believed that the razor was in the hands of the black man.⁷ This example illustrates the danger that stereotypes pose to African-American men. As observers, we are fairly loose in our perceptions, careless in our descriptions, and, most fatally, too willing to act on the basis of stereotypes. Some stereotypes may be true if somewhat overgeneralized. Most are clearly false. But they are nearly always self-fulfilling as observers fall victim to distorted perceptions.

Why, we might ask, are stereotypes so powerful? Obviously, they are not simply random errors that somehow fall into common use. Instead, they are connected to the reality of intergroup relations. In this country, for more than half its history, the vast majority of African people who came to this country were enslaved. White people claimed to “own” these Africans and, under our laws, the “owners” were entitled to abuse them and work them without compensation. It would have been difficult under these circumstances for those who favored slavery to believe that there was no difference between the races. Such a belief would have made the injustice of chattel slavery evident and would have touched off feelings of shame in those who defended it. Thus, a narrative was born – one that justified slavery in terms of the inferiority of the African races. Slaves needed the white man’s protection, white Americans said, because they were, as a race, mentally deficient and morally compromised.⁸ Indeed, some even suggested that African slaves lacked normal human feelings.⁹ Even after the abolition of slavery, the narrative remained. Well into the Twentieth Century, there were few defenders of the idea that the races were equal in feeling, ability, and moral stature. And unfortunately, the narrative lives on in many areas of the country and in unconscious spaces of most white minds.

Stereotypes are reinforced by the fact that they connect to this narrative. This explains why negative stereotypes are so powerful. Whether we consciously embrace them or not, they “ring true” because they resonate with the ancient story of racial superiority. Furthermore, once a stereotype lurks in our unconscious, we are likely to see every confirming

7. Gordon W. Allport & Leo J. Postman, *The Basic Psychology of Rumor*, TRANSACTIONS OF THE N.Y. ACAD. OF SCI. 61, 61–81 (1945); GORDON W. ALLPORT & LEO J. POSTMAN, *THE PSYCHOLOGY OF RUMOR* (New York: Henry Holt & Co. 1947) (overstating the results in their studies regarding racial stereotypes); see Molly Treadway and Michael McCloskey, *Unseen: Distortions of the Allport and Postman Rumor Study in the Eyewitness Testimony Literature*, 11 LAW AND HUM. BEHAV. 19, 20 (1987) (stating that “in over half of the experiments using this picture at some stage in the series of reports, the black man, rather than the white man, was said to hold the razor in his hand”).

8. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

9. See, e.g., *State v. Jarrott*, 23 N.C. 76, 67 (N.C. 1840) (“some acts which between white persons are grievous provocations, when proceeding from a white person to a slave—whose passions are, or ought to be tamed down to his lowly condition — will not and cannot be so regarded”).

instance and none of the exceptions. This is because perception is often guided by our unconscious expectations. Worse, as the experiment described above shows, we will even interpret an exception (a white man holding the knife) as a confirming instance of the stereotype.

Stereotypes also gain power from the fact that they are self-fulfilling. For example, if police believe that crime is heavier in black areas, they will police those areas more intensively. As a result, crime statistics for those areas will rise. Or, to take another example, if taxi drivers will not pick up black men for fear of being robbed, black men will learn this and make other arrangements for transportation. This means that the number of harmless, black taxi riders will go down and the percentage of thieves in the pool will go up.¹⁰ For all these reasons, stereotypes persist even if there is no real evidence to support them.

On a conscious level, most of us would entirely disavow the ideology of white supremacy. Many of us have worked hard to rid ourselves of “old” ideas. But they stubbornly persist and express themselves in moments when we are thinking and speaking inattentively. This creates a situation of cognitive conflict and social embarrassment. It would help, of course, if we could all just admit that this is the case and sincerely apologize for the harm we have caused. But often this is not what we do. When we find ourselves relying on a stereotype or making a microaggressive comment, we struggle to say what we “really meant.” Sometimes white people simply argue that the stereotype is true. Sometimes we try to say that the comment in question was not really based on race. But the truth is that, in a moment of inattention, our tongues connect to the putrid story of racial superiority that is buried deep in our brains and, we say or do something offensive.

This explanation of stereotypes makes it clear why microaggressions can be so painful to those are targeted. By referring to a negative stereotype, a microaggression implicitly places the recipient into a stigmatized group and attributes certain negative characteristics to her. For example, a well-meaning professor may think that a white middle-class student does not understand the social context of a given case. Without thinking, she calls on a nearby student of color by saying: “Do you think that x (the white middle-class student) has the full picture?” If the case is about drugs, single parenthood, or poverty, this may cause discomfort to the student of color. True, if the same question had been asked of a white student, everyone would have taken it at face value. However, when the question is directed at a student of color, (s)he feels singled out as a person who would know about these matters – all of which are part of a racial stereotype. Even though most students of color who end up at elite law schools have not been raised in poverty, they are keenly aware that some of their white counterparts assume that this must be true. And, whether the student of color comes from a poor background or not, (s)he will find it embarrassing to be taken as the poster child for social dysfunction.

10. See GLENN LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 30–31 (2003) (discussing this example at length).

Labeling a student as poor in front of a large group of mostly privileged students is stigmatizing. Stigmas and stereotypes are not individual acts of hostility; they inevitably relate to social groups. Take, for example, the use of the word “faggot” as a disparaging and offensive epithet for a male homosexual. It is an ugly word: it has a guttural sound and rhymes with maggot. Its origins bespeak its extreme negativity as well as its relationship to sexism and homophobia:

Faggot, origin —late 13c., “bundle of twigs bound up,” from Old French fagot “bundle of sticks” (13c.)

Especially used for burning heretics (emblematic of this from the 1550s), so that phrase fire and faggot was used to indicate “punishment of a heretic.” Heretics who recanted were required to wear an embroidered figure of a faggot on their sleeve, as an emblem and reminder of what they deserved.

“male homosexual,” 1914, American English slang (shortened form fag is from 1921), probably from earlier contemptuous term for “woman” (1590s), especially an old and unpleasant one.

The oft’ reprinted assertion that male homosexuals were called faggots because they were burned at the stake as punishment is an etymological urban legend. Burning was sometimes a punishment meted out to homosexuals in Christian Europe (on the suggestion of the Biblical fate of Sodom and Gomorrah), but in England, where parliament had made homosexuality a capital offense in 1533, hanging was the method prescribed. Any use of faggot in connection with public executions had long become an English historical obscurity by the time the word began to be used for “male homosexual” in 20th century American slang, whereas the contemptuous slang word for “woman” was in active use.¹¹

The word “faggot” is frequently used in anti-homosexual hate speech, and it can cause real suffering for gay men. It is also a good example of the operation of stigma. To see why this is so, we should listen to one man’s description of the effect this word had on him. His name is Rory O’Neill and he is the man behind Panti Bliss, a popular Irish drag queen. He was recently the center of controversy when he labeled two newspaper columnists and a Catholic Think Tank, “homophobic.” They threatened to sue for libel and the television

11. *Faggot*, DICTIONARY.COM, COLLINS ENGLISH DICTIONARY - COMPLETE & UNABRIDGED 10TH ED., <http://www.dictionary.com/browse/faggot> (last visited July 26, 2017).

station that had aired his words quickly settled despite his objection.¹² His response came in the form of a speech that has been widely shared on the internet.¹³ Let me quote from it:

Have any of you ever been standing at a pedestrian crossing when a car drives by and in it are a bunch of lads, and they lean out the window as they go by and shout “Fag!” and throw a milk carton at you?

Now it doesn’t really hurt. After all, it’s just a wet carton and anyway they’re right – I am a fag. So, it doesn’t hurt, but it feels oppressive.

When it really does hurt, is afterwards, because it is afterwards that I wonder and worry and obsess over what was it about me, what was it they saw in me? What was it that gave me away? And I hate myself for wondering that. It feels oppressive and the next time I’m standing at a pedestrian crossing I hate myself for it but I check myself to see what is it about me that “gives the gay away” and I check myself to make sure I’m not doing it this time.

Have any of you ever come home in the evening and turned on the television and there is a panel of people – nice people, respectable people, smart people, the kind of people who probably make good neighborly neighbors, the kind of people who write for newspapers, and they are all sitting around having a reasoned debate about you. About what kind of a person you are, about whether you are capable of being a good parent, about whether you want to destroy marriage, about whether you are safe around children, about whether God herself thinks you are an abomination, about whether in fact you may be “intrinsically disordered”. And even the nice TV presenter lady who you feel is almost a friend and she thinks it’s perfectly ok that they are all having this reasonable debate about you and what rights you deserve or don’t deserve.

And that feels oppressive.

Have you ever been on a crowded train with your gay friend and inside a tiny part of you cringes because he is being *so* gay and you find yourself trying to compensate by butching up or trying to steer the conversation onto “straighter” territory? This is you who have spent 35 years of your life trying to be the best gay possible and yet there is this small part of you that is embarrassed by his gayness.

And I hate myself for that. And that feels oppressive. And when I’m standing at the pedestrian bloody lights I am checking myself.

12. Liam Stack, *Panti Bliss, The Accidental Activist of Ireland*, N.Y. TIMES, Aug. 19, 2015, <https://www.nytimes.com/2015/08/20/fashion/panti-bliss-the-accidental-activist-of-ireland.html>.

13. Rory O’Neil, *Panti’s Noble Call at the Abbey Theatre*, YOUTUBE (Feb. 2, 2014), <http://www.youtube.com/watch?v=WXayhUzWnI0>.

Have you ever gone into your favorite neighborhood café with the paper that you buy every day, and you open it up and inside is a 500-word opinion written by a nice middle-class woman, the kind of woman who probably gives to charity, the kind of woman that you would be totally happy to leave your children with. And she is arguing so reasonably about whether you should be treated less than everybody else, arguing that you should be given fewer rights than everybody else. And when you see that and the woman at the next table gets up and excuses herself to squeeze by you with a smile and you smile back. But inside you wonder to yourself, “Does she think that about me too?”

And that feels oppressive. And you go outside and you stand at the pedestrian crossing and you check yourself and I hate myself for that.¹⁴

This passage clearly describes the complexity of stigma. What Mr. O’Neill has done in this brief excerpt is to connect the practice of yelling hostile epithets with a particular kind of harm. Note that the harm he describes is not trivial. He is not talking about social discomfort or even hurt feelings. What he is talking about is a reverberant kind of self-hate. First, he hates himself not for being gay but for appearing to be the “disgusting thing” that the word “faggot” purports to describe. Then he hates himself for hating himself. Then hates himself for trying to pretend that he is not one of those “disgusting things.” Soon he is awash with the kind of negative energy that makes it difficult to find one’s way in the world. This type of harm is not uncommon. It is, in fact the classic reaction to being stigmatized.

Erving Goffman, the well-known sociologist wrote a book on stigma.¹⁵ This is not a book about racial stigma or homophobia—he is writing about the problem of stigma generally, but he makes a number of points that are important to think about in this context. First, he shows us how debilitating stigma can be. He begins the book by reproducing a letter that was written to an advice columnist. It is heart wrenching. “Dear Miss Lonelyhearts,” the letter begins.

I am sixteen years old now and I don’t know what to do and would appreciate it if you could tell me.

I would like to have boyfriends like the other girls and go out on Saturday nites, but no boy will take me because I was born without a nose— although I am a good dancer and have a nice shape and my father buys me pretty clothes. I sit and look at myself all day and cry. I have a big hole in the middle of my face that scares people even myself so I can’t blame the boys for not wanting to take me out.

14. *Id.*

15. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (Prentice Hall, Inc. 1963).

My mother loves me, but she cries terribly when she looks at me. What did I do to deserve such a terrible bad fate? . . . I asked Papa and he says he doesn't know, but that maybe I did something in the other world before I was born or that maybe I was being punished.

Ought I commit suicide?

Sincerely yours,
Desperate¹⁶

Like Panti Bliss, "Desperate" is stuck in a place of reverberating self-hate, and it is worth taking a moment to focus on its extreme consequences. It is not just that stigma undermines self-respect, though that is part of it. It is also that stigma leads her to experience herself as something noxious – noxious like a piece of rotten meat or a stinky stale cigarette. As a result, she comes to believe that she is so defective that self-elimination is the only decent or heroic thing she can do. Goffman refers to this harm as a question of spoiled identity. Stigma is a characteristic that you recognize as being deeply you; but, at the same time, makes you feel that your very existence is entirely unacceptable. While you may try to rationalize it and say it is not so bad, you cannot easily disconnect it from the tide of shame that floods your heart. Note how serious the result of stigma can be. Desperate's question is clearly sincere – Should she kill herself? So, too, Mr. O'Neill's fear is real. He is too well adjusted in his gayness to want to kill himself but he recognizes that the world is filled with others who would do him harm. Thus, he continues:

Have you ever turned on the computer and seen videos of people just like you in faraway countries, and countries not far away at all, being beaten and imprisoned and tortured and murdered because they are just like you?

And that feels oppressive.

Goffman's second point is that people rarely develop this state of mind all by themselves. It needs an atmosphere of family or social abuse to flourish. Stigma inevitably implicates group action. It commonly arises in the feelings that one group has about another. Social groups have a life of their own. This means that every group constructs norms of behavior that serve to define the group and to direct its activity. For example, among certain groups of heterosexual men, there is often a tacit agreement about how they should treat homosexuals. It is in this context that stigma occurs. We know a stigma is present when:

16. Nathanael West, *Preface to id.* at 14-15.

1. There is a prevailing narrative among the dominant group that imputes a series of negative characteristics to members of a subgroup.

In our society, gay men are an obvious example of a stigmatized group.

2. According to this narrative, membership in the subgroup can be ascertained by the presence of certain stereotypical characteristics.

For example, the relevant narrative with respect to gay men designates a series of characteristics that define gayness. Certain manners of speech (a soft voice, a lisp), certain manners of dress (careful attention to detail, color coordination) and certain kinds of physical gestures (limp wrists, exaggerated hand movements) are all part of what might identify any individual man as gay.

3. The narrative depicts the subgroup as not being “normal,” and therefore less entitled to the privileges and immunities of the larger group. This results in disrespectful and damaging conduct that causes varying degrees of trauma and physical violence

For example, the stigmatizing behavior described by Panti Bliss or the repeated stories of heterosexual violence against gay men.

Note that the harm here is not just the immediate self-hate but also the on-going loss of the rights and privileges of group membership – some of which relate to safety and simple civility. Thus, young men who would normally think it inappropriate to yell insults from speeding cars feel entitled, maybe even obligated to do so, with respect to gay men. And gay men, sadly, live in a world that is less civil and less safe than the one that group norms would normally provide.

III. MICROAGGRESSIONS IN LAW SCHOOL LIFE, PART I: THE CLASSROOM

On its face, the law school campus seems immune from incivility and violence. Nevertheless, most students of color live through a virtual storm of microaggressive conduct. Not all of it is on campus. Students must commute to the school, shop in the local area and find apartments in local neighborhoods. The fact that they are law students does not exempt them from the racism of the surrounding community. My law school is located in a “liberal” suburb of Boston. The town is not all white, but neither is it fully integrated. Police, merchants and even residents still look at African-Americans – especially young African American men – with suspicion. Thus, it is small wonder that students of color do not feel at home.

The law school campus, fortunately, is more integrated and the school makes a real effort to provide an inclusive environment. This integration does not mean, however, that it is a safe zone. Listening to students over the years, I have heard many descriptions of

microaggressive conduct. As a woman who went to law school in 1973, I experienced some myself. These experiences have convinced me that most classroom microaggressions could be easily avoided. As an example, I will use an episode from my own law school experience.

Our first case in Criminal Law was the *People v. Josephine Chavez*.¹⁷ The prosecution alleged that Chavez had delivered a child in her home bathroom and that she either killed it or failed to take any steps to keep alive. By the time she cut the cord, the baby was limp, possibly dead, and Josephine wrapped it up in newspapers and left it under the tub. The professor, who was white and male, led the mostly white and male class through a discussion of the elements of manslaughter as they applied to the facts of the case. It was apparent from the discussion that none of the students who participated had the least understanding of what could lead a woman to take so little interest in the survival of her child. In fact, they thought her behavior so bizarre that it led them to make some negative inferences about her intent. After thirty minutes, Margaret Montoya, the lone Latina in the class, raised her hand. She was visibly upset but determined to make the class understand the facts and circumstances that made Josephine Chavez feel she had no choice. Some of the students were supportive, but there was little discussion of her points. After Margaret's intervention, the class moved on to other matters. Many years later, Ms. Montoya, now a law professor, wrote about the experience:

Contextual information should have been relevant to determining the criminality of her behavior. Josephine Chavez's behavior seems to have been motivated as much by complex cultural norms and values as by criminal intent.

A discussion raising questions about the gender-, class-, and ethnicity-based interpretations in the opinion, however, would have run counter to traditional legal discourse. Interjecting information about the material realities and cultural context of a poor Latina woman's life introduces taboo information into the classroom. Such information would transgress the prevalent ideological discourse. The puritanical and elitist protocol governing the classroom, especially during the 1970s, supported the notion that one's right to a seat in the law school classroom could be brought into question if one were to admit knowing about the details of pregnancies and self abortions, or the hidden motivations of a pachuca (or a chola, a "homegirl" in today's Latino gang parlance). By overtly linking oneself to the life experiences of poor women, especially pachucas, one would emphasize one's differences from those who seemed to have been admitted to law school by right.¹⁸

17. 176 P.2d 92 (Cal. App. 1947).

18. See Margaret E. Montoya, *Máscaras, Trenzas, Y Greñas: Un/Masking the Self while Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. J. L. GEN. 185, 205 (1994).

Prof. Montoya's point is well taken. It is not only that the classroom discussion omitted relevant considerations. It was the fact that there seemed to be a taboo against mentioning these considerations; that "one's right to a seat" could be questioned for even knowing about them. It is tempting for all of us who are not Margaret — the only Latina sitting in in the austere confines of a Harvard classroom — to say that she is overreacting; that she would not be ostracized for speaking her mind. Indeed, there were many of us — students and perhaps even the professor — who understood her point and admired her bravery. But bravery it was. The pressure to remain silent about such things is intense. But as Professor Montoya notes, the silence comes at a cost:

The silence had profound consequences for me and presumably for others who identified with Josephine Chavez because she was Latina, or because she was female, or because she was poor. For me, the silence invalidated my experience. I have re-experienced the longing I felt that day many times. At the bottom of that longing was a desire to be recognized, a need to feel some reciprocity. As I engaged in their reality, I needed to feel them engage in mine.¹⁹

I have chosen this example because, like many microaggressions, it is devoid of any malice on the part of the professor or the students. Indeed, it is incidents like these that have led the forces of reaction to complain about "political correctness." "What is so wrong," they say, "with treating the appellate decision on its own terms? Even if some of our students feel excluded, the world is a hard place. We all have to "man up" and find our way through the difficult and sometimes hostile terrain."

I understand the impatience that lies behind these objections, but there are ample reasons why law professors ought to be concerned about this kind of problem. First, we are educators and not armored knights jousting in an intellectual marketplace. If we want our students to learn, we have to be concerned about teaching them in the place they are in. This means that if some students think of Josephine Chavez as a "homegirl" and others think of her as some stereotypical bad girl, the discussion must be open enough to include both perspectives. Secondly, there is an issue of fairness. Understandably, a student who feels excluded because of her knowledge will not do as well as one who feels validated in her ignorance. Thus, students who are treated as insiders gain an advantage over those who have been excluded.

There is also a more profound reason why law professors should be concerned about this problem. Some people suggest that American law represents the ability of those who

19. *Id.*

are rich and powerful to assert their will over everyone else. Others believe that it represents consensus and the ideal of self-government. Most of us, I suspect, think it lies somewhere in between. This issue lies at the heart of questions about law's legitimacy. We load the dice in favor of consensus if we make room for only one perspective in the classroom. By permitting the social perceptions of the dominant white culture to be treated as fact, we beg the question of law's legitimacy. We empower those students who belong to the dominant culture to claim a kind of universality for the law that it does not deserve. If, on the other hand, there is room for many perspectives in our classrooms, we allow the law to grow towards the ideal of true universality.

My final point is this: It is not difficult to open the classroom to other perspectives. If you are assigning the Chavez case, there are a few simple things that you can do to prepare. First, you must recognize that there is a wide gulf between Chavez's perspective and that held by the appellate judges who decide her fate. Second, you need to assign a reading that describes that other perspective. You could, for example, assign parts of Prof. Montoya's article. Or there are many others that would meet the need. During the last thirty years, Critical Race Theory has blossomed, resulting in rich literature that offers many different perspectives on various areas of the law. Third, you should be sure to summarize the salient points from the article sometime near the beginning of the discussion. The advantage of this is that you are eliminating the need for students of color to represent the missing perspective – you have brought it forward and will defend it yourself if necessary. The resulting discussion will not only be more inclusive; it will also stimulate many interesting questions about the role of law in society.

IV. MICROAGGRESSIONS IN LAW SCHOOL LIFE, PART II: LSATs AND THE STIGMA OF AFFIRMATIVE ACTION

One common form of law school microaggression involves the concept of affirmative action. Affirmative action is controversial on both sides of the political spectrum. Some on the right argue against it because they think it discriminates against white applicants. Some on the left oppose it because they think it stigmatizes students of color. Whether you are for it or against it, there is no question that it sets up a pernicious narrative about racial differences in our student populations. It runs something like this:

Admission to law school is granted on the basis of merit. To determine merit, the school uses a numerical formula. The inputs of this formula are undergraduate grade point average and LSAT Score.

Since people of color do less well on the LSAT's,²⁰ a class admitted solely on the basis of the numerical formula would be disproportionately white. This result is not acceptable, and therefore the school admits a number of less qualified people of color.

Clearly, this narrative rests upon one very significant assumption. It equates the ordering achieved by the numerical formula with merit, and it is this sleight of hand that makes the whole concept of affirmative action so microaggressive. It is the essence of stigma. A small subgroup is identified by an easily applied criterion (skin color) and, its members are singled out as inferior or less worthy of inclusion.

This kind of stigma would be bad enough if there were only a few roughnecks who embraced it. (Imagine them riding around in cars yelling “affirmative action admittee” and throwing wet milk cartons at law students of color.) But, as Panti Bliss reminds us, roughnecks are not the only problem; the “nice people, respectable people, smart people, the kind of people who make good neighborly neighbors” may present more invidious difficulties. Whether they say so or not, many otherwise liberal and sensitive members of the law school community believe this narrative. Sadly, even students of color come under its spell. Thus, it is not enough to remain silent, to ignore it or to pretend it doesn't exist. We must investigate the matter and examine the underlying assumptions. Does the racial difference in LSAT scores rest on racial bias or real differences in ability?

First, let us consider what the test presumes to measure. At first glance, it looks like this is a technical question, requiring a Ph.D. in psychometrics. This complexity deters most of us from thinking about it, but it should not. The truth is that even if we take the technicians at their word, the LSAT has little to recommend it as a predictor of legal ability. Here is the explanation of the validity of the LSAT direct from the LSAC²¹ website:

Correlation is stated as a coefficient for which 1.00 indicates an exact positive correspondence between candidates' test scores and subsequent law school performance. A coefficient of zero would indicate nothing more than a coincidental relationship between test scores and subsequent performance. The closer to 1.00 the correlation coefficient is, the greater the test's predictive validity [. . .]

The correlation between LSAT scores and first-year law school grades varies from one law school to another (as does the correlation between GPA and first-year law school grades). During 2016, validity studies were conducted for 168 law schools. Correlations between

20. Susan P. Dalessandro et al., *LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2007–2008 Through 2013–2014 Testing Years*, LAW SCHOOL ADMISSION COUNCIL, Oct. 2014, at 22.

21. See *About LSAC*, LSAC.ORG (2017), <https://www.lsac.org/aboutlsac/about-lsac> (explaining that the LSAT, like all standardized tests, results in significantly lower scores for African-Americans. For the test taking year 2013-2014, the difference between the mean score for black and white test takers was approximately eleven points).

LSAT scores and first-year law school grades ranged from .12 to .61 (median is .41). The correlations between UGPA and first-year law school grades ranged from .02 to .50 (median is .27).²²

Two things are noticeable from this account. First, when the LSAC claims that its test is valid, what this means – and *all* that it means – is that it has some correlation with first-year grades. Second, its correlation with first-year grades varies widely from school to school. And finally, a third thing is clear to anyone familiar with the law school admission process: admission to a particular law school often depends upon a few points difference in LSAT score.

The problem with linking the validity of LSAT scores with first-year grades is clear. There is some question as to whether first-year grades are a realistic measurement of one's aptitude for law. As a person who has taught first-year courses and dispensed first-year grades for thirty years, I believe that they roughly measure a certain intellectual skill that is important to lawyers. Specifically, they measure the speed and accuracy with which a student can digest a given factual hypothetical, recall certain legal principles and apply them properly to the hypothetical. What they do not measure is other useful traits. For example, a lawyer is well served by an ability to comprehend other points of view and to build bridges between differing points of view. Lawyers are also well served by an ability to strip away abstract conceptions and get to the point – the things that each side may view as vital. If we tested for these things, there might be no racial bias at all. In fact, one might argue that the ability to bridge differing points of view is heightened by the experience of being a minority in a white-dominated culture.

If we consider the correlation between LSAT's and first-year grades, the question remains whether there is a real difference in performance between the races or whether the test itself imports a racial bias. To begin, we might note that these kinds of tests have a long and doubtful history.²³ Racial bias was evident from the beginning. The first widely administered standardized test was the Army Mental Test that was given to soldiers during the First World War. On that test, "fair" Northern Europeans scored significantly higher than "darker" Southern Europeans and Eastern European Slavs; and, confirming the test gives expectations, American "Negroes" scored even lower. The reason for this is not hard to see. The questions on the test had obvious cultural biases. For example, in a section where the test taker was to complete a picture by providing a missing object, the thing missing was, in one instance, a bowling ball and, in another instance, a tennis net. In effect, scoring well required you to know that bowling was played with a ball and tennis was played with a net.

22. *LSAT Scores as Predictors of Law School Performance*, LSAC.ORG (2017), <https://www.lsac.org/jd/lSAT/your-score/law-school-performance>.

23. See STEPHEN J. GOULD, *THE MISMEASURE OF MAN* (W. W. Norton & Co. 1981).

The problem with these tests and to some extent all “aptitude” tests is that it is hard to separate intelligence from the cultural assumptions of the white middle class. Modern testing tries to avoid such obvious pitfalls, but efforts to correct this problem often fail. The current LSAT consists of three parts: Reading Comprehension, Analytical Reasoning, and Logical Reasoning. These labels make it sound as though the test measures a set of race-neutral abilities, but the issue is not as straightforward as it first appears. All three of the sections require the test taker to absorb a certain amount of content. Since the test is timed, speed is of the essence. A person may answer a question correctly; but, if it takes her somewhat longer to do so, she will not finish the test. Therefore, the issue – especially at the top end of the performance curve where racial differences are the greatest²⁴ – is speed rather than ability. It is necessary therefore to ask ourselves what contributes to the speed of comprehension.

One factor is that our thought processes are sped up by the use of familiar stereotypes to rule out possible interpretations. Here is a hypothetical example of a seemingly innocent grammar question that may have a gender bias:

- **Instruction** – Indicate what changes are necessary to make the following sentence grammatical. If none is necessary, mark d) as the correct answer.
- **Mary took a karate course to protect herself from a well-known instructor**
 - a) Mary took a karate course, to protect herself from a well-known instructor.
 - b) Mary takes a karate course to protect herself from a well-known instructor.
 - c) Mary, wanting to protect herself, took a karate course from a well-known instructor.
 - d) No change

Note that to confound the common stereotype that women are passive, the writer of the question has portrayed Mary in an active role. The problem, however, lies in the fact that there are two possible interpretations of this sentence and the right answer depends upon what you think the sentence is intended to express. Some students will quickly assume that the intended meaning of the sentence is that Mary is taking a karate class (from a well-known instructor) because she wants to protect herself. They will, therefore, select answer

24. See *The Widening Racial Scoring Gap on Standardized Tests for Admission to Graduate School*, THE J. OF BLACKS IN HIGHER EDUC. (2006), http://www.jbhe.com/news_views/51_graduate_admissions_test.html (stating “In 2004, 10,370 blacks took the LSAT examination. Only 29 blacks, or 0.3 percent of all LSAT test takers, scored 170 or above. In contrast, more than 1,900 white test takers scored 170 or above on the LSAT. They made up 3.1 percent of all white test takers. Thus, whites were more than 10 times as likely as blacks to score 170 or above on the LSAT. There were 66 times as many whites as blacks who scored 170 or above on the LSAT.”).

c). Other students may see an additional possible meaning. Perhaps it is the well-known instructor that had made Mary feel less safe. These test takers may know someone who has been harassed by an instructor or perhaps they have been harassed themselves. They will see that the question is ambiguous; and, if they refer back to the instructions, they will mark d) as the correct answer. Given the gendered realities of modern life, it is likely that there will be more males in the first group and more women in the second. Unfortunately, those in the second group will be doubly penalized. Not only is it likely that their answer would be scored wrong,²⁵ but also, in a timed test, their need to resolve the ambiguity wasted precious minutes. It would not take more than one or two such ambiguities to skew the results by gender.²⁶

A second thing that affects the time taken on an exam is priming. A test-taker is “primed” when subjected to a protocol that significantly affects performance on the test. The results are remarkable. Consider the following description of what happens when students are primed by asking them to identify their race before taking the test.

[Steele and Aronson] primed Caucasian and African American college students by asking them to identify their race just before they took a test. The researchers found that such a simple priming task had profound effects on African American test performance: African American participants took longer to answer questions and achieved lower overall scores than Caucasian participants, but only when they were primed. Thus, [they] found that priming a participant’s racial identity likely implicated a complex relationship between African American identity and negative stereotypes relating to ability.²⁷

Since LSAT examiners ask applicants to identify their race before taking the exam, this result is particularly significant in evaluating performances differences in their scores. When you put it all together, it seems clear that African American students are unfairly stigmatized, not by affirmative action but by the racial effects of relying on LSAT scores in law school admissions. Before thinking what we might do about this problem, I want to make a

25. Questions are retained when they are verified in an experimental section given to all test takers. An answer is considered “correct” when a group of high scoring test takers select that answer. Thus, it is likely the more traditional answer will receive a positive score.

26. The ambiguity in the hypothetical question might seem to be good reason for throwing it out. But throwing a question out of a standardized test depends on subjecting it to two different statistical tests. First, did the question discriminate—were there enough takers who got it right and enough takers who got it wrong to make it worthwhile asking the question. Second, did the question discriminate properly? Did the students who did well on the test get it right and the people who did poorly get it wrong? This second test introduces a conservative element to the test. Questions are good questions only if they replicate the results obtained by questions in the past. This means that if the test has a bias, questions will only be included if, in fact, they tend to replicate the bias.

27. Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 14 (Justin D. Levinson & Robert J. Smith eds., 2012) (citing Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African-Americans*, 69 *J. Personality & Soc. Psychol.* 797 (1995)).

point about affirmative action. The Supreme Court talks about affirmative action being justified because it gives the black population a time to “catch up” with whites. Maybe it is just the opposite – maybe we – we, white people — need time to figure out how our seemingly inclusive culture erects barriers – often invisible to us – that exclude people of color. If we are committed to racial equality, there are obviously things we could do. If we continue using the LSAT, we should at least require the LSAT to stop asking for racial identification at the testing site. Instead they should gather this information at the time people sign up for the test. Furthermore, there should be more investigation into the kinds of questions that promote racial bias and more disclosure about the limitations of the test.

My personal view is that we should stop relying on the LSAT or seriously reduce its weight. There are possible alternatives. For example, a group of researchers from U. C., Berkeley, sought to broaden the skills to be measured by an admissions test. When they did so, racial bias diminished. They report:

The research process unearthed a complex model of lawyering. It confirmed that professional competence requires not only the analytic quickness and precision that law school currently seeks, teaches and rewards but that it also requires relational skills, negotiation and planning skills, self-control and self-development, creativity and practical judgment, among other proficiencies. The research confirmed that selection based on this more complete model of lawyering greatly reduces racial disparities and captures a more fundamental meaning of merit which should drive admission decisions. Finally, and importantly, the research showed that professional competence can be predicted with objective tests. Just as the LSAT predicts likely academic success as a first-year law student, the generally race-neutral assessments that Shultz and Zedeck created and tested as a part of this research project predict a different sort of merit-likely success as a practicing, problem-solving attorney.²⁸

Imagine, if you can, a world where admissions officers received numerical scores that provided better information about their applicants and where any form of affirmative action became unnecessary. This information is what it would take to eliminate the stigma of affirmative action and provide a truly diverse and inclusive environment for our students.

28. Kristen Holmquist et al., *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 J. LEGAL EDUC. 565, 566 (2014).

V. CONCLUSION

I want to end by reiterating Dr. Pierce's point about microaggressions. The past century has seen real progress in integrating American society. The worst aspects of Jim Crow are dead. *De jure* segregation is a thing of the past. Many people of color are in the forefront of American political, intellectual, and cultural life. This progress is good, but it is not enough. Minorities continue to pay an unacceptable cost for integration. So long as we subject them to the endless gauntlet of microaggression, we have not achieved full equality. As Dr. Pierce says, this is "the essential ingredient" for success. Oddly, this last part is not the hardest part of the process. The first stage has involved changing society, facing conflict, and making room for people of color in our social systems. The second stage requires only that we discard worn-out ideologies.

It is therefore ironic that just as we reach this point, we encounter serious backlash. We were willing, it seems to change many of our institutional arrangements, but now we are reluctant to accept personal responsibility for our actions. No one likes to make mistakes; no one likes to suffer the embarrassment of making those mistakes in public. As white people, the idea of microaggression hits us in this place of relative insecurity. If we want to be politically correct, we have own up to the limits of our enlightenment. We have to recognize the dark spaces still in our minds. It is easier, of course, to simply reject the requirement of political correctness. But, if we think about it, we can see that there are many reasons we should not do so. Aside from politeness and good manners, there is a basic question of justice. Americans inherit a long history of racial injustice. To ignore microaggressions is to say: Our history of racial oppression has left a residue of interpersonal discomfort between the races. Although I have received the many advantages of being white, I still insist that the comfort I receive by pretending to be race-blind is more important than the discomfort I inflict on others by refusing to recognize the persistence of racism. For those who are white and care about justice, this is an untenable position.

