Racing: A Critical Race Theorist’s Qualitative Analysis of Whether African American Male Law School Alumni Were Mismatched or Malignent

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Racing: A Critical Race Theorist’s Qualitative Analysis of
Whether African American Male Law School Alumni Were Mismatched or Maligned
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This thesis entitled:

Racing: A Critical Race Theorist’s Qualitative Analysis of Whether African American Male Law School Alumni Were Mismatched or Maligned written by Darrell D. Jackson has been approved for the School of Education

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The final copy of this thesis has been examined by the signatories, and we find that both the content and the form meet acceptable presentation standards of scholarly work in the above mentioned discipline.

IRB protocol # 0310.13
Abstract

Jackson, Darrell D. (Ph.D., Education; Educational Foundations, Policy, and Practice)

Racing: A Critical Race Theorist’s Qualitative Analysis of Whether African American Male Law School Alumni Were Mismatched or Maligned

Thesis directed by Professor Michele S. Moses

Despite the vast research on African Americans and affirmative action, little qualitative analysis has been done to investigate how race exists and functions in American law schools. This dissertation researches the ways in which race is constructed, deconstructed, and reconstructed within two American law schools. Three primary lenses guide this exploration: (a) Omi and Winant’s theory of racial formation; (b) Bonilla-Silva’s theory of color-blindness; and (c) critical race theory.

The central question of this dissertation is: What can the experiences and voices of African American male former law school students reveal about race and how it functions in law schools? Additionally, how are these experiences related to attending more-selective or less-selective law schools? In the United States, the value of African Americans’ law school experiences has been, most recently, reduced to a statistic. Missing from the statistics are the unique voices, perspectives, and experiences of African Americans who attended law school.

Through individual and focus group interviews, my study investigated, compared, and contrasted the experiences of 10 African American male former law students who attended a less-selective or more-selective law school. Against a backdrop of 6 law school faculty interviews, to gain institutional perspective, I considered the former law students’ “costs” and “benefits” as suggested by Sander (2004) and others. The participants revealed that both institutions must better address racial issues and impediments before identical statistical outcomes can be expected at any level.

Ultimately, this dissertation calls for a replacement of the mismatch theory with, what I call-the process of progress. Where the mismatch theory is grounded in exclusion, my theory is grounded in inclusion. In the struggle for equity, the focus must be on the institutions, not the individuals. I call upon the institutions to pay particular attention to groups who have historically been disenfranchised from the law school process. In the end, as long as law schools are a microcosm of American society, by implication, the process of progress will better serve America and our democratic ideals.
For my family
those who forged the path before me
those who walk this journey beside me
and those I have yet to meet
Acknowledgements

Just as I argue throughout my work that no one has or can “do it all by themselves,” this work is the result of support from numerous allies. The acknowledgements recognize a few of the people and organizations that assisted me along the way; however, there are countless others who played a role and will not be found on these two pages. I recognize their importance in this journey and hope that the effort that they put into me is seen in the effort that I put into this research.

First and foremost, I am a man of faith. I thank God for the many blessings that have brought me to this point-in-time. I pray that my writings and my work will always be congruent with my spiritual foundations.

My parents, William and Mary Jackson, have been my rudder in myriad ways. Their love and patience have always been my rock, even in times when I likely made it difficult to give either. I hope that in whatever I do, it brings honor to them and the Jackson name.

To my biological brothers, William Jackson, Jr. and Stephen Jackson, you have always been my exemplars. I knew what was expected of me because I watched everything that you did and tried with all my might to meet or exceed that standard. Thank you for showing the way to your little brother.

As all couples know, my partner, Kristine Jackson, has supported me in countless ways. Not only has she carried the financial burden while my only income was that of a graduate student, but she stayed up many nights to help me work through ideas and to make this document look its very best. Thank you for your love, laughter, and patience.

To my committee, Professor Brayboy, Professor Dutro, Professor Maeda, and Professor Matthew, thank you for steering me through this intellectual journey. My growth as a scholar is a
direct reflection on all that I have and continue to learn from each of you every day – inside and outside of the classroom. Thank you for the time that you gave up to nurture my development.

My existence at the University of Colorado and the words in this dissertation would never have occurred without my advisor, Professor Moses. I am forever grateful for all that you have done as my friend, my teacher, and my colleague. You are, without a doubt, the best advisor any student could ever hope to find. I am grateful for the manner in which you have nurtured me and my ideas. Moreover, I am proud to be a part of your intellectual lineage.

To my fellow students, the faculty, and the staff at the University of Colorado School of Education, thank you for becoming extended family. Through dialogue, discussions, and even arguments, you have helped me think and see and grow in ways that will enrich me throughout my entire life. There are far too many names to list here, but know that I recognize and thank each of you.

To my academic siblings, Brandi Gilbert, Joshua Childs, and Dr. Patrick De Walt, thank you for making sure that I stayed grounded and “kept it real.” You all make me think more, think harder, and think better. We have much work to do and I look forward to reminding each other to carry on, get to work, and stay strong.

Finally, I also owe a special thanks to the American Educational Research Association for support through the Minority Fellowship in Education Research and to the University of Colorado for their support through the Beverly Sears Graduate Student Grant Award. This project could not have been completed in a timely manner without their funding, as well as intellectual support.
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CHAPTER 1

The Law School Race: An Introduction

“What the Negro needs most … “

W.E.B. Du Bois (1935)

I am a racer; the greater the speed, the closer the peril, the better the moment. By racer, I am referring to one who thrives on the competition of getting from point A to point B in the shortest amount of time. I have competed on foot (e.g., track & field), I have competed mentally (e.g., math teams), and I have competed on machines (e.g., motorcycles). Although my analogies will focus heavily on motorcycle road racing, I believe that anybody who has ever competed in a timed event will be able to understand and apply the comparisons to better understand and appreciate this dissertation. It is important to remember that the faster the speed the greater the potential danger; but, more often than not, speed and danger are required for victory.

It is fascinating to watch novice motorcycle racers during their first experience on a racetrack. They have clearly separated themselves from 99.9% of humanity who will never risk life and limb by entering a race. But to the more experienced racers, it is obvious that novice racers, obviously, have not acquired the same level of experience. They are not racing to win, they are racing to survive.
Granted, there are “the naturals” or “gifted few” who can enter, win, and dominate on their first attempt. They are the exceptions. They are an outlier’s outlier. Racing to survive is part of the process for the rest of us mortals. By racing to survive, a participant is racing with two central goals: one, not to get hurt, and, two, not to hurt anyone else. An ethical analogy might be the Hippocratic Oath: Do no harm.

As I defined my initial conceptualization of racer, I realized that I am also a “racer’ in another sense. I am always considering the role that race plays in any setting. While chapter 3 of this work contains a thorough analysis, here, we can define race as the manner in which American society has used human phenotype and pigmentation to differentiate individuals and groups of people. Whether one is attending a predominantly White institution, sitting at the conference table of a Fortune 500 company, spectating at a NASCAR race, or myriad other scenarios, racial issues are ever-present. Because, according to the U.S. Census, European Americans\(^1\) quantitatively dominate every state in America (with the exception of Hawaii), that leaves all other populations to maneuver within their non-dominant racial reality. However, I suggest that the same analysis also applies whenever European Americans find themselves in southeast Washington, D.C., south-side Chicago, inside a historically Black college or university, or many other locations. The important difference is that European Americans can avoid each and every one of these places nearly all of the time. Alternatively, people from

\(^1\) I intentionally use (and prefer) the term European American, as opposed to White or Caucasian. I believe that the term European American is more appropriate in the context of the terms African American, Mexican American/Latino, Asian American, and Native American/Indigenous populations. Within this work, any inconsistent use of racial identifiers is my attempt to maintain consistency with the original author’s preference. For example, if an original author used the terms White and Black, I attempt to also use White and Black while discussing that author’s work, instead of substituting my preference for European American and African American.
racially defined communities, and thus, historically marginalized communities, will rarely ever be able to completely avoid predominantly European American settings.

One scenario, as discussed above, places students from historically marginalized communities in predominantly White institutions. To become accepted, the students are then expected by many academics, lobbyists, and politicians, to become statistical mirror images of the students who resemble the institution in most regards. At times this mandate is subtly conveyed; for example, through programs that suggest an intention of assimilation. Traditionally, such a result undeniably intimates assimilation into the European American community and a “swallowing up” of the ideas, thoughts, and cultural practices of any other community (Culp, 1995; Markus, Steele & Steele, 2000). At times this mandate is more harshly conveyed; for example, when students from privileged backgrounds suggest or explicitly assert that others do not deserve to be present (Chea, 2011). Faculty may act similarly or may disrespect the presence and ideas of students from historically marginalized communities. Examples include simply ignoring or criticizing their contributions to classroom discussions. By statistically mirror, I mean a student must enter an institution of higher education with a virtually matching grade point average, matching standardized test score, and matching abilities to maneuver within the collegiate setting both academically and socially despite dissimilar cultural capital (e.g., not having a family history of college attendance, having attended a high school with significantly less resources). By students who resemble the institution, I mean students who are able to look at

2 Instead of other regularly used terms like minorities or people of color, I prefer the term historically marginalized communities. With the growth in population of Latino/Mexican Americans, the definition of a minority will soon be quantitatively improper. Moreover, the inference that a group is “less than” another can have a variety of psychological impacts. Additionally, the term “people of color” suggests that European Americans have no color. They do, and they cover a wide array of complexions. Alternatively, the term historically marginalized communities respects the struggle, courage, and tenacity that was crucial to the survival and progress of the communities I write about and research. Finally, that term stands in direct contrast to the privilege so often unrecognized, denied, or dismissed by privileged communities.
professors and see themselves; students who are able to look at the school administration and see themselves; students who are able to look at the portraits that decorate buildings defining the history of the institution and see themselves. By seeing themselves, I mean seeing their race, their gender, their family, their community, and more. Simultaneously, the historically marginalized students must navigate this terrain under the microscope of the same faculty, administration, researchers, and others with whom they share little to no resemblance or visible ancestry. What this leaves is a sense of distance, at best, or worse, an outright un-welcoming environment.

In the midst of many local, state, and national initiatives suggesting what is best for students from historically marginalized communities, generally, and African American students, more specifically, I undertook this dissertation to learn what African American students believe they need to prosper and succeed. While many venues would have proved worthwhile, given my own background and professional expertise, I chose to focus on one setting that met the intersection of my research interests: law, education, and race or cultural studies. Therefore, I chose to examine race issues related to law students and law schools. I also narrowed the scope further by limiting my participants to African American males. Many other historically marginalized communities have been and should be similarly researched; however, I chose African American males in law school due to their disproportionately small enrollment in that venue, and in graduate school and higher education overall, as well as the critical need to confront this issue until resolved (American Bar Association, 2005). Many other communities are worthy of similar studies. I would have done them and my participants a disservice by attempting to fully analyze all groups. I chose one, the one that I know best. I hope that others will expand on my research. My primary aim was to provide a rich, contextualized, and nuanced
picture of my study participants, as well as their law school and post-law school experiences, so that we may better understand what actions are necessary to support the educational attainment and success of all communities as well as the applicability and accuracy of the mismatch hypothesis (Sander, 2004).

Positionality

As I come from a Critical Race Theorist’s perspective, I include my own positionality to clarify my experiences, which ground my analysis.

Like so many other African American males, I believed that there was one path to success—sports. Although blessed with what most would characterize as above-average athleticism, which I worked to hone to its optimal level, I was not among the elite that are found in the Olympics or the National Football League. As such, as college came to an end, so did my “full-time” athletic life. It was then that I was faced with the collegiate $64,000 question: What should I do with my life?

By asking just the right question, my high school biology teacher and “second mom” provided the answer. I was visiting home and my high school, during winter break of my senior year of college when she asked, “Have you ever considered going to law school?” I had … I thought I might do that when I was “old” (maybe 40). But, the honest truth was that I had considered law about as much as I had considered becoming an astronaut. I knew nobody who practiced either profession. Instead, they were like Olympic champions: of course they existed, but I would never really get to know one.

3 The mismatch hypothesis is discussed, at length, in Chapter 2.
She assured me that they could be found more often than Olympic champions and asked me to meet with an administrator at a local law school. Trusting in her, I met with the gentleman and learned what was involved with attending law school. In my naïveté, I believed that the process was simple enough: fill out an application, submit my college transcripts, and take a standardized test called the Law School Admission Test (LSAT).

Not knowing that I was already seriously late in the application process, I discovered that the February exam was my last, and only, opportunity to take the LSAT if I wanted to enter law school that fall. We were leaving on a family trip and, not knowing any other approach, I stopped by a local book store and purchased one or two LSAT preparation books. One had a heading that said, “Preparing for the LSAT in five weeks.” Coincidentally, I had exactly five weeks until the exam. I followed their instructions to the letter while on the trip, after I returned home, and when I returned to college for the spring semester.

Although my grades steadily improved while an undergrad, my first two years had focused on everything but academics. Fortunately, in an age of increased standardized testing, I had become fairly adept at such exams. I scored well (enough) on the LSAT, wrote an acceptable personal statement, and found myself in law school at the end of the summer.

During my first day at the law school, I remember standing in line, with what seemed like a huge number of very expensive books, and looking around at the other 1Ls (first-year law students). They seemed nice enough as they exchanged pleasantries, although none looked like me. They talked about relatives and other people that they knew in the law profession. I knew none. One even talked about her father, a local politician and attorney with his own firm. Obviously, the firm also carried her last name. I thought it odd that someone who had not yet
participated in one day of law school already had a law firm with her name inscribed on the building.

Finally, I stumbled across one woman and one man who looked like me. While I do not believe that any researcher would consider three out of a class of approximately 200 to be a critical mass, we believed that supporting each other was critical in many ways. We always sat beside each other and attempted to coach each other through our struggles and difficulties – the blind leading the blind. Thus began my law school journey.

The impetus behind this dissertation grew from my experiences as an African American male who attended law school, likely as an affirmative action admit, and proceeded into what most in society would consider a successful career. My entry into law school was not unique, nor do I assume it to be typical for other African American lawyers. However, this part of my story provides a glimpse into the experiences that shaped the way I approached my research, both conceptually and methodologically.

The purpose of this study, a qualitative study using interviews and focus groups, as well as available archival data, was to explore with a group of African American male former law school students how their race affected their educational and career opportunities within the legal profession. Patton (1990) defined qualitative methods as consisting “of three kinds of data collections: (1) in-depth, open ended interviews; (2) direct observations; and (3) written documents” (p. 10). Within this study, I relied heavily upon Patton’s first category and requested items from the third category from each participant. The second category was unavailable because I, obviously, could not observe what happened to the participants in the past, during their law school careers. I did, however, observe their current personalities, jobs, emotions, and more. Finally, this study also allowed for analytical reflection on my own experiences within that
same arena. The rest of this chapter provides the reader with an understanding of how I conceptualized data gathering, the procedures I undertook to locate participants and collect data, descriptions of the relevant parties, and the choices made along the way.

**Research Questions**

I undertook this dissertation and the journey into my participants’ lives (as well as my own) to investigate one central question: What can the experiences and voices of former law school students who are African American males reveal about race and how it functions in law schools? Moreover, amongst the many interrelated sub-questions, how are these experiences related to attending a more-selective or a less-selective law school? In the United States, where affirmative action policies continually face resistance (usually from those far more socially privileged), the value of African Americans’ law school experiences has been, most recently, reduced to a statistic (Ho, 2005a, 2005b; Rothstein & Yoon, 2008; Sander, 2004). Missing from this analysis are the unique voices, perspectives, and experiences of African Americans who attended law school. In this dissertation, I sought to examine more fully the individuals beyond what can be quantified.

As I investigated the various functions of race within law school, I also considered whether and how law schools contributed to the construction of race within and outside of their institution as well as whether and how African American male former law school students contributed to the same construction. I also asked and contemplated what it meant to be African American and male to former law school students from more selective or less selective law schools.
Next, I inquired as to whether African American male former students, from a more selective law school, reported similar or different experiences during and after law school than their counterparts from a less selective law school. I asked about their perspectives and experiences, during and after law school, their choices (self-determination), and their views about race and its role. I investigated how selectivity, as defined by *U.S. News & World Report*, affected their choices before and after law school, as well as the emotional and financial costs they bore. Of utmost importance, particularly in assessing Sander’s (2004) claims about this group, I asked how these participants defined success and failure. Finally, I deeply considered how answering these questions complicated or complemented Sander’s mismatch theory.

**Assumptions**

In examining the voices, perspectives, and experiences of a historically marginalized community, I began with a core belief. As a prosecutor for approximately a dozen years, I tried to implement the judicial ideology of blind justice. However, my interdisciplinary approach of connecting law with education and race or culture has led me to believe that another kind of “blindness” – color-blindness – is both unhelpful and unconscionable.

Color-blindness is a concept that calls for eliminating the consideration of race in any decision-making process (Connerly, 2000). I believe that color-blindness is untenable because, as Bonilla-Silva (2006) explains, any “minimization of racism is a frame that suggests discrimination is no longer a central factor affecting minorities’ life chances” (p. 29). Minimization is often heard in phrases such as, “It’s better now than it was in the past” (p. 29). In the law school admission process, minimization is employed with the assessment of “credentials.” Although some European Americans may agree that racism exists, and may go so
far as to admit that racism is pervasive, many minimize its ongoing effects by arguing that students from historically marginalized communities lack the credentials to succeed (e.g., LSAT scores, undergraduate grade point averages, and strong undergraduate lineages). This provides absolution from the historic oppression imposed by the privileged as well as its ongoing consequences. Historic systems of oppression, such as slavery and colonization, created extraordinary advantages for the privileged. Present-day racism continues to exacerbate the divide. Racist policies are maintained in myriad institutions, including, but not limited to, education (Kozol, 1991), health (Matthew, 2008), and housing (Briggs, 2005). By substituting, *de facto* racism for *de jure* racism, raced communities lost significant support from courts and legislatures. Today, nothing more need be initiated; traditional advantages need only be maintained for groups with power to sustain power and for privileged groups to remain privileged above others. By subscribing to a rationale that all others must be measured by a criteria inherently based in privileged experiences and values, the administrative gatekeepers can assuage racist guilt by relying upon the “lack of credentials” to exclude or suppress historically marginalized communities and maintain the status quo.

Furthermore, during the college and university admission process, a color-blind idealist would argue that all applicants should be judged “blindly.” The administrator would gather information about each applicant that relied heavily or exclusively upon numerical data. At its foundation, this argument relies on a belief (erroneous) that numerical data is color-blind, objective, and, thus, more meritocratic. Yet the error in this belief has profound implications.

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4 Historically, *the* most privileged group in the United States is European American males (sometimes referred to as WASPs or White Anglo-Saxon Protestants). However, I use this term a bit more generally because, as described through the critical race tenet of differential racialization, privilege has been distributed to different groups at different times, in different amounts, and for different periods.
Ultimately, because I believe that color-blindness is increasingly driving law school admissions, my dissertation critiques color-blindness as a masterful concept; color-blindness is a process of racial formation (Omi & Winant, 1994) even as its proponents profess racial irrelevancy. Assuming that an admissions officer could act in a completely color-blind manner, at best, she merely maintains the status quo, built upon a 400-year history of oppression, colonization, and subjugation.

Moreover, race is continually being re-inscribed. While Americans must never forget the historical wrongs that need to be redressed, citizens must also remain vigilant about contemporary methods by which marginalization occurs via race. Race is reconstructed systemically through discriminatory home loan processes, rejected employment applications, limited educational allocation, and various other ways that are masked as color-blind. Yet, the outcomes are “colorful” in their effect. That is, the groups most negatively affected are groups “of color” or historically marginalized communities.

To borrow from physics: An unopposed force in motion, remains in motion. Given the momentum of history, engaging in the “perfect” practice of color-blindness keeps populations “perfectly” proportioned where they presently reside. If two objects start five spaces apart from each other and both are moved three spaces forward, one object still remains five spaces “behind” the other. Worse yet, if the forward object is moved three spaces forward and the other object is moved two spaces forward, the distance between the two has grown – although a valid argument can be made that both objects have progressed. So, it has been with racial mobility within the United States. All groups have, arguably, progressed in some form or fashion. Yet, equality remains elusive.
Policy Background

Over the past six years, the American Civil Rights Institute (ACRI), led by former University of California Regent and well-known anti-affirmative action activist Ward Connerly, has campaigned in a number of states advocating for a color-blind society through state ballot initiatives calling for an end to what some call racial preferences and others call affirmative action. In education, affirmative action often refers to “a policy that aims to take an applicant’s race, ethnicity, and sex into account in making selection decisions” (Moses, 2002, p. 109). Racial preferences are, on the other hand, more akin to preferring, desiring, or wanting a race or group of races more than another (Hraba & Grant, 1970).

ACRI’s initiatives have included Proposition 209 in California, which passed in 1996; I-200 in Washington, which passed in 1998; Proposal 2 in Michigan, which passed in 2006; Initiative 424 in Nebraska, which passed in 2008; Amendment 46 in Colorado, which failed to pass in 2008; and Proposition 107 in Arizona, which passed in 2010. An ACRI initiative is rumored to be on the ballot in Oklahoma in 2012. ACRI’s initiative is copied, virtually word-for-word, as it is introduced from one state to another.

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5 The ACRI, according to its website (http://www.acri.org), is a nationally recognized civil rights organization created to educate the public about racial and gender preferences. ACRI focuses on assisting organizations in other states with their efforts to educate the public about racial and gender preferences, assisting federal representatives with public education on the issue, and monitoring implementation and legal action. Additionally, the organization has become known for its support - financial, legislative, and otherwise - of state ballots that would eradicate affirmative action measures that target race or gender.

6 In an opinion issued July 1, 2011, the United States Sixth Circuit Court of Appeals struck down Michigan’s constitutional amendment known as "Proposal 2," finding it unconstitutional under the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment (BAMN, 2011). The decision was stayed when the court elected to hear arguments en banc.

7 For example: “The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting” (Frankel, 2000, p. 431).
One of the studies often cited in support of arguments advanced by ACRI and others against race-based affirmative action policies in higher education is the “mismatch theory,” articulated by Sander (2004). In brief, the mismatch theory argues that African American law school students are more harmed than helped by admission into elite law schools under affirmative action policies. The theory relies heavily upon quantitative data, such as LSAT scores, undergraduate grade point averages (UGPA), law school grade point averages (LGPA), and bar passage rates. Given Sander’s premise, one purpose of my dissertation is to discover how this research might complicate or complement the mismatch theory.

Purpose

This dissertation’s purpose was to investigate the experiences, during and after law school, of African American male former law school students. Within this investigation, I considered the experiences of those former students who may have been labeled affirmative action recipients against those that would likely not have been so labeled. It is important to remember that the definition of affirmative action often varies significantly. Some view affirmative action as enhanced efforts to recruit and retain members of historically underprivileged communities (Crosby, Iyer, & Sincharoen, 2006; Golden, Hinkle, & Crosby, 2001; Steeh & Krysan, 1996). Others view affirmative action as the admission of candidates with statistically lower scores after consideration of other factors including their racial identity (Crosby, Iyer, & Sincharoen, 2006; Golden, Hinkle, & Crosby, 2001; Steeh & Krysan, 1996). Many other definitions of affirmative action would likely appear as one considers additional areas, like government contracting. Though I believe that affirmative action is a broad tool to be exercised by gatekeepers in concert with qualitative measures, in contrast, Sander (2004), Sowell
(2004), and others tend to reduce admission departments’ use of affirmative action to a quantitative assessment. To them, admissions departments become numerical automatons. Therefore, reaching beyond the quantitative assessments and delineations of affirmative action was the cornerstone of this dissertation.

However, I am not naïve about the use of quantitative data. By definition, the more elite a law school is, the more selective its admission process. Two primary quantitative criteria used by law schools in the selection process are LSAT scores and UGPAs. Factually, the population of applicants from most historically marginalized communities is proportionally smaller than that of European Americans and the median LSAT score of applicants from most historically marginalized communities is lower than that of European American applicants. A mismatch theorist argues, then, that it is only through racial preferences that most African American applicants (and other historically marginalized communities) are admitted. As developed throughout this work, I argue that law schools must not limit themselves to a simple quantitative analysis because these measures alone will not provide a complete (or holistic) analysis of an applicant.

As an example, according to the Law School Admission Council, during the 2007-2008 admissions cycle, 37,823 Caucasian males took the LSAT and received a mean score of 153.09. During that same period, 4,255 African American males took the LSAT and received a mean score of 142.80 (Law School Admission Council, 2008). Therefore, as a law school’s selectivity decreases, so does their median LSAT score, thereby increasing the pool of applicants from most

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8 There are some African American applicants who score on par with or above their European American counterparts. However, these individuals must be considered outliers and the arguments in this dissertation are based upon medians within each community. For example, the average LSAT score for Blacks who applied to law school between April 16 and May 15, 2008, was approximately 141. During that same time-frame, the average LSAT score for White applicants was 155. (On July 14, 2010, retrieved from: http://members.lsac.org/Public/MainPage.aspx?ReturnUrl=%2fPrivate%2fMainPage2.aspx)
historically marginalized communities available to meet or exceed that school’s median score.\(^9\) I lay this foundation for those unfamiliar with the process; however, as I will reiterate throughout this work, my intention was to go behind and beyond these quantitative labels.

This was a qualitative study, focusing on interviews of 10 African American male former law school students. I engaged in both structured and open-ended interviewing with study participants to gain a better understanding of their law school and post-law school experiences. To the extent available, within my analysis, I considered relevant documents (e.g., UGPAs, LSAT scores, LGPAs, class rankings within their respective law schools), job opportunities during and after law school, experiences taking the bar examination, and career satisfaction. The selectivity of a law school was determined by its acceptance rate. The acceptance rate is the number of applicants admitted divided by the total number of applications received. The acceptance rate used in this study was found in the 2011 edition of *U.S. News & World Report’s America’s Best Graduate Schools*. To reiterate, my primary aim was to provide a rich, contextualized, and nuanced picture of my study participants’ law school and post-law school experiences, so that we may better understand what actions are necessary to support the educational attainment and success of all communities as well as the applicability and accuracy of the mismatch hypothesis.

**Theoretical Framework**

As a result of my reading, research, thinking, and discussions, I have come to question the level of understanding, within and without the academy, of the experiences of African

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\(^9\) I acknowledge that there is a statistical difference between a median and a mean. My intent is not to engage in a quantitative analysis, merely to provide foundational statistics.
American males both during and after completing law school. Moreover, I have come to believe that race is a daily lived experience and functions to differentiate members of society based upon beliefs about their differences. Therefore, the analysis of race-based affirmative action as a lived, individual and societal experience, is at least as relevant as the head count of graduates and bar-passers. Both the short and long-term effects of affirmative action factor into its value. Critical race theory analyzes short and long-term racial impact by considering its historic social utility as well as present and future (potential) effects.

Critical race theory (CRT) is an emerging theory that grounds itself in the analysis of race (Delgado & Stefancic, 2001). Still in its youth, CRT is already gaining traction as a methodological approach (Parker & Lynn, 2009; Solórzano & Yosso, 2009). It is this theoretical framework that primarily guides my perspectives and assumptions. In a later section of this dissertation, I provide a more detailed accounting of CRT’s tenets.

One of CRT’s tenets that is most relevant to my methods is often labeled “unique voices of color” or “legal storytelling” (Delgado & Stefancic, 2001). This tenet asserts that narrative is a valid and necessary form of argument that can convey information to historically privileged communities that is known or may be felt within historically marginalized communities. Some have utilized this method throughout an entire text to convey their message (Bell, 1987; Delgado, 2007), while others have used it intermittently within a work (Tatum, 1997). My use of this tenet in my study provides an improved understanding of the experiences, during and after law school, of African American male former law school students. Hearing their voices enables a better assessment of the costs and benefits associated with affirmative action. It is the “unique voices of color” CRT tenet that I hoped to extrapolate from my interviews.
Moreover, my experiential knowledge helped shape my theoretical framework. My experiences as an African American male, (potentially) an affirmative action recruit, a law school student, a lawyer, a law school administrator, and a scholar, all contribute to the framing of my research. I expect each role to act as “a major source of insight, hypotheses, and validity checks” (Maxwell, 2005, p. 38).

Significance

This dissertation conveys the voices of an insufficiently heard community: African American males. Specifically, for this project, it examines the voices of some African American males who attended law school. As legal challenges like *Fisher v. University of Texas at Austin* (2012), *Grutter v. Bollinger* (2003), and ACRI’s ballot initiatives continue to arise, it will be important to understand the effects and consequences of laws, votes, and decisions (Saenz, 2010).

Moreover, an important contribution that this work will make to the field of education is to question the simplistic notion of costs and benefits to individuals only. As analyzed above, Sander suggests that 86% of today’s African American law school student population would still be admitted under a race-blind system. The effects, he suggests, would be significantly higher rates of graduation and bar passage. This identifies another anti-affirmative action argument: the “problem” lies with the individual, not at the institutional level. I suggest a reconsideration of such a conclusion.

Reconsidering this notion is appropriate based upon statistics and logic. According to the Pre-Law Advisors' National Council, the individuals in law school average 25 years of age.  

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The elite institutions to which Sander refers often possess 200 years of history. The ability of a 25-year-old to form foundational flaws seems to pale in comparison to the abilities of an institution ten times his age. Moreover, the mismatch theory’s failure to deeply examine structural inequality, generally and within law schools, provides additional rationale for reconsidering its conclusions. This study provides insight into how structural inequality affected 10 African American former law school students.

Another purpose of this dissertation is to improve an institution, American law schools. One way in which I hope to do this is by examining, in Sander’s words, the costs and benefits of attending. Especially, for members of historically marginalized communities, a cost is that the focus (and, at times, the wrath) of assessors (e.g., Sander, ACRI) falls upon the individuals instead of the institutions. A benefit is that through the student’s experiences, the institution can be improved. That analysis helps us to better understand the effects of institutions on individuals.

Additionally, this dissertation contributes to the research on law schools, generally, and African American male law students, specifically, and the potential affirmative action consequences behind their attendance in law school. Researchers have not yet thoroughly studied the experiences, during and after law school, of African American male former law school students.\textsuperscript{11} Nor have researchers qualitatively analyzed Sander’s mismatch hypothesis as it applies to this particular demographic. Such a nuanced analysis may have greater “real world” applicability than the purely quantitative analyses Sander provided. This research, in part, locates Sander’s theory against the “real world” lives, histories, hopes, aspirations, and victories of the students who Sander’s formula defines as inappropriately selected and placed.

\textsuperscript{11} I intentionally do not use the term “law school graduates” because I believe that students who do not graduate can provide similarly valuable information. I hope to pursue this in future research.
Ultimately, this dissertation calls for a replacement of the mismatch theory with, what I call-the process of progress. Where the mismatch theory is grounded in exclusion, my theory is grounded in inclusion. I call upon institutions to work with and for all individuals. I argue that where the mismatch theory forces segregation across law schools, the process of progress leads to greater association across all groups. In the end, as long as law schools are a microcosm of American society, by implication, the process of progress will better serve American society and our democratic ideals.

Structure

The rest of this chapter addresses the organization of the dissertation. What follows are five chapters. Chapter 2 is the literature review. Therein, I give a detailed account of the origins of Sander’s mismatch theory and the many responses to date. I categorize these responses as either quantitatively or theoretically driven. My goal is to add my qualitatively driven analysis to the discussion. Chapter 3 describes my theoretical framework in detail. It is intended to ground discussions about affirmative action and mismatch theory to their most common denominator: race. This chapter will fully analyze and guide the reader through the definitions, history, and utility of what it means to be raced. Chapter 4 describes the methods used to assemble this study. It is intended to provide foundational structure to this work but not necessarily duplicability. No two individuals, much less groups of individuals, will ever see, experience, or understand an event in exactly the same way. Additionally, even the same individuals will respond differently given different interrogators, different locations, different places in time, and a host of other factors. Chapters 5 and 6 are analysis chapters. The goal of these chapters is to make sense of the immense amount of data collected from the participants. It is important to know that while every
single recorded word is not included in these chapters, the dominant themes and issues raised by the participants drive the discussion. Finally, chapter 7 is the conclusions chapter. Here, the research is summarized and analyzed. This, in turn, drives the creation of further arguments and suggestions for continuing research.

This is the strategy that I undertook as I journeyed into the thoughts and experiences of 10 African American males about their law school experiences. As with many journeys taken by vehicle, I had some idea of where I was going. However, I anticipated that there would be detours, road closures, and surprises along the way. I also firmly believed that within the unexpected the most fascinating discoveries occur. It is from these discoveries that I believe I can most contribute to the academic community, to scholarship on race and education, and, most importantly, to the experiences and achievements of African American males.
CHAPTER 2
Exploring the “Appropriate Place” for African American Law Students: A Literature Review

Introduction

As discussed in the preceding chapter, my personal experiences caused me to struggle with Sander’s mismatch theory. Concepts like equity, equality, fairness, and justice all seemed to be in conflict as I read Sander’s thesis and considered the lives of the students about whom he was purportedly concerned. His insinuation of caring seemed incredible and unlikely, but, I recognized that I had neither the breadth of knowledge about Sander, the mismatch theory, nor the law school lives of African American students to suggest an alternative theory. I concluded that doctoral-level research and analysis along with a thorough understanding of Sander’s mismatch theory was required for me to feel comfortable refuting what my instinct already told me was untrue for the vast majority, if not all, of Sander’s intended “beneficiaries.” This chapter frames the years of reading, research, and analysis that have gone into understanding Sander’s mismatch theory.

As with the rest of this dissertation, my framing occurred through a critical race theory (CRT) lens. CRT suggests that an analysis of Sander’s theory must include, at least, a consideration of: (a) the normative nature of racism, (b) the opposite of interest convergence
(which we could call “interest divergence”), (c) the social construction of race, (d) the intersectionality of the students, (e) the unique voices of color brought by the students, and (f) positive transformation (Delgado & Stefancic, 2001). While some of the opposition to Sander came from academics well versed in CRT, none has integrated CRT into a qualitative study similar to this dissertation; nor have previous works delved into the very idea of what it means to be raced and its relevancy to any response to Sander. This chapter will present Sander’s mismatch theory, as well as the litany of opposition to Sander. The next chapter will offer an analysis of what it means to be raced.

Sander’s opponents may suggest that I am only perpetuating his rhetoric by addressing his conclusions in this dissertation. To an extent, I may be. However, my intent is not to focus on Sander, but, instead, to focus on those individuals whom Sander purports to help. My readers need to understand Sander’s argument in order to appreciate why the voices that follow in this study must be foregrounded against the mismatch theory.

Moreover, on February 21, 2012, the United States Supreme Court granted petition to hear Fisher v. University of Texas at Austin. This will be the first time that the Court has taken the opportunity to reconsider Grutter v. Michigan (2003). Grutter was decided one year before Sander’s mismatch hypothesis was published in the Stanford Law Review. Therefore, this will be the first time the Court has had the opportunity to apply Sander’s theory to a matter presently before the Court. For those who consider Sander’s suggestions incomplete or incorrect, it is critical that they immediately present their research, their theories, and their recommendations to the Court and to the public.

This chapter will help place Sander’s ideas within a political policy context. It is important to consider Sander’s recommendations beyond their merely academic impact. As
previously described, his statements will have implications within courts and legislatures, to lobbyists, and beyond. By considering the real-world impact of Sander’s work, I hope to suggest a similar application for my own work.

**Affirmative Action Policy in Higher Education Admissions**

Affirmative action in higher education serves two main purposes. One is to provide greater exposure of all historically marginalized groups to the institution of higher education. Another purpose is to provide greater life opportunities to groups that have historically been victimized by a racist society (Bowen & Bok, 1998; Moses, 2002; Moses & Saenz, 2008). In conceptualizing a racist society, it is important to distinguish racism from prejudice. Anybody is capable of showing prejudice; however, for racist action to occur, one must be in a position of power and privilege over another. Racism eliminates and subjugates – two activities for which power and privilege are prerequisites.

The politics surrounding affirmative action are some of the most polarized of any political issue (Curry, 1996; Intelligence Squared, 2007; Kennedy, 1986; Skrentny, 1996). Supporters (Crenshaw, 1998-2000; Guinier & Torres, 2002; Wise, 2005) of affirmative action in higher education contend that it is needed to rectify societal evils of the past and achieve equality. Such evils include, amongst other things, the exclusion of women and other historically marginalized communities from institutions of higher learning and exclusion from careers subsequent to such training. Equality is advanced by providing additional measures that support recruitment, admission, retention, degree completion, and career ascension by members of these historically marginalized groups.
Opponents (Connerly, 2000; Sander, 2004; Sowell, 1986) of affirmative action in higher education usually do not take issue with the fact of historic evils. However, equality, they argue, cannot be attained by treating individuals differently in the present. Equality, they argue, can only be achieved when all people attain equivalent standardized assessment outcomes. One example is the argument that the admission of all candidates into college and universities should be measured, in whole or in large part, by grade point averages and standardized test scores.

One of the most prominent arguments against affirmative action is the desire for a color-blind society (Connerly, 2000). Under this approach, no decision would involve any consideration of an individual’s race or ethnicity. Race, ethnicity, and any similarly defining traits would be “unseen” and, therefore, irrelevant. This idea is in tune with an oft-cited quote from a United States Supreme Court decision: “The best way to stop discriminating on the basis of race is to stop discriminating on the basis of race” (Parents Involved in Community Schools v. Seattle School District No. 1, et al., 2007, p. 748).

The opposing argument to this faction of the Supreme Court as well as Ward Connerly is that race is a bellwether for the health of our nation and that we ignore it at our peril (Guinier & Torres, 2002). In their book, Guinier and Torres argue for something called “political race.” They use the analogy of the miner’s canary as a symbol for race. The miners brought a canary into the mines with them. Due to its delicate respiratory system, a canary would stop breathing at the first sign of toxins in the air of the mines—well before humans would be affected—giving the miners notice and time to flee. In this manner, the authors argue that race and racial issues should be a sign to American society about issues that may already be significant, but on the cusp of becoming even larger. Just as the miners know that the problem is not with the canary, but with the air around it, Guinier and Torres suggest that the problem is not with race, but with
the issues that surround it. If the miners assumed the bird was simply weak and not heed the warning, they would die. In the same vein, the authors suggest that ignoring problems identified as “merely racial” will likely take a far greater toll on a wider band of America than anticipated.

Another argument against affirmative action is that it allows for the admission of less “meritorious” or deserving applicants. Sander’s (2004) analysis relies, in large part, upon this premise. If non-European American students do not score the same or better on standardized testing and grading, they are considered less meritorious of admission. However, as Jackson and Moses (2009) showed, merit can have competing interpretations (p. 18). In their analysis of affirmative action as it was being debated over a proposed amendment to Colorado’s Constitution, they evaluated the way in which differing sides framed the concept of merit. One debater, Jessica Corry, represented the anti-affirmative action coalition while Melissa Hart represented the other. According to Corry, affirmative action programs ignore merit, causing students admitted under such programs to feel, and others to see them as, inferior or second-class citizens. Hart discussed what women and students from historically marginalized communities might bring to the classroom as evidence of their merit for higher education admissions. She saw merit as an expansive concept, one that not only includes traditional ideas of academic merit, but that also goes beyond academic credentials as measured by GPAs and standardized test scores. Corry viewed the idea of “merit” in a restricted sense (i.e., academic qualifications only) whereas Hart saw it in an expanded sense (i.e., social-experiential as well as academic qualifications).

Lastly, another argument against affirmative action is that it “stigmatizes” the recipients and therefore reduces their credibility (Eastland, 1992). This argument is premised on the idea that once people are labeled affirmative action recipients, they will never know whether their accomplishments are due to their own efforts or due to affirmative action. They will, therefore,
forever live with an affirmative action label attached to everything they do. This conceptual stigma harkens back to the days of *The Scarlet Letter* (Hawthorne, 1850). However, research does not bear out such stigma. For example, most recently, researchers surveyed 610 students at seven public law schools and determined that minorities at affirmative action schools felt just as good about their qualifications and about how others treat them as minorities at non-affirmative action schools (Onwuachi-Willig, Houh, & Campbell, 2008).

In deciding whether affirmative action is warranted and, if so, whether to use it, a pivotal consideration is the purpose of attending college. The purposes may include: to heighten students’ knowledge, to prepare students for careers, to encourage students toward higher levels of research, to teach students how to critically analyze, and to prepare students to be better citizens. Gutmann (1987) suggested that institutions of higher learning “provide a realm where new and unorthodox ideas are judged on the intellectual merits; where the men and women who defend such ideas, provided they defend them well, are not strangers but valuable members of a community. Universities thereby serve democracy as sanctuaries of nonrepression” (p. 174). While participants with similar mindsets could conceivably create “new and unorthodox ideas,” the research on the educational benefits of diversity suggests that varied mindsets would more likely create intellectually debatable issues than would a homogeneous group (Antonio, 2001; Chang, 1999; Gurin, Dey, Hurtado & Gurin, 2002; Moses & Chang, 2006). While thresholds must be maintained to assure that all participants are able to engage actively in debate, a standardized test administered to students with varied life and cultural experiences is intended to determine standard modes of thought (Helms, 1992). To obtain differentiation, institutions of higher learning must search for prospects with experiences and talents distinct from one another. Affirmative action is a tool for recruiting, admitting, matriculating, and retaining varied students.
If the previous assessment justifies the use of affirmative action, another question remains: Why use affirmative action as opposed to some other tool? Moses suggested that “affirmative action is necessary because it fosters students’ self-determination by playing a crucial role in expanding their social contexts of choice, both while they are students and afterwards” (Moses, 2002, p. 107). Moses argued that affirmative action expands the life choices of its recipients. Moreover, she proposed that one outcome is increased pride for the recipients because they “get the message that their race or ethnicity [and I would add “or gender”] is considered important enough to be used as a qualifying factor for university admissions” (p. 131). Similar to the athlete, the musician, the legacy, or a variety of other recruits, Moses advised that affirmative action recipients should find pride in what I call the gift\(^{12}\) that they bring to their institutions of higher learning. This gift may be found in, amongst other things, experiences, perspectives, and ideologies. Affirmative action supports this recognition in a way that other tools may not. Moreover, affirmative action does this in a manner that “does not significantly diminish the self-determination of white students” (p. 137).

**Mismatch Theory**

In November 2004, Richard Sander, a Professor of Law at the University of California, Los Angeles (UCLA), School of Law, published a now oft-cited piece about affirmative action. His primary question was “whether affirmative action in law schools generates benefits to blacks\(^{13}\) that substantially exceed the costs to blacks” (Sander, 2004, p. 369). While it is difficult

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\(^{12}\) Borrowed from various Du Bois writings about gifts (e.g., W.E.B. Du Bois, *The Gift of Black Folk* (1924; reprint, New York: AMS Press, 1971)).

\(^{13}\) Although I previously stated my preference for using the term African American, I will mostly follow Sander’s (and the critics’) use of the term black throughout this chapter.
to determine exactly which benefits Sander included in his analysis, he clearly argued that the “bad outcomes” result in: “higher attrition rates, lower pass rates on the bar, [and] problems in the job market” (p. 370). He concluded that affirmative action “produces more harms than benefits” (p. 371). More specifically, he advocated that “a strong case can be made that in the legal education system as a whole, racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system” (p. 372).

Sander’s conclusions are sometimes labeled the “mismatch theory” (Ayers & Brooks, 2005; Delgado, 2007; Harris & Kidder, 2004/2005; Sowell, 2004). Sander gives credit to Summers (1970), Sowell (1986), and Wangerin (1989) for coining the phrase “mismatch hypothesis.” In short, according to mismatch theorists, African American recipients of affirmative action are “mismatched” with the law schools to which they were admitted, and end up with lower achievement and success as a result of their matriculation. Following Sander’s logic, if African Americans are matched with their “appropriate” schools, there would be greater benefits and fewer costs. By “appropriate,” Sander means a school that has a median LSAT score and UGPA closely equivalent to those of the applicant. This, Sander concluded, would benefit African Americans in law schools and the legal profession.

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14 With the exception that Sander does identify “higher prestige” as a benefit (Sander, 2004, p. 371).

15 The articles cited have interchangeably used “mismatch theory” and “mismatch hypothesis.” I will attempt to maintain consistency with the original author’s preference.
Sander’s guiding assumptions.

Sander’s conceptual framework for the mismatch theory is premised upon certain assumptions. These include, but are not limited to: (a) an American societal goal is racially integrating the country, (b) affirmative action has primarily and historically been justified by “its impact on minorities” (Sander, 2004, p. 368), and (c) a color-blind system of admission is preferable to one that is not.

First, Sander assumed that racially integrating America is a societal goal (p. 368). One flaw in his study is that American society has never fully embraced nor acted upon a goal of full racial integration in education or otherwise (Ladson-Billings, 2007). Instead, the remedies awarded pursuant to *Brown v. Board of Education* (1954) were a matter of certain African American interests converging with those of European Americans (Bell, 1980). Bell’s analysis was supplemented by the fact that the initial *Brown* decision was made without any judicial remedies to enforce the holding.

Next, Sander argued that diversifying American campuses was an institutional justification for affirmative action, however, he immediately proceeded to assume that affirmative action has primarily and historically been justified by “its impact on minorities” (Sander, 2004, p. 368). He said, “Few of us would enthusiastically support preferential admission policies if we did not believe they played a powerful, irreplaceable role in giving non-whites in America access to higher education, entrée to the national elite, and a chance of correcting historic under-representations in the leading professions” (p. 368). He emphasized the identity of the recipient when he connects “blackness” to being a beneficiary (p. 369). In so doing, Sander viewed affirmative action in a monocular fashion. Throughout his analysis, Sander ignored or
avoided any serious analysis of potential benefits to institutions, American society, or democracy.

Sander immediately confounded his “racial analysis” by pointing out that “UCLA’s diversity programs had produced little socioeconomic variety” (p. 371). Here, he changed the nature of his outcome variable from a racial emphasis to a socioeconomic emphasis. Substituting socioeconomic diversity for racial diversity has become the call of the neo-liberals and neo-conservatives in affirmative action dialogue (Malos, 2000; Slater, 1995). This substitution suggests a “color-blind” approach to affirmative action, generally, and to educational admissions policies, specifically.16 Color-blindness is discussed, in depth, in Chapter 3.

Moreover, Sander’s concepts of success and admission standards should be questioned. In his analysis, he pointed to the period 1964-1967 as the time frame “when law schools were eliminating the last vestiges of discrimination” (Sander, 2004, p. 377). He appeared to believe that discrimination in law school admissions was defeated some 40 years ago and, at that time, African Americans gained “equal access” (p. 377). Significant research has shown that discrimination in law schools has not been defeated (Bell, 2004; Bonilla-Silva, 2006; Littlejohn & Rubinowitz, 1987; Loury, 2002), yet Sander does not consider any such findings.

Interestingly, part of Sander’s hypothesis appears to be coming true. He suggested that “about 86% of blacks currently admitted to some law school would still gain admission to the system without racial preferences” (p. 373). At the time that he collected his data, fall 2001, African Americans made up about 7.7% of first-year enrollment. As of fall 2008, in a time when Ward Connerly’s American Civil Rights Institute-sponsored state initiatives have either taken

16 Sander also completely avoided the reality of law school tuition. Unless financial packages support the admission practices, it is virtually impossible to change the financial restrictions of a law school education, and, thus, the “socioeconomic variety” of the applicant pool.
effect or been substantially considered across the United States, African Americans’ first-year enrollment has decreased to approximately 7.2%. That is approximately a 7% drop in first-year enrollment. Sander’s 86% hypothesis, obviously, would represent a 14% drop in current enrollment. Further research should seek to determine if the “success” variable predicted by Sander has also come to fruition.

Critiques

The critiques of Sander’s mismatch hypothesis are many and deep (e.g., Ayers & Brooks, 2005; Camilli, Jackson, Chiu, & Gallagher, 2011; Chambers, Clydesdale, Kidder, & Lempert, 2005; cummings, 2006; Harris & Kidder, 2004/2005; Moran, 2005; Weeden, 2006; Wilkins, 2005). An even stronger indication of an error in his analysis is that Sander’s hypothesis has attracted critiques from academics in law, education, statistics, and beyond. Generally, critics have challenged Sander’s analysis, metrics, and methodology. Examples include charges that Sander ignored alternative explanations such as racism within law schools and the legal curriculum, as well as economic hardships (Delgado, 2007). Delgado also suggested that Sander may have been so “predisposed to show that affirmative action was counterproductive [that] he didn’t think to ask what the black drop-outs were doing” (p. 648). Moreover, attempted replications of Sander’s study have raised doubts about the accuracy of his reported correlations (Ho, 2005a; 2005b). Using an economic analysis of the law, critics have questioned Sander’s definition of success, which assigned a value of zero to an incomplete law school education. Camilli, Jackson, Chiu and Gallagher (2011) suggested “that regression analyses of the kind

conducted by Sander (2004; 2005) are incapable of producing credible estimates of causal effects” (p. 31). Sander has denied such allegations (Sander, 2005a; 2005b).

In what follows, I thoroughly discuss the critical analyses surrounding Sander’s research and theory. I categorize each into quantitative critiques or theoretical critiques. I analyze how each critique has contributed to the literature on the mismatch theory, as well as its relevance to my study. Ultimately, I show that a deeper understanding of the experiences of the African American law students critiqued by Sander is essential to understanding Sander’s data and the effects of applying the mismatch theory.

**Quantitative.**

In addition to being a professor of law, Sander holds a Ph.D. in economics from Northwestern University. Likely as a result, he focused on quantitative methods for the creation of the mismatch theory. Most critics, therefore, have also engaged in quantitative analysis of the theory. In May 2005, Sander issued “A Reply to Critics” in an epic edition of the *Stanford Law Review*, which introduced readers to four attacks on Sander’s theories and methods and ended with his response. Ayers and Brooks (2005) began by providing a response that “refutes the claim that affirmative action has reduced the number of black lawyers” (p. 1809). Instead, these authors suggested that “the elimination of affirmative action would reduce the number of [African American] lawyers” and that their data suggested “an equally plausible ‘reverse mismatch effect,’ where the probability of black law students becoming lawyers would be maximized under a system involving an affirmative action program with larger racial preferences than those presently in place” (p. 1809).

Ayers and Brooks restricted their arguments to Sander’s quantitative analyses. First, they considered the various weaknesses in conclusions made from Sander’s regression analysis.
Second, they considered probability curves, created both by Sander and by them, and the extent to which these curves undermined Sander’s theories. Third, they contradicted Sander’s conclusions about the correlation between bar passage rate and law school attended as well as the ultimate population of Black lawyers. Lastly, they critiqued Sander’s paternalism regarding rejecting Black affirmative action recipients and instead called for better distribution of information to applicants about their likelihood of success at any particular law school. Ultimately, Ayers and Brooks questioned Sander’s interpretation of his own data and the conclusions he ascribed to affirmative action.

In the same *Stanford Law Review* volume, Chambers, Clydesdale, Kidder, and Lempert (2005) argued that Sander “significantly overestimated the costs of affirmative action and failed to demonstrate benefits from ending it” and that “the conclusions in ‘Systemic Analysis’ rest on a series of statistical errors, oversights, and implausible assumptions” (p. 1857). Similar to Ayers and Brooks (2005), Chambers et al. suggested that implementation of Sander’s recommendations would lead to a much larger decline in matriculation by African American law students than Sander suggested (p. 1860). Noting that Sander based his analysis on a quantitative method known as grid modeling, Chambers et al. asserted that “the grid model cannot provide even a loose estimate of how many African Americans would in fact matriculate in law school, but Sander, though recognizing that the model cannot tell us what African Americans would actually do, in the end treats it as if it does” (p. 1863). Their research led them to contradict Sander and conclude that ending affirmative action would reduce the number of students for two reasons.

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18 By paternalism, I adopt cummings’s (2006) definition of “attempting to exercise control over another individual that purports to be implemented in the best interests of that individual” (p. 27). In Sander’s articles, he argues that African American law students are mismatched with their appropriate institution and would be better served at less elite or rigorous schools. As cummings noted, “Sander seeks to substitute his judgment for the very students that are making that decision for themselves. This is paternalism in its starkest form” (p. 31).
One, students whose LSAT scores and UGPA's "are so low that they could not get into a school even if they applied to a broad range of schools" would be lost and, two, that "some African Americans who could get into some law school somewhere would no longer choose to apply to law school, or would apply only to schools that would not admit them, or would be accepted someplace but decide not to attend" (pp. 1867-1868).

Next, Chambers et al. critiqued Sander's statistical analyses employed in "Systemic Analysis." They noted, "Sander rests all his important claims about black student performance on statistical analyses. If his analyses are inadequate, his conclusions are unreliable" (p. 1868). They initially referenced his failure to report a Nagelkerke R-Square\(^{19}\) to show the strength of associations reported in his regression models. The results of their computation, an R-Square of .325, suggested that Sander's table fails to fully explain what leads to bar passage (p. 1870). Moreover, according to Chambers et al., Sander's model, while highly accurate in predicting who will pass the bar, does a dismal job "in predicting who will fail, as it correctly labels as 'fails' only 129 out of the 1074 sample students who actually did fail, for a success rate of only 12%" (p. 1871). They concluded this phase of their critique by noting:

Numerous other statistical problems can be found in Sander's analysis. These include excluding race as a cause of outcomes in models plagued by multicollinearity, neglecting to model selection effects when predicting student performance, and treating law school tier not as a set of nominal variables but as an interval scale measure. In sum, the statistical misstatements and modeling

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\(^{19}\) Briefly, "R" is an abbreviation for correlation coefficient, which is a measure of linear association. "The closer R is to 1, the stronger is the linear association between variables . . ." (Freedman, Pisani, & Purves, 2007, p. 126). R-squared indicates how well outcomes can be predicted by a statistical model. R-squared values range from 0 to 1, and an R-squared of 1 is optimal.
errors in *Systemic Analysis* mean that the conclusions appear to have far more evidentiary support than they in fact do (pp. 1872-1873).

Chambers et al. go on to point out a variety of other concerns with Sander’s data. For example, he chose to use the National Survey of Law School Performance (NSLSP) for some analyses and the Bar Passage Study (BPS) for other analyses. Sander’s choice of the NSLSP led him to conclude that African American students would perform as well as Whites absent affirmative action (p. 1877). Chambers et al. argued that had he continued to use the BPS, “he would have reached quite different conclusions, conclusions that would have been more consistent with almost all of the research that has been done relating standardized test scores among African Americans to later graded performance” (p. 1877). They noted that “studies conducted by the Law School Admission Council (LSAC) have shown more than once, even among white and African American students with identical entry credentials, African American students typically receive somewhat lower law school grades than whites” (p. 1877). This is particularly fatal to Sander’s theory. His premise rests on the statistical deviation between African Americans and European Americans creating the “mismatch” in appropriate institutions. According to Chambers et al., if that variable is eliminated, typically, the outcome remains the same.

Some critics may argue that Chambers and colleagues’ findings regarding matching standardized scores between European Americans and African Americans is further support for Sander’s suggestions about the capabilities of African American students; however, such a claim would be contradictory. If one is aligned with Sander’s hypothesis, then an African American scoring on par with a European Americans counterpart is equally “as smart.” This suggests that something more contributes to equal “success” within law schools. One such variable that has
been repeatedly attacked is the law school climate and the embedded hostility toward historically marginalized groups (Allen & Solórzano, 2000-2001; Guinier, Fine & Balin, 1994-1995; Homer & Schwartz, 1989-1990). In order for critics to assume a myopic view of intelligence or admissibility they must ignore certain factors. These factors include, but are not limited to, first-generation status, full-time or part-time employment while attending law school, and lack of mentoring from family or friends.

Next, Dauber (2005) added to the criticism of Sander’s research by stating that “Sander has muddied rather than clarified the waters with a flawed and ultimately misleading contribution” (p. 1902). In large part, her criticism focused on Sander’s inappropriate use of a dummy variable, using White lawyers as a stand–in for Black lawyers. Instead, she argued that “black law students with similar academic credentials who attend higher-status schools do better, not worse, than comparable black law students attending lower-prestige schools in terms of bar passage rates” (p. 1902). Ultimately, she pointed to the Stanford Law Review and its failure to engage in a peer-reviewed process as the critical flaw in disseminating Sander’s research.

Sander’s response to the concert of opponents in the Stanford Law Review issue was multifaceted. He portrayed his hypothesis as receiving “predominantly favorable” responses and claimed that the critiques are “toothless” (p. 1964). Interestingly, he considered the Wilkins rebuttal, which I identify below as one of the impetuses for this dissertation, as the strongest of all the published critiques. Before engaging each of his critics individually, he discussed a data set made up of individuals he defined as his “‘second-choice’ sample” (p. 1973). This is the group of African American law students who were admitted into an elite institution yet who elected to go to a lower ranked school. According to Sander, this group produced “outcomes closer to the white average than the black average” (p. 1974, emphasis in original). The
implication is that this is further support for the mismatch theory. The arguments against such an implication include, but are not limited to, the analysis made by many students (not just the Black students that Sander qualitatively analyzed) to incur less debt by attending a less selective law school closer to home—so that employment could be continued, housing shared, families maintained, and more. There is no indication that Sander accounted for these relevant, yet non-quantified, rationales.

Sander dispensed with the critics by specifically addressing each of their central complaints. With the quantitative critics, he agreed with certain facets of their arguments, but ultimately dismissed their conclusions as either misinterpretations of his argument or the data. Notably, Wilkins’ argument, discussed below, received as much, if not more, space than any other critique.

In addition to the Stanford Law Review, the Yale Law Journal produced a three-part analysis of the mismatch theory that included a comment by Daniel Ho, a response by Sander, and a reply to that response by Ho. Ho (2005a) argued that Sander misapplied “basic principles of causal inference” by relying on “unjustifiable assumptions” (p. 1997). The faulty assumptions, Ho argued, all led Sander to articulate erroneous conclusions. Ultimately, Ho concluded that, although they “get lower grades as a result of going to a higher-tier school” (p. 2004), “for similarly qualified black students, attending a higher-tier law school has no detectable effect on bar passage rates” (p. 1997). In summary, Ho stated that “whichever way one cuts it, there is no evidence for the hypothesis that law school tier causes black students to fail the bar” (p. 2004).

Sander (2005a) responded by stating that “Ho seems to miss the central analytical framework of my article, is vague in his claims of bias, and offers an alternative approach that violates the very methodological precepts he lays out” (p. 2005). Sander went on to argue, “there
are two fundamental problems with Ho’s analysis. First, he assumes that the ‘tier’ variable in the BPS [Bar Passage Study] data set is a perfect hierarchical measure of school prestige” (p. 2009) and, second, “unobservable characteristics” (p. 2010). Sander concluded by suggesting that “criticism is vital, but critics who wish to reject the mismatch theory outright have a responsibility to offer their own explanation and cures for the disparate harm our current system inflicts on blacks” (p. 2010). As I have stated previously, it is this paternalistic approach of “infliction on blacks” that my study’s data challenged, as I analyzed the voices and experiences of those who were “harmed” or, according to Sander, avoided such “harm.”

Ho’s reply (2005b) argued that “the descriptive facts Sander presents may account for some of the reasons for affirmative action, but they do not address the consequences of affirmative action” (p. 2011). Ho’s three key criticisms of Sander included: (a) that “Sander’s control group, as he conceived it, is invalid” (p. 2012); (b) that Sander ignored the “rule of interference” which propounded “that controlling for a consequence of the cause is never justified and will never produce the right causal effect” (p. 2012); and (c) that Sander introduced “a textbook example of bias induced by controlling for a consequence of the cause” (p. 2014). Ultimately, Ho suggested that Sander (re)introduced an important dialogue about affirmative action, but mishandled the opportunity.

Ho’s conclusion that Sander’s regression suffered from post-treatment bias was supported by Barnes (2007). She added to the list of quantitative researchers who found that Sander’s hypothesis was not supported by the very data he used. Her analysis was new because she did not solely analyze Sander’s mismatch theory, she considered “two theories that seek to explain black students’ depressed achievement in law school: the mismatch theory and the race-based barriers theory” (p. 1765). Using three variables, race, school type, and credentials, she investigated three
performance measures: bar passage, graduation, and obtaining a well-paying job after law school (which she defined as earning $40,000 or more in 1995) (p. 1775). Statistically, Barnes argued that “ending affirmative action would lead to 13.4% fewer black lawyers, 22.6% fewer new black law graduates, and 23% fewer black law graduates with well-paying jobs” (p. 1800). She concluded that the difference in grades between Black and White law students is not attributable to mismatch. “Instead, some form of latent race-based discrimination may be at play” (p. 1807).

Furthermore, her data suggested a “reverse-mismatch”—that African American law school students are more likely to graduate from elite institutions (p. 1789). Finally, she “suggests that the legal academy should prioritize further investigation to determine what specifically about law school culture has negative (or positive) consequences. The challenge is to determine what in law school culture helps students, particularly minority students, thrive” (p. 1806). One of the goals of this dissertation is to accomplish just that—to hear, through the voices of former law school students, what “helps students, particularly minority students, thrive.”

Rothstein and Yoon (2008) engaged in one of the most current and in-depth quantitative critiques of Sander’s ideas. Arguing that Sander’s theory implicitly attributes any Black underperformance to mismatch, Rothstein and Yoon implemented a strategy of comparing Black students with White students with the same credentials irrespective of the school that they attended (p. 683). They argued that their approach was preferable to Sander’s because “to identify the mismatch effect of affirmative action, Sander must correctly estimate four effects from three different statistical models. If any of these models goes wrong, the answer obtained at the end of the process will be biased” (p. 685). Rothstein and Yoon concluded, contrary to Sander’s suggestions, that “in the absence of affirmative action, . . . the number of black students entering law school would fall by about 60 percent, while black representation at the most
selective schools would fall by 90 percent” (p. 711). Furthermore, their analysis “casts doubt on the mismatch hypothesis, particularly as it applies to elite schools” (p. 711), and they warned that “there is no plausible interpretation of the data under which the elimination of affirmative action would increase the number of black lawyers, or even decrease it by a small amount” (p. 712).

In addressing several caveats to their research, Rothstein and Yoon warned that they “do not explore the cultural, pedagogic, or other features of the law school environment that account for these effects” (p. 653). It is that void that I hope to partially fill with this research. This dissertation explored the cultural features of the law school environment and heard from former graduates how the pedagogy and institutional environment(s) affected their experiences.

Recently, Camilli, Jackson, Chiu, and Gallagher (2011) engaged Sander by analyzing whether positive effects exist from supporting the mismatch hypothesis. Their analysis furthered the current research because they engaged the mismatch theory by looking at potential benefits instead of potential detriments, as focused on by previous articles. The authors grounded their theory in similar studies by Alon and Tienda (2005) and Dale and Krueger (2002). Focusing on the “match effect” that would occur if Sander’s hypothesis held true, the authors considered the value added effect of attending an elite law school. According to the authors, using the LSAC National Longitudinal Bar Passage Study for their data source,

some evidence was found supporting the negative match hypothesis for Black and Asian law school students in the lower propensity range. Yet, the match effects for bar passage in the upper range were much lower than Sander’s reports, and did not approach statistical significance at \( \alpha = .05 \). (p. 203).

They concluded that “the bar passage rates difference seems very modest relative to the substantial social networking advantages of elite school attendance” (p. 204) and highlighted
Sander’s own acknowledgement that “he did not consider ‘perhaps the single greatest benefit of affirmative action in law school: its role in building the long-term careers of Black lawyers and giving them a place in the most elite ranks of the profession and American society’” (p. 207). It is, in part, the evolving careers of African American former law school students that I engaged in this dissertation.

In summary, I focused on three central strands highlighted by Sander’s critics. First, they suggested that Sander’s definitions and data interpretation failed because there was greater likeness between students than Sander concluded. They also concluded that the population of African American law students would be reduced far more than Sander proposed. Finally, they argued that, as a quantitative exercise, Sander could not support the causal claims he made between affirmative action and outcomes for African Americans in law school.

**Theoretical.**

Wilkins (2005) wrote the last article in the *Stanford Law Review’s* series of criticisms of Sander’s work. However, Wilkins undertook a theoretical rebuttal to Sander’s hypothesis, rather than a quantitative one. Wilkins asserted that, under the mismatch theory, “Sander must prove that grades are more important than law school prestige for those black law students who actually become lawyers” (p. 1918). He then argued that Sander provided only one piece of evidence to support his burden: that according to the first wave of responses to the After the JD (Dinovitzer, Garth, Sander, Sterling, & Wilder, 2004) study, “black lawyers with high grades from low-status schools are as—if not more—likely to obtain high-paying jobs than their counterparts from higher-status schools with lower grades” (p. 1918). Wilkins contended that “this single piece of evidence does not come anywhere close to proving that most black lawyers
would be better off in a world in which the vast majority of them would attend law schools
twenty to fifty places below the ones that they currently attend” (p. 1919).

In a four-part analysis, Wilkins recounted the beneficial history of affirmative action in
law schools and the legal profession, weighed the importance of attending an elite law school
against the importance of grade point average, questioned the validity of the bar exam and its
connection to law school or the practice of law, and, finally, suggested alternatives for analyzing
and addressing the issue that Sander claimed is paramount: the disproportionately lower grades
and bar passage rates of African Americans in law school. Most importantly, however, is that
Wilkins provided a point of access that led in part to my dissertation work. First, he stated that,
it is only by placing affirmative action in the broader context of how careers are
actually forged in today’s legal marketplace that we can reach credible judgments
about whether such policies hurt some of their intended beneficiaries, and, more
importantly, what we might do to rectify this situation (p. 1920).

Second, he interviewed African American Harvard Law School alumni and engaged in counter-
storytelling to stress the benefits of a Harvard Law School education. The similarities to my
research are obvious. Like Wilkins, I interviewed alumni in order to explore how careers were
forged in today’s legal marketplace and I employed storytelling (Delgado & Stefancic, 2001) to
stress the personal experiences of alumni and to determine the costs or benefits each incurred.

In his dissent to Wilkins’ response, Sander admitted a crucial reality behind the mismatch
theory that often goes overlooked by its proponents. He stated, “Systemic Analysis does not (and
does not pretend to) consider all of the costs and benefits of racial preferences” (p. 2005). It is
this exploration of costs and benefits that I believe this dissertation adds to the established
literature on the mismatch theory. Furthermore, in responding to Wilkins, Sander raised another
valuable issue when he stated: “Doing poorly in law school could be a significant long-term handicap for lawyers in two other ways. First, how much one learns in law school could actually influence how good a lawyer one becomes after law school” (p. 2006). Although there is a second “handicap” referenced by Sander, it is the first that I believe this dissertation also explores: How do law students define what they learned in law school and what is the connection between what students learn in law school with how good a lawyer they become? Finally, Sander’s response to Wilkins touched on a third topic of importance to this work: the paternalism that results from an adoption of the mismatch theory. Sander suggested that the typical Black law school graduate “would have gotten a significantly better job had he been somehow able to bypass affirmative action in law school” (p. 2006). It is this presumption that African American law students are unable to choose the most appropriate law school for their individual goals that I also explore through an examination of the lives of 10 African American former law school students.

In considering the history of mismatch theories prior to Sander’s, Harris and Kidder (2004/2005), a professor of law at UCLA and a researcher at the Equal Justice Society, respectively, assigned several other errors to Sander’s conclusions. They pointed out that Sander’s theories were previously argued by a host of other individuals, including, but not limited to, Stephan and Abigail Thernstrom, Ward Connerly, Walter Williams, Gail Heriot, and Thomas Sowell. Using Thernstrom’s erroneous prediction that California’s Proposition 209 would redistribute African American undergraduates from UCLA and UC Berkeley to campuses like UC Riverside, Harris and Kidder pointed out that such “benefits” never materialized, and that in 2004 UCLA provided the most applicants to law schools in the country (paragraph 3).
They then addressed Sander’s theory that, absent affirmative action, African Americans would relocate to more “appropriate” law schools by questioning his assumption “that law schools are fungible in terms of attractiveness to black applicants” (paragraph 9). Instead, they argued that there is no reason to believe that an African American candidate from New Jersey (a metropolitan area with a significant minority population) would attend the University of Montana (an area with a small minority population).

Harris and Kidder (2004/2005) also disputed Sander’s conclusions by referencing the Bar Passage Study (amongst others), which found that Black students with the same entry credentials as their White classmates within the same law school still earned lower grades. This led to a deeper analysis of causes and includes theories like “underperformance” and “stereotype threat” (Perry, Steele & Hilliard, 2003, p. 109). It is this deeper levels of analysis that this dissertation begins to address.

Individually, Kidder (2005) dealt with many of Sander’s quantitative issues in his Tomás Rivera Policy Institute executive summary. Calling Sander’s conclusions “speculative,” Kidder concluded that “based on 2004 admission data, an annual decline in African American attorneys of 30% to 40% is more likely if affirmative action were ended” (p. 1). Kidder discussed three primary reasons that led to Sander’s estimates being too optimistic. First, the quantity of applications and acceptance rates in 2001 (the year from which Sander drew his data), were an anomaly due to the national economy and job market. Second, in using another researcher’s (Wightman’s) model, Sander simply ignored the researcher’s “warning that the grid model is ‘less realistic in its assumptions’ because it ignores the schools to which minority students actually applied” (p. 3). Additionally, Kidder pointed out that Wightman found “that LSAT scores and college grades ‘are not significant predictors of graduation from law school’” (pp. 5-
6). Lastly, Kidder suggested that Sander impermissibly mixed his data by applying “his flawed interpretation of Wightman’s 2001 figures to the Law School Admission Council’s Bar Passage Study data, which tracked the 1991 entering class of law students” (p. 3) (emphasis added).

Kidder concluded by suggesting that “the number of black lawyers resulting from the 2004 admissions cycle would likely decline by 30-40% if affirmative action were not practiced” (p. 7). In questioning the idea of a mismatch, Kidder pointed out that “in 2001-2003, the top 26 law schools graduated about 1600 African Americans, with an impressive graduation rate above 96%, including 100% at Columbia, Georgetown, and Michigan” (p. 6). It is from these law schools that one finds the majority of law professors, federal judges, and partners at major law firms (pp. 7-8).

In connecting Sander’s critique of affirmative action to the theory of institutional diversity, Johnson and Onwuachi-Willig (2005) “re-cast the question posed by Professor Sander from ‘what’s wrong with affirmative action?’ to ‘how do we diversify our law schools?’” (p. 28). They critiqued Sander’s article by focusing on two points. First, they “contend that the focal point of ‘A Systemic Analysis of Affirmative Action on American Law Schools’ is unduly narrow” (p. 4). Second, they “examine critically Professor Sander’s assumption that relatively lower UGPAs and LSAT scores explain why African Americans fail to fare as well academically in law school as their white peers” (p. 4). They chose not to question the statistical conclusions reached by Sander. Instead, they argued that Sander chose to avoid the more difficult assessment of how “soft” variables, like a hostile law school environment, contributed to his conclusions.

The final articles that I will discuss were grounded on an analysis of privilege. Together, they questioned whose truths get priority over others and why. Moran (2005) summarized many of the authors described herein and concluded that there are six truths one must accept when
Sander’s “conclusions are adopted” (p. 48). The six truths are, essentially, contradictions to the very data used by Sander. An example, from “Truth Number One: The Best Blacks Are Simply Not as Qualified as the Best Whites,” is Moran’s critique of Sander’s failure to consider economic status, educational preparation, age, or the potential of stereotype threat in LSAT scores, UGPA, subsequent law school grades, and bar passage rates. Moran framed her argument in a manner that forced supporters of Sander’s hypothesis to be boxed into six beliefs and assumptions. Ultimately, she questioned why Sander’s argument received so much attention from the media while another study received none. That study, by Lempert, “showed that black Michigan Law School Graduates earn as much as white graduates, are as satisfied with their careers, and do more public service than whites” (p. 59).

Randall (2006) was much more direct in her response to Sander. She used the law school at which she is a faculty member as an example of how the LSAT has been and continues to be improperly considered. Specifically, she objected “to the use of LSAT cut-off scores, or any admission process that has a disparate impact on Blacks and other minorities” (p. 142). Moreover, she found that instituting a cut-off for applicants based on their LSAT scores is not only “clear evidence of institutional racism, but it is also evidence of systemic racism since many institutions—including law schools, the American Bar Association (ABA), and U.S. News & World Report—could change their policies, practices, or procedures, to use the LSAT ethically and responsibly” (p. 108). Her article discussed why the use of a cut-off score was not legally defensible and suggested many alternative approaches a law school could undertake to create a more diverse and successful law school class. She argued that given the disproportionate importance law schools have historically placed on an applicant’s LSAT score and the clear
evidence that the result discriminates against African American and Latino applicants, this practice must stop immediately.

Weeden (2006) adopted Randall’s argument, in part, when he directed that “admission standards should not systematically exclude any discrete group on the basis of disadvantage traceable to historical anti-competitive conduct” (p. 16). He accepted most of Sander’s arguments as logical and true, for example: “I believe that Sander is correct in concluding that, because of the larger boost given at top-tier schools to African Americans under affirmative action, law schools in the next tiers have no practical choice but to use segregated admissions tracks in the name of affirmative action” and “Professor Sander advances the common-sense argument that students with substantial gaps in LSAT score, undergraduate GPA and racial experience will not perform similarly on the bar, no matter what law school they attend” (p. 197). Weeden also argued for race-neutral admission standards, but unlike Sander who asserted that the current system is correct, Weeden argued that the current system needs reform. Using Bell’s (1980) theory of interest convergence, Weeden argued that “citizens must always engage in due diligence when considering whether policies allegedly designed to benefit minority groups actually benefit or harm those groups when the policies are implemented” (Weeden, p. 198).

cummings (2006) analogized Sander to a shark, nipping at the heels of affirmative action (pp. 796-797). As an author often associated with the critical race theory and LatCrit movement, Cummings is one of a few critics that brought CRT analysis to Sander’s hypothesis. After reviewing the host of earlier quantitative and theoretical critiques, Cummings focused on the privilege Sander enjoyed in advancing his hypothesis, yet never acknowledged. Referencing

20 Cummings intentionally does not capitalize his name.

21 LatCrit is a movement that developed from and is, in many aspects, analogous to CRT.
the experiences of indigenous peoples, cummings addressed the paternalistic nature of Sander’s suggestion that he knew what was best for African American students. cummings located Sander within a historical context that has led White males to engage “in the worst kind of clandestine racism: that of deciding as a member of the majority race what is appropriate for a minority race” (p. 830). cummings further historicized Sander’s article by educating the reader about Sander’s failures as an architect of UCLA’s post-Proposition 209 formula for admissions. Finally, cummings called Sander to task for using his biracial son “to authenticate and present himself as ‘non racist’ in divulging his data analysis” (p. 840), equating it to “I have a friend/cousin/niece or nephew who is (half) black” and for failing to appropriately credit the value that diversity brings to the law schools’ classrooms, a benefit that Sander should be well aware of given his position as a law school professor.

Delgado (2007) used critical race theory, of which he is considered to be a founding theorist, to engage a counter-narrative to Sander’s theory. Using two fictional characters, Delgado argued that “racism at the law schools and in the legal curriculum and sheer economic hardship are equally plausible hypotheses” for Sander’s mismatch theory (p. 644). Delgado addressed the issues of paternalism and Social Darwinism found within Sander’s writing and suggested that a logical extension would lead to the elimination of social security, veteran’s benefits, and national parks (pp. 645-646). Finally, using Dr. Martin Luther King, Jr. as an example, because he scored so poorly on the Graduate Record Examination (GRE) that he was unable to pursue a Ph.D. in sociology and enrolled in divinity school instead, Delgado suggested that

because [Sander] was predisposed to show that affirmative action was counterproductive, he didn’t think to ask what the black drop-outs were doing.
With their knowledge of the legal system, they may well be going on to careers of great worth, even if they are not practicing law. Sander defines success too narrowly (p. 648).

One of the goals of this dissertation was to engage a more nuanced analysis of success.

It is noteworthy that although some authors call for additional qualitative analysis of the issues surrounding the mismatch theory, there is a dearth of research based on a qualitative methodology. None of the literature examined here either claimed or appeared to be primarily qualitative. This dissertation is intended to address that gap and provide insight into the affected individuals and their experiences.

Conclusion

The Sander controversy is indicative of the larger debate over affirmative action. While Sander contended that affirmative action has worked to the detriment of African Americans, Rothstein and Yoon and others concluded that without affirmative action, the population of African American lawyers would be significantly smaller. In a deliberative democracy, this suggests the need for discussion of these concepts and issues within a variety of forums (Gutmann, 1987; Gutmann & Thompson, 2004). My research aims to contribute to this discussion. However, to intelligently consider the effect on African Americans and other historically marginalized communities, I must deeply examine what it means to be raced. That is accomplished through my conceptual framework, explained in the following chapter.
CHAPTER 3
Mapping the Race Track: A Conceptual Framework

“I’m living in your system and you tell me it’s just.
But, there ain’t no justice, just us!”

Ruthless Rap Assassins (1990)

The above statement summarizes the conflict many historically marginalized students face in many American law schools. Each student struggles to maintain his or her own unique racial identity within one of the most elite institutions in American society. Law school as an institution must acknowledge as its pinnacle of authority the United States Supreme Court whose hollowed walls proclaim, “Equal Justice Under Law.” As their personal journeys toward becoming lawyers both conform to and differ from statistical data showing that the law is anything but equal to communities of color, students must make sense of the reality that they are joining institutions where “there ain’t no justice, just us.”

Introduction

“Unless you know where you’ve been, you cannot know where you are going.” This statement, by an unknown author, answers why deconstructing race is not just helpful, but necessary to understanding one’s racial identity, as well as understanding how institutions not
only impact that identity, but are themselves altered by the presence of racial others. Deconstructing race helps illuminate a map showing how we arrived at today’s understanding(s) of race and the direction in which we might chart our course for the future. More specifically, properly theorizing race is essential to understanding the experiences of African Americans in law schools and hence to framing this dissertation.

This chapter defines that theoretical framework and grounds my study of African American male former law school students. It outlines the theories of race that underpin my analyses, drawing centrally on W.E.B. Du Bois, Michael Omi and Howard Winant, Eduardo Bonilla-Silva’s notion of color-blindness, and CRT, which as a racial theory generated primarily by legal scholars, is particularly salient to this topic. As the participants I interviewed for this dissertation navigated the terrain of law school, they struggled—consciously, sub-consciously, or, some would argue, unconsciously—with what it meant to be “a guest in someone else’s house” (Sotello Viernes Turner, 1994). As they entered the structures that guard one of the most elite of American institutions (the legal system), the participants, like the vast majority of students from historically marginalized communities saw few students, administrators, faculty, or pictures on the walls that looked like them. Within both a personal and social context, these students had to resolve the role (fluid as it may be) that race played in their studies and in their lives.

First, I offer definitions of race and racism, relying primarily on Omi and Winant’s notions of the paradigm of race and racial projects. Then, I examine Bonilla-Silva’s ideas of how color-blind racism continues to perpetuate the ownership status attached to law school admission and how “Whiteness as property” explains historically marginalized students’ continued existence as guests “in someone else’s house.” Finally, throughout this chapter as well
as this dissertation, I engage CRT to guide my understanding of the role that race has played within American law schools.

I must note, however, that as Brayboy (1999) pointed out, frameworks can be problematic in a study of this nature. As I analyzed the experiences of my participants, I imparted claims and offered suggestions about how race impacted them. But each of their journeys was unique and their lenses were not necessarily like my own. “It is important to ask how anyone can be an expert on someone else’s life” (p. 103). So, while my framework helped map my exploration, I remained aware and respectful of the various paths and considerations others chose to guide their own journeys.

**Race and Racism**

Critical race theorists often identify law professor Derrick Bell as the godfather of CRT. I acknowledge his invaluable contribution but begin my exploration of a critical race consciousness some 60 years prior to Bell’s birth. Though the term CRT had yet to emerge in popular literature, Dr. W.E.B. Du Bois engaged many of its tenets (Rabaka, 2007). He did so back in the late 19th century, far before the formal CRT movement found traction in the 1970s and ‘80s. Du Bois transitioned analysis from the historic plea for Negro rights to a questioning of the power dynamics and privileges that kept all historically marginalized communities oppressed and often unable to psychologically break their bonds.
Du Bois.

Du Bois defined race as “a vast family of human beings, generally of common blood and language, always of common history, tradition and impulses, who are both voluntarily and involuntarily striving together for the accomplishment of certain more or less vividly conceived ideals of life” (Du Bois, 1986, p. 817). As such, race is a categorization that connects and divides people within and without communities. It helps and hinders our ability to know who is “like” us. This suggests that if we know who is like us, who we are most likely to be in community with, we can find the people that are most willing and best able to support our needs and interests. However, because Du Bois’s definition does not get to the idea of privilege and power, it provides only a starting point in defining race.

To consider further the utility of racial definitions both inside and outside of communities, I suggest that racial ideologies originate at the intersection of fear and safety. Fear allows those in the most privileged positions to remind others of the perils of being anything other than the privileged race. Fear keeps historically marginalized communities from venturing far from their “approved locations.” Without the necessary support, they find themselves alone and vulnerable in a very hostile environment. Safety for the privileged lies in presumed physical safety as well as safety from more capitalistic concerns like maintaining property values, educational opportunities, and work. Safety for historically marginalized communities stems from a history of lynching, beatings, and false arrests at the hands of public and private “authorities.”

Du Bois’s work was brilliant in that it brought into the light the reality surrounding African American culture. He helped America dispel many of the myths that had perpetuated the fear European Americans had about African Americans (and, arguably, even some of the myths
that African Americans believed about themselves). By scientifically analyzing African American communities (Du Bois, 1899), he helped move academics who were interested in historically marginalized communities from the study of eugenics to ethnic studies. He fostered a monumental turning point.

However, Du Bois captured race as an historic event. His concepts were grounded in what had occurred to Africans and African Americans to bring them to their current struggle. He was able to ground much of his analysis in commonalities—for both historically privileged communities and historically marginalized communities. The level of heterogeneity found in the United States today did not exist during Du Bois’s time. The issue that must be added to Du Bois’s ideas is the continual nature of the struggle for power and privilege that grounds the utility of racism by any oppressor against the oppressed. Racism has evolved and will continue to evolve as privileged American communities work to strategically maintain power that was formed at the creation of the nation. Omi and Winant (1994) help us to better understand that ever-evolving process.

Omi and Winant.

According to Omi and Winant, “Race will always be at the center of the American experience” (p. 5). Their seminal text, Racial Formation in the United States: From the 1960s to the 1990s, provided a chronology of racial ideology through America’s development. Their analysis led them to confront what race had historically meant, extract the wheat from the chaff within those historical definitions, and suggest their own theory of “race”—known as racial formation.

Omi and Winant’s analysis of the historical paradigms of race fell into three categories: ethnicity, class, and nation. They explored each of these categories fully to explain why they
rejected each in coming to a more thorough definition of race. In brief, ethnicity was defined as a
group formation process based on culture and descent. Culture was categorized, amongst other
things, as religion, language, customs, nationality, and political identity. Descent, on the other
hand, was defined by heredity and a sense of group origins. From their perspective, the ethnicity
paradigm played a pivotal role in the 1920s to 1960s and has recently mutated into neo-
conservatism.

**Ethnicity.**

Ethnicity theory emerged in the 1920s as a challenge to then-predominant biologistic and
Social Darwinist conceptions of race. Herein, we begin to see the evolutionary modifications of
racial theory. Because the biologistic theory, grounded in Darwinian ideology, was still
significant to many, the culture and descent grounding involved in ethnicity theory suggested
that ethnicity “was socially ‘primordial,’ if not biologically given, in character” (p. 15). This is
significant because it allowed the framers of racial theory to move slowly regarding re-
conceptualization of racial groups. The framers were the dominant strata of society and this level
of control in categorization allowed them to maintain dominance and subjugation, even as they
gave up notions of biological difference.

Ethnicity theorists “saw race as a culturally grounded framework of collective identity”
(Winant, 2000, p. 178). The theory’s conclusion suggested that if each group merely symbolized
a varied strain of ethnicity, then each group should strive to assimilate into mainstream (read
European American/White) society as other groups, like the Irish, had demonstrated (Ignatiev,
1995). No greater weapon exists than one that defines a group as lesser because of their “traits”
and tells that group that their failure to ascend to equality is, obviously, their own fault since
other groups proved that it could be done. Ethnicity theory’s prescriptions for solving racial inequality were to blend, integrate, and assimilate.

Besides the inherent problems with fracturing society into an “us” versus “them” competition of who can assimilate fastest, ethnicity theory suffered (and continues to suffer) from the antithesis of its fracturing component. Ethnicity theory, as applied in an American socio-political arena, condenses each group into homogenous categories. Omi and Winant (1994) call this the “they all look alike” problem with ethnicity theory (p. 20). To magnify “the problem of the Negro” (Du Bois, 1903), European Americans have simultaneously limited the ethnic categories for others while maintaining the breadth of their own. Consider the national recognition given to St. Patrick’s Day, Notre Dame and the Fighting Irish, Columbus Day and the imperialistic colonialism of Italy and Spain, or the German traditions of Oktoberfest. For most European Americans, Omi and Winant argue, Black is Black, Asian is Asian, and so forth. European Americans celebrate and recognize the individuality within the category European American or White. But, at the same time, the dark peoples of Africa, or the Caribbean, or South America, or America, are all ethnically Black. All people from China, Japan, North Korea, South Korea, Laos, Cambodia, Thailand, and the like, are ethnically Asian. This allows dominant society to grossly exaggerate the characteristics of others, frame Asians as the “model minority,” and frame Blackness as the binary opposite of Whiteness.

Omi and Winant criticized the implementation of the ethnicity paradigm for a variety of reasons. First, the ethnicity paradigm ignored qualitative differences in the way peoples entered into American society. Examples of these qualitative differences include slavery, colonization, and racially based exclusion. Second, the ethnicity paradigm failed to recognize that distinctiveness from the White majority is often not appreciably decreased by adoption of the
norms and values of the White majority. Finally, the ethnicity theory invites the conclusion that all other groups are the same while Whites are privileged with variety; privileged because, despite their variety and the divisions it may cause, they are able to maintain dominance. This, in essence, becomes a double privilege (with an intentional nod toward Du Bois and the concept of double consciousness) because Whites are able to maintain their dominance both cumulatively and within their ethnic varieties. For instance, the property rights associated with being White (Harris, 1993) are not lost when one is “being Irish.”

Ethnicity does play a role in people’s lived experiences, but it is not synonymous with race. For many Whites, the unique histories captured through their ethnicity provide them with unique cultures from which they find pride, tradition, and sometimes even a shared language. The same can be said of Blacks and is often captured in the Pan-African movement. Here, Black ethnicity includes such variations as African American, Caribbean, Sub-Saharan African, and many others. Yet however important their ethnicity may be to themselves and their community, to the dominant society what matters is their race (i.e., that they are Black).

Equating ethnicity with race—which Omi and Winant call the reduction of race to ethnicity—leads to the types of conclusion articulated by Nathaniel Glazer (1997/2003) and Ward Connerly (2000). These authors suggested that the ethnicity paradigm provides for equality through assimilation. They argued that once all ethnicities “behave” in a manner consistent with the values and beliefs of the dominant group (Whites), perceptions of the non-dominant groups will become “color-blind” and equal acceptance will occur. Unfortunately, if the President of the United States, who lives, arguably, the type of life most desired by American society, 22 is still

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22 How many parents have argued to their children: “Go to school and get an education and one day you could grow up to be President of the United States”? 
subject to pictures depicting him as an African warrior living in the jungle, to what level of equality through assimilation could the vast majority of south side Chicago African American residents realistically aspire?

Class.

The second racial paradigm considered by Omi and Winant is that of class. The class theory of race found its origins in the ideas of Karl Marx and Friedrich Engels (1848) and Max Weber (1905) (Winant, 2000). Class theorists “understood race in terms of group-based stratification and economic competition” (Winant, 2000, p. 178). The theory, in short, “suggested that the market itself, unhampered by an interventionist state, would eliminate racial discrimination” (Omi & Winant, 1994, p. 24).

Scholars such as William Julius Wilson have argued that “class has become more important than race” (Wilson, 1980, p. 150). In theory, once the class divide narrowed or was eliminated, the subordination of racialized groups would diminish. Affirmative action was one of the outcomes of a class theory of race (Winant, 2000, p. 179). This connection helps explain why those unfamiliar or uninformed can often (and improperly) conflate race and class. However, as Omi and Winant (1994) pointed out, “it is rather obvious that racial categories cut across class lines…” (p. 34). Recent media accounts, exemplified by the treatment of Harvard University Professor Henry Louis Gates, Jr. by the Boston police, demonstrate this lived reality. To take an example from popular culture, the “Carlton” image portrayed in the 1990s popular television series, The Fresh Prince of Bel-Air exemplified the complex interplay between race and class. In

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23 On July 16, 2009, Professor Gates was arrested while “breaking into” his own home. Upon returning from a trip, he found himself locked out of his home. A neighbor who did not know Gates called the police when she saw him and his driver forcing their way into the house. A White police officer responded and, though Gates provided evidence of his employment at Harvard and his residence at that address, he was ultimately arrested. Many of the subsequent facts are in dispute but as Ogletree (2010) articulated, a question remains as to whether the White officer would have arrested a White resident, much less a resident who was a White professor at Harvard.
that series, which starred mega-star Will Smith, members of the Banks family (an African American family) lived in a manner that adopted most if not all of the norms and values that are often associated with European Americans. They lived in a mansion, they drove expensive cars, their children attended elite private schools, and they employed household help. While admittedly the majority of European Americans do not lead this type of privileged lifestyle, when most Americans envision the resident of a mansion, the owner of an expensive car, the parents of privately schooled children, and individuals with hired help, they are likely to first think of a person of European descent. Yet, as more than one episode depicted, the Banks family was routinely exposed to a reality that their “Blackness” defined them as abnormal and reminded them that their “abnormality” left them in constant negotiation of fluid levels of acceptance. Their distinctiveness was not eliminated by their adoption of the norms and values of privileged European American society.

Omi and Winant (1994) defined the class paradigm of race as consisting of three approaches: market, stratification, and class-conflict. The market approach argued that the market itself will eliminate racial discrimination. Very similar to the fields of law and economics, the market approach is grounded in a belief that incentives for maximization of profit will control human behavior. History and “herstory” have both suggested a weakness in this theory. For example, the history of the unionization of factory workers is replete with racist conflict. Maximization of wages would dictate that factory workers would have focused on their common financial interests, leaving aside racial distinctions. However, based on an assortment of rationalizations, White factory workers chose to ostracize Black and Asian factory workers and segregate unionization. Such segregation weakened the collective and allowed only for a reinforcement of the “at least I ain’t Black” property right.
Whiteness as a property right exists, as Harris (1993) articulated, because economic value attaches to it. One simple example is that throughout history, a person of European American descent has been more likely to be hired than a person of African American descent (Moss & Tilly, 2001). While Marx’s theory would argue that workers acted stupidly to exclude minority workers from their unions, Harris’s (1993) theory would suggest that White workers acted “intelligently” to protect their asset—their Whiteness. And while Marxists might relegate the imposition of race as an action of the bourgeoisie, Marxists would then be ignoring the dynamic nature of the interactions that occur within races and the roles that such interactions can play in individual and group development.

“Herstory” is equally divisive. For example, when the Women’s Movement of the 1960s and ‘70s argued that women were not being treated as equals, its perspective was that of White, middle-class women (amongst other descriptors). When African American women attempted to voice their experiences and concerns, they were subordinated to White women’s desires and perspectives. Their racial problems were often considered secondary to “the” Women’s Movement perhaps something to be considered or addressed after the “important” issues were corrected (hooks, 2000).

Omi and Winant’s stratification approach to the class paradigm of race argued that individuals receiving roughly equal incomes, or partaking of equal quantities of wealth, are deemed to have similar “life chances” (Omi & Winant, 1994, p. 27). However, a variety of data suggests otherwise. Again, with an acknowledgement to the errors inherent in any oversimplistic, dichotomous analysis, European Americans in equal income brackets as African Americans have longer life expectancy while African Americans battle with far more health issues (e.g., diabetes, high blood pressure, increased infant mortality rates) (Kawachi, Daniels, &
Robinson, 2005). African Americans with equal income are far more likely to be rejected for
loans and apartments (Feagin, 1999). Even with similar levels of education, African Americans’
median incomes are still less than those of Whites (Carnevale, Strohl, & Melton, 2011).
Moreover, when presenting with similar resumes, a “Black sounding” name increases the
likelihood of one being denied a job (Bertrand & Mullainathan, 2004). Thus, the idea of similar
“life chances” remains a fallacy.

Nation.

Finally, Omi and Winant (1994) analyzed the nation as a paradigm of race. Herein, racial
dynamics are understood as products of colonialism and, therefore, as outcomes of relationships
which are global and epochal in character. The nation concept is less subject to critique than it is
the foregrounding for Omi and Winant’s theory of racial formation.

In (re)defining race, Omi and Winant offered that race is a concept that signifies and
symbolizes social conflicts and interest (power) by referring to beliefs about different types of
human bodies. They suggested, as others have, that race has no fixed meaning and has a life of
its own. This leads to a conclusion that there is no biological basis for distinguishing among
human groups along the lines of race. The danger herein lies in the cooption of this theory into
color-blindness. The color-blind theorist argues that if there is no biological basis for
differentiating, then the only sensible (re)action is to treat all people exactly the same. However,
the color-blind position fails for two reasons. First, color-blindness ignores the reality that
different groups approach the present with vastly different experiences. Second, power structures
built upon historic struggles assure that “sameness” is analogous with Whiteness.
Racial Formation Theory.

Omi and Winant (1994) promoted an alternative approach to conceptualizing race—a racial formation theory. Racial formation is the sociological process by which racial categories are created, inhabited, transformed, and destroyed. The process is always historically situated and continuously evolving. Furthermore, their theory is based on the idea that concepts of race were always politically contested and that the state is the preeminent site of racial contestation.

Omi and Winant defined a racial project as, simultaneously, an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines. These dynamics occur on both the macro and micro levels. The macro level occurs via racial policy-making, state activity, and collective action (e.g., redistricting, allocation of school funding, government lending and contracts). The micro level exists in everyday experiences well-known to people from historically marginalized communities (e.g., people moving to the other side of the street and/or holding their possessions a bit tighter when a person from a historically marginalized community approaches and glances; when a person from a historically marginalized community is the only representative in a meeting, or is expected to represent all of the interests for his entire race). Combining their theories of racial formation and the racial project, a racial project is racist if, and only if, it creates or reproduces structures of domination based on essentialist categories of race. Ultimately, Omi and Winant magnified the hierarchical purposes of being raced. The utility lies in the continued unequal allocation of power.

Much like in sports, domination occurs from a lack of equality. Some argue that inequality is a necessary outcome of competition—“only the strong survive” or “the cream will rise to the top.” However, as Omi and Winant analyzed, race is utilized in order to assure that the
competition is fixed. By using race to reinforce and maintain a privileged hierarchy, neo-conservatives (and neo-liberals) are able to suggest that historically marginalized communities fail to achieve as a group due to their own shortcomings—racial deficiencies. This allows the privileged to assuage any guilt that they are unfairly maintaining their status. Their status, they believe, is due to earned merit, not inequality in the rules of the game.

Omi and Winant expanded on this concept in describing how hierarchical structures and inequalities are maintained in politics. They attributed the answer to hegemony, which they defined, pursuant to Gramsci, as “the conditions necessary, in a given society, for the achievement and consolidation of rule” (p. 67). This hegemony, in some ways a culmination of efforts to maintain a hierarchy and inequality, is reproduced in common, everyday systems—education, the media, religion, folk wisdom, and more.

For purposes of this dissertation, Omi and Winant theorized about privileged groups’ perspectives on affirmative action. The authors stated that “the attack on affirmative action is not simply about ‘fairness,’ but also about the maintenance of existing social positions and political stability” (p. 130). According to Omi and Winant, this heightened the appeal of arguments propounded by individuals like Ward Connerly and Linda Chavez because it allowed conservatives to rearticulate the meaning of racial equality as a matter of individual rather than group or collective concerns. Thus, hierarchy and inequality are maintained under the auspice of “true fairness.”

Omi and Winant’s work is seminal because it moved the dialogue about race forward. When the first edition of their book appeared in 1986, it advanced a discourse that had become stuck in the aftermath of the Civil Rights Movement. Dr. Martin Luther King, Jr. provided the answer to what it meant to be “raced” in the 1960s and for many (especially of the privileged
class) his efforts “fixed” the dilemmas of that time by outlawing formal discrimination. Moreover, having fixed those historical issues, the 1970s defined race within an era of benevolence that affirmatively acted to bring all raced groups to a societal level equal with their White counterparts (and, in the view of some, beyond the level of Whites, as their property interests in their Whiteness waivered and became questionable). If de jure segregation had been terminated and federal statutes “affirmatively” advanced the civil rights of non-European Americans, then what continued to stunt progression toward equality and (as desired by many) full assimilation? Omi and Winant expanded the paradigm to make it mobile, living, and changing.

The argument can be made that it is not worthwhile to engage in a struggle that has no end. In other words, if “the rules” will constantly change, then it is a waste to “play the game.” If we aim the rifle of equality at the target of racism, we are sure to miss since the target will likely have moved before the bullet reaches its destination. This is the charge of many neoconservatives (and neoliberals for that matter): the problem of race in America is that we keep talking about race in America. They argue that since science has debunked the notion of biologically defined races, continuing to focus on race only separates American citizens and prevents American unity. Their philosophy dictates that only by acting and talking like we are all equal will we ever live like we are all equal.

There is something comfortable and easy about their position—for all parties involved. If we simply stop doing what we have been doing, we can fix “the problem” of being raced. It requires the nation to do little or nothing.

I have built and continue to rebuild my own definition of race. For me, race is the importantly irrelevant, invisibly defined, mind, body, and spirit of a group of people—from a
small aboriginal race to the entire human race. Race is power, and as with any power, has the potential to be used in either a negative or a positive manner. For the privileged, race has been used to marginalize others and maintain resources. Within raced communities, racial norms and values can be a source of pride. My definition is intentionally dynamic and likely to morph as a variety of personal factors (age, class, parental status) change. However, like the chameleon that morphs into a variety of different shades yet always remains a chameleon, I believe that the salience of race will remain at the core of my analysis even as my perspective and experiences alter its shades and colors (pun intended). I am quite comfortable with the likelihood that future generations will review our “modern day” analysis of race and find it elementary and pedantic (Winant, 2000, p. 181).

**Color-Blindness**

One contemporary definition of race suggests a complete absence of race. Usually, referred to as color-blindness, this approach warrants its own deconstruction. Eduardo Bonilla-Silva’s *Racism without Racists* (2006) provides an important tool for this deconstruction.

Bonilla-Silva developed a theory he named “color-blind racism.” This “type” of racism allows Whites to declare that they “see” no race amongst others, and therefore, must not be racists. Color-blind racism has four central frames: abstract liberalism, naturalization, cultural racism, and minimization of racism (p. 26). Of these four frames, he named abstract liberalism as the most important. Each frame helps explain “neo-racism.” In brief, abstract liberalism involves using ideas associated with political and economic liberalism in an abstract manner to explain racial matters. Naturalization suggests that racial decisions and divides are “natural” human choices. Cultural racism ascribes certain “non-dominant” behaviors and beliefs to a particular
culture. And, finally, minimization of racism suggests that racism is no longer a factor because “things are better than they were.”

I use Bonilla-Silva’s work as a tool to help me analyze an ongoing struggle of law school admission, acceptance, and achievement. Within United States law schools, most African American applicants (and other historically marginalized groups) struggle to gain access to this potentially profitable bastion of professional (or, some would argue, vocational) training. For the extreme few (I use this term intentionally because, by their nature, law schools provide admission to only a select few; however, African Americans are disproportionately underrepresented among law school students)\(^{24}\) that manage to gain entry, their time in law school is often defined by a lack of other students, professors, and administrators with similar backgrounds and experiences. Therefore, although these students are, arguably, insiders, they also remain outsiders. Finally, for the minority (again, I use this term intentionally because, historically, African American law school students disproportionately leave school, either voluntarily or involuntarily (Wightman & Ramsey, 1998)) that successfully navigate the three to four years of indoctrination, they will likely find achievement after law school as elusive as achievement during law school. Bonilla-Silva’s theory of color-blind racism helps to make the invisible hurdles of law school visible and comprehensible.

One example of abstract liberalism can be found in Ronald Reagan’s economic “trickle down” proselytizing which proved to be misguided and erroneous to those truly at ground level as they continued to find themselves without water (resources) (Albeda, McCrate, Melendez, & Lapidus, 1988). Apparently, a lot of dams were built along the stream, increasing value only for those that lived upstream. This concept will be helpful in considering how law school admission offices engage in abstract liberalism.

While Bonilla-Silva clearly felt that engaging in abstract liberalism provided the strongest mechanism for fundamentally denying the existence of race (or, at least, the effects of racial differences), his analysis of minimization of racism also enhanced our understanding of law school admissions. “Minimization of racism is a frame that suggests discrimination is no longer a central factor affecting minorities’ life chances” (p. 29). Minimization is often heard in phrases such as, “It’s better now than it was in the past” (p. 29). In the admission process, minimization is employed with the requirement of “credentials.” Although Whites will likely agree that racism exists, and may go so far as to admit that racism is pervasive, they minimize the ongoing effect by arguing that non-European American students\textsuperscript{25} lack the credentials to succeed (e.g., LSAT scores, UGPAs, and strong undergraduate lineages).

As previously discussed, this safe harbor provides absolution from the historic oppression imposed by the privileged in areas like education, health, and housing. Activity systems, such as slavery and colonization, created extraordinary advantages for the privileged. Today, nothing more need be initiated; traditional advantages need only be maintained. By ascribing to a rationale that people from historically marginalized communities must measure up to criteria inherently based in privileged experiences and values, administrative gatekeepers can assuage

\textsuperscript{25} Some Asian communities are excluded and often are labeled “model minorities.”
racist guilt by relying upon people from historically marginalized communities’ supposed lack of credentials to maintain the status quo. Furthermore, during the admission process, a color-blind idealist would argue that all applicants should be judged “blindly.” The administrator would gather information about each applicant that relied heavily or exclusively upon quantitative measures as qualifications of merit. At its foundation, this argument relies on the erroneous belief that numerical data is color-blind and, thus, more meritocratic. The error of this belief has profound implications.

Minimization is also how Bonilla-Silva explained Whites’ rationalization “that blacks who experience discrimination deserve so because they act irresponsibly or complain too much” (p. 47). It is the ability of the privileged to dispute the salience of race in other’s lives. It leads to the stigma assigned to someone who “plays the race card.” Importantly, the ability to make such rationalizations originates within the same power structure discussed throughout this chapter. To assign the fault to the oppressed alleviates the oppressor of responsibility and, moreover, provides them with the rationale to engage in paternalistic endeavors. The rationale goes, if the oppressed do not know how to rise above their historic depths, it is the oppressor’s duty to show them the way. Historically, this was seen in European Americans’ interactions, subjugation, and conquest of North America’s indigenous peoples. The irony lies in the oppressor’s ability to ignore the role oppression played and continues to play in the very same hierarchy.

Law school administrators tend to look to a variety of factors in assessing each candidate. However, some factors clearly have greater impact than others. As an example, I will engage one: the prospect’s undergraduate institution. Just as certain law schools carry more cachet than others, certain undergraduate institutions carry more weight than others for gaining admission to law schools. Using both their own personal experiences and a variety of ranking measures (e.g.,
U.S. News & World Report, Research I institutions, etc.), administrators often consider which students will: (a) most enhance their own law school’s reputation, and (b) most likely succeed in navigating the rigors of their program (Grutter v. Bollinger, 2003).26 When undergraduate institutions search for applicants with prized extra-curricular activities who completed their secondary education at premiere schools, they necessarily engage in selections that have unequal results based upon race (Mullen, 2010). This results in a “trickle down” effect at the law school admission level.

First, some of these undergraduate institutions were historically closed to African Americans. This closure reduces potential privileges gained through legacy status. By legacy status, I am referring to applicants who receive admissions preferences based upon prior attendance by their ancestors. Legacy preference is, arguably, “a policy designed in part to enhance the likelihood of ongoing monetary gifts to the university” (Mullen, 2010, p. 87).

Theorists who ground their ideas in abstract liberalism ignore the fact that a supposedly color-blind criterion like alma mater and legacy status actually serves as a significant proxy for race. While there were a statistically insignificant number of African Americans granted enrollment in these institutions, they were indeed outliers. For example, in 1869, George Lewis Ruffin became the first African American to graduate from Harvard Law School. In 1969, 100 years later, African Americans still comprised only 3% of the students (Dershowitz & Hanft, 1979). Therefore, legacy admits will necessarily be predominately European American. Being the offspring of an alum provides invaluable advantages to gaining access to premier institutions.

26 These conclusions are gleaned from case law, personal experience, and personal contacts.
Second, since the median wealth of African Americans significantly trails that of European Americans, the neighborhoods that house the most prized secondary schools are substantially less accessible to the majority of African American students. With property values playing a critical role in school resources, advanced placement classes, gifted and talented classes, artistic extra-curricular activities, sports, and more, have been eliminated from secondary schools from which the vast majority of African American students graduate (Mullen, 2010).

The above list comprises many of the items that separate the accepted from the rejected at prized undergraduate institutions. When we account for “trickle-down,” we are able to capture how dry the bed becomes for African Americans attempting to access a law school education. Bonilla-Silva recognized this reality when he noted how abstract liberalism often ignores “the effects of past and contemporary discrimination on the social, economic, and educational status of minorities” (p. 31). “Trickle-down” is a mechanism by which racism becomes and remains institutionalized and systematized.

Abstract liberalism, discussed above, provides framing for color-blindness, a masterful concept because color-blindness is a process of racial formation even as it professes not to be. Even assuming that an admissions officer could act in a completely color-blind manner, at best, they would merely maintain the status quo, built upon a 400-year history of oppression, colonization, and subjugation. To borrow from physics: An unopposed force in motion remains in motion. Given the momentum of history, engaging in the “perfect” practice of color-blindness keeps populations “perfectly” proportioned where they presently reside.

27 In fact, according to the Pew Research Center, the median wealth of White households is now 20 times that of Black households (Kochhar, Fry & Taylor, 2011).
Color-blindness provided the lens through which Bonilla-Silva analyzed the interview data from the 1997 Survey of Social Attitudes of College Students (SSACS) and the 1998 Detroit Area Study (DAS). It is through this “new racial ideology” called color-blindness that Bonilla-Silva further explicated the rationales used by European Americans to maintain unearned merit. He skillfully defined its utility in the ability of Whites to “rationalize minorities’ contemporary status as the product of market dynamics, naturally occurring phenomena, and Blacks’ imputed cultural limitations” (p. 2). He surgically used the quotes from the interviews to demonstrate how color-blind ideas are inherently color-laden.

In *Racism without Racists*, Bonilla-Silva advanced upon other theorists who also analyzed race and power (Deloria, 1998; Said, 1978) as systemic or institutionalized processes. Bonilla-Silva noted that “for most Whites, racism is prejudice” but other texts (Deloria, 1998; Said, 1978) illuminated racism as much, much larger than prejudice. In the 1700s and 1800s when European Americans were “playing Indian,” (Deloria, 1998) a variety of prejudices circled American society. Protestants were prejudiced against Catholics, and prejudice existed between farmers and industrialists—but genocidal tendencies arose only around issues of race.

Another Bonilla-Silva definition led to his concept of “a society’s racial structure as the totality of the social relations and practices that reinforce White privilege” (p. 9). His highlighting of a *structure* helped clarify the nature of the problem. He demonstrated that the crux of the issue lies not in individual differences or choices but in structural obstacles. This is tantamount to the difference in a door that one is being asked to open versus a building that one is being asked to move.

Racial structure is the scaffolding that leads to racial ideology, which Bonilla-Silva defines as “the racially based frameworks used by actors to explain and justify (dominant race)
or challenge (subordinate race or races) the racial status quo” (p. 9). Each of Bonilla-Silva’s definitions and analyses furthers the construction of the answer to: Why race(ism)? He would respond: Because Whites need systemic or institutionalized structures that will explain and justify to themselves and others why they remain the dominant and privileged race. Color-blind racism is thereafter the framework that guides the rest of his treatise.

Bonilla-Silva helped build on Omi and Winant’s *Racial Formation in the United States* (1994). Omi and Winant’s work served as a bridge from one generation (Dr. King’s) to the next (the Wall Street high-consumption days of the late 1980s and early 1990s). Bonilla-Silva’s work interprets the new generation’s actions as the neo-liberal and neo-conservative political agendas’ assault on all things colored. Omi and Winant recognized and addressed the direct assaults on race and racial issues undertaken by Presidents Reagan (primarily) and George H.W. Bush (secondarily). Reagan suggested that America’s educational system was failing due to judicial and executive mandates that required America to do “too much too quickly.” His statements were a direct assault on much of the Civil Rights Movement. Bonilla-Silva guided the reader through the next wave of attacks from Presidents George W. Bush (primarily), Clinton (secondarily), and even, to some extent, Obama, as color-blindness evolved to further restrict the ideals of the Civil Rights Movement. Examples include George W. Bush’s choice of Supreme Court justices who have evidenced a preference for color-blind analysis (e.g., Alito, Roberts); Clinton’s retraction of Professor Lani Guinier’s nomination to the Civil Rights Division of the Department of Justice; and even Obama’s statements that “a rising tide lifts all boats”\(^28\) when asked about disproportionate rates of housing foreclosures and unemployment among historically

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marginalized communities, as well as his abandonment of Shirley Sherrod when she was deliberately misquoted by Andrew Breitbart. Most importantly, Omi and Winant theorized that race is constantly being rearticulated, and Bonilla-Silva identified that color-blind racism is the dominant form of racial formation in the late 20th to early 21st century.

Without dutiful and continued monitoring, law schools will remain institutions that replicate and reinforce a racial hierarchy. Relenting to a strategy of color-blind admission would reinforce the status quo and trickle-down blame (from graduate schools to undergraduates schools to high schools and so on) attempts to absolve each institutional level of responsibility. Bonilla-Silva called for more than equal opportunity, but for an equality of results (p. 212). These results must occur on all educational levels—from elementary to doctoral. By continually remembering Bonilla-Silva’s lessons about using color-blind racism as a tool, we can attempt to ensure that law school admission offices remain conscious of their role in our country’s past, present, and future. Without such maintenance, the engine driving true equality (as a dream, an aspiration, or a reality) will assuredly break down in the middle of the race.

Continued implementation of color-blind racism will perpetuate inequality in law schools. One must accept that racism can be overt and covert, and one would be hard-pressed to argue otherwise given American history. Moreover, one can logically conclude that American law schools’ primary use of the LSAT and UGPA for admission has a discriminatory effect simply based on the population of African American, Latino, and Native American prospects admitted. Therefore, as Randall (2006) notes:

Not only is this problem clear evidence of institutional racism, but it is also evidence of systemic racism since many institutions—including law schools, the American Bar Association (“ABA”), and U.S. News & World Report—could
change their policies, practices, or procedures to use the LSAT ethically and responsibly (p. 108).

It is such systemic racism that will allow and maintain the perpetuation of inequality in law schools.

Just as Omi and Winant and Bonilla-Silva’s works acted as bridges, a new bridge emerged within the legal arena first, and found utility in other disciplines thereafter. CRT bridged a historic legal consideration of marginalization, called critical legal theory, with a focus on the impact of race in law. Influenced by philosophers like Karl Marx, Max Weber, Antonio Gramsci, Michel Foucault, and Jacques Derrida, critical legal theorists include, but are not limited to, Roberto Mangabeira Unger, Morton J. Horwitz, and Duncan Kennedy. They argued that

the law exists to support the interests of the party or class that forms it and is merely a collection of beliefs and prejudices that legitimize the injustices of society. The wealthy and powerful use the law as an instrument for oppression in order to maintain their place in hierarchy. The basic idea of CLT [critical legal theory] is that the law is politics and it is not neutral or value-free (Critical Legal Theory, 2012).

CRT began with a similar foundation but found that critical legal theory failed to fully appreciate the racial implications in its analysis. Next, I discuss CRT’s relevance within my conceptual framework.
Critical Race Theory

In a society where institutions (e.g., economic, educational, legal) play a significant role in creating and maintaining racial theory, I now turn to the legal theories of race. Throughout this chapter, I have attempted to separate the analysis of each institution or influence. However, I would be remiss if I did not acknowledge the intertwined effect of each institution upon another. For example, laws were created and maintained to support the economic and educational advantages (e.g., jobs and segregated schooling) enjoyed by European Americans. The economic advantages were supported by educational opportunities available only to the offspring of European Americans and maintained by a legislature that assured the continued legitimacy of such policies, and pseudo-scientific educatory principles provided justification for the creation of statutes and the rationing of financial resources.29

CRT emerged in the mid-1970s from “a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power” (Delgado & Stefancic, 2001, p. 2). It originated as a strategy for incorporating race into analysis of laws and legal decisions. Its necessity was born out of a belief that critical legal studies theorists were focusing too much on class difference and not enough on racial difference. The outgrowth occurred because, although critical legal studies challenged the “meritocracy” of the United States (DeCuir & Dixon, 2004, p. 26), critical legal studies insufficiently analyzed and

29 As one example, legal theories of race emerged in Asian communities as European Americans strove to maintain economic advantages (Haney-Lopez, 2006). In the late 19th and early 20th century, the nation was developing and colonizing new territory. Whites saw their “right” to full and unencumbered profits and power threatened by Asians’ desires to become owners of land and businesses. So, “affirmative action” was implemented and laws were created that permitted only “Whites” to enjoy the privileges of full citizenship, and therefore, the ability to purchase certain land. As with most laws, interpretations quickly entered into the debate. Asians made appeals to the courts to be classified as “White.” Arguing from varied positions, Asians demonstrated that they were “as White” as those already enjoying that categorization and privilege (Ozawa v. United States, 1927; United States v. Thind, 1923). From these cases and their progeny emerged the legal conceptualization of Whiteness as property (Harris, 1993).
accounted for the effects of race and racism as they related to law and American society. Moreover, minority scholars “thought that they were being overlooked in critical legal studies” (Ladson-Billings & Tate, 1995, p. 52). That same sensation of being “overlooked” is central amongst the issues that CRT analyzes (Bell, 1987, 1992, 1994; Crenshaw, Gotanda, Peller & Thomas, 1995; Harris, 1993).

At least two separate followings have developed within CRT. One is often labeled idealism while the other is labeled realism. Idealists contend that “racism and discrimination are matters of thinking, mental categorization, attitude, and discourse” (Delgado & Stefancic, 2001, p. 17). On the other hand, realists argue that although “attitudes and words are important, racism is much more than having an unfavorable impression of members of other groups” (p. 17). It is a “means by which society allocates privilege and status” (p. 17). If the realists are correct, “one needs to change the physical circumstances of minorities’ lives before racism will abate” (p. 20).

One would prioritize “matters like unions, immigration quotas, and the loss of industrial jobs to globalization” (p. 20). However, if the idealists are correct, campus speech codes, civil and criminal remedies for racist speech, diversity seminars, and increasing the representation of Black, brown, and Asian actors on television shows will be high on one’s list of priorities. This dissertation is largely grounded from a realist perspective. My work suggests that race’s role in law school is directly connected to maintaining privilege and status. Moreover, I argue that race’s role is exemplified in the participants’ experiences.

While no list of CRT tenets would be exhaustive or definitive, Delgado and Stefancic (2001) argued that six fundamental principles define critical race theory. 1) A conviction that racism is ordinary and is an incurable part of “doing business” and existing in society. 2) A belief “that our system of White-over-color ascendency serves important purposes, both psychic and
material.” Also known as “interest convergence,” under this tenet, “racism advances the interests of both White elites (materially) and working-class people (psychically)” (p. 7). Therefore, there is little incentive for the majority of American society to modify the status quo.

3) A recognition “that race and races are products of social thought and relations” (p. 7). Also known as “social construction,” this tenet argues that without any objective or fixed categories of race, society constructs classes of race as the definers of race see fit. This relates back to the second tenet in that these definitions will be created in a manner that does not disturb who holds the power.

4) A recognition that dominant society will “racialize” different minority groups at different times. Also known as “differential racialization,” this technique may serve to supply a preferred labor pool or distance a certain group as an “other.” By doing so, the dominant group not only serves its immediate needs, it also supports division amongst varied minority groups.

5) “No person has a single, easily stated, unitary identity” (p. 9). Also known as intersectionality or anti-essentialism, the tenet acknowledges that many individuals have many different labels that they may use to define and describe themselves and their ancestry. To apply only one label is to ignore the others. For example, it is important to understand and acknowledge if a person identifies as a lesbian, African American, woman and not simply “categorize” them as “only” an African American, or a lesbian, or a woman. One must understand that there are different axes of classification (including, but not limited to, race, gender, class, and sexuality), all of which are interrelated.

6) Finally, “because of their different histories and experiences with oppression, Black, Indian, Asian, and Latino/a writers and thinkers may be able to communicate to their White counterparts matters that the Whites are unlikely to know” (p. 9). Also known as the “unique voice-of-color” and, in the legal arena, as “legal storytelling,” this tenet encourages the marginalized to recount their experiences and apply their own unique perspective.
Another unique aspect of CRT is its purpose. As Delgado and Stefancic explain: “Unlike some academic disciplines, critical race theory contains an activist dimension. It not only tries to understand our social situation, but to change it; it sets out not only to ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better” (p. 3). Along with its prescription for a personal/socio-political comprehension of race, this combination of tenets, origination of the theory by researchers from historically marginalized communities, and its message makes CRT, to date, the most prolific and current prescription for solving racial inequality. Equally important, CRTs groundings are firmly planted in historic philosophies of race and education (Du Bois, 1897/1996, 1935; Dewey, 1938).

**CRT Praxis**

Ultimately, I envision this theoretical framework being (co)created and grounded in the lived experiences of the 10 African American former law school students who were willing to share their journeys with me. I believe that their voices are highly important to any framing of their racial experiences in law school. I engaged in this discourse because CRT has embraced counter-narratives as a central part of the theory (Delgado & Stefancic, 2001; Solórzano & Yosso, 2009). This tenet is important because as any privileged group’s narrative is repeated and engrained, it can become the norm—whether true or false. Over time a true, false, or non-critically analyzed norm can become understood as simply “common sense” (Haney-Lopez, 2003). Counter-narratives are a tool for pushing back on the potentially hegemonic influences of a privileged group’s ideas, statements, and stories. It is this critical analysis or challenge that provides a “truer” understanding by and for all groups. However, before going further, I will
apply CRT to the story that I know best: my own journey through Southern State University School of Law.  

As I prepared to emerge from law school, an air of arrogance and amazement surrounded me. I was almost cocky about having survived three years of what most people readily admitted they could not do. I was also amazed that the three years had flown by so quickly. Was I really about to become a lawyer? Probably my most exciting accomplishment was that I, along with a host of others, had created and published the first Southern State University School of Law Civil Rights Law Journal (CRLJ). We hoped that this would be an ongoing vehicle for addressing the many issues surrounding race, ethnicity, and civil rights within the legal academy. In a law school where students from historically marginalized communities were heavily under-represented, a significant number of these same students were officers on the CRLJ board and we were thrilled to see the fruits of our labor in bound copy, ready for distribution throughout the country—and in our dreams, throughout the world. Imagine my response when I received an email from the dean of the law school lambasting me for connecting the law school to the law journal. His correspondence clearly warned me not to connect our new journal with the institution in any manner.

I was furious! We were doing our best to broaden the reach of our young school and our dean was doing all in his power to silence our actions. Instead of conveying pride in our accomplishment, he demonstrated nothing but embarrassment and disdain. Moreover, I was a third-year student who had already accepted a job. So, I fired off a response that I hoped would shame the dean to the greatest extent possible. I reminded him how the law school had recently recognized the accomplishments of a variety of other organizations and that the school had

30 Southern State University School of Law is a pseudonym.
always emphasized the importance of law journals and law reviews. Here, we had organized, raised funding, recruited reputable judges, faculty, and attorneys as authors, and accomplished what most would or could not. It was in that moment that I was reminded that I (and many of my fellow officers) did not belong in their institution. If I kept my head low and made little or no noise, I would be allowed to pass through. But, if I actually exercised the knowledge I’d been given in an unauthorized manner, I would be ostracized. Quickly, I was reminded where I “belonged,” where I did not.

I offer this very personal statement as an opportunity to engage some of the tenets of CRT. The first tenet of CRT suggests that racism is an ordinary, everyday part of “doing business” in America. As I prepared to depart the law school, I began to feel as if I was joining some elite fraternity. I do not believe that I had “forgotten” about race, but I assuredly believed that I was transcending some barriers. In one stark moment, I was reminded that race and racism is a part of “everyday business.” The only variable that separated the CRLJ from any number of other organizations was that the editorial board had a significant number of students from historically marginalized communities and the journal’s articles were meant to be relevant to a “different” variety of communities.

Interest convergence might suggest that the law school support our activity, but with a dean who was uninterested in recruiting, retaining, or understanding historically marginalized communities, no interest convergence could be built. Moreover, no outside forces stimulated an interest convergence. Unlike the threat of communism during the 1950s and 1960s, which aligned the interests of federal officials with civil rights leaders and thus led to the Brown vs.

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31 I recognize that both men and women were graduating with me, but given the overrepresentation of men within the highest levels of the legal profession, becoming a law school graduate really did feel like entering a fraternity.
Board of Education (1954) decision and the passage of the Civil Rights Act (1967), there was no pressure on the law school administration to bend to the will of the privileged.  

Both my story and that of the CRLJ are opportunities to engage in legal storytelling. This statement is an obvious attempt to convey an incident that had profound implications for my understanding of the relationship between race and legal institutions. Moreover, it was an incident that largely went unacknowledged by the larger law school community. If the same actions had befallen the primary law journal, it would likely have found mention in one of the many legal news venues and probably have found space within a major local newspaper. Additionally, the CRLJ acted as a vehicle for conveying ideas, stories, and issues that were often unacknowledged in many other journals. The articles told of histories, struggles, and victories important to historically marginalized communities.  

Finally, the CRLJ and my story are meant to contain an activist dimension. They are each meant to have transformative power, to carry the voices and stories of historically unheard peoples both into their own and mainstream communities. These communications are meant to be a catalyst for more action and more equity. The goal behind CRT, CRLJ, and my story is not merely to consider and theorize about race, but to map (and re-map) a direction of equal opportunity outcomes for all.

Conclusion

This chapter provides a historical and theoretical accounting of the (de)construction of race and establishes a foundational reasoning for why race is a category of analysis throughout

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32 Interestingly, it would take nearly a decade and a half, a change in the school’s leadership, and pressure from the American Bar Association, to create some significant level of interest convergence and to stimulate change on a larger scale.
this dissertation. Like any tool or map, racial ideology can be used in multiple ways. It can be used to strengthen a people or beat them down. It can help communities discover who and why they are or it can help colonizers further colonize. To succumb to Justice Roberts’ suggestion that, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race” (*Parents Involved in Community Schools v. Seattle School District No. 1, et al.*, 2007, p. 748) is to ignore all that racial understanding can offer. Instead, to be convinced of Justice Blackmon’s beliefs that “in order to get beyond racism, we must first take account of race,” (*Regents of the University of California v. Bakke*, 1978, p. 407), acknowledges the multiple “uses” of race and calls upon us to consider race as a societal responsibility and reality that can either bring a nation together or break it apart.

My goal has been to highlight that national journey through theories of biology, ethnicity, class, nationalism, color-blindness, and critical race studies. I have suggested that critical racial analysis is necessary, because previous theories have proven inadequate, untruthful and incomplete, and because many have been grounded on the perspectives and beliefs of the privileged. In America, “privileged” has never meant non-European Americans. At times, it may have included a person from a historically marginalized community, but it has never represented the majority of those members. This dissertation is one step in presenting an analysis of race from those who have struggled to understand, accept, and flourish within their racial identities, grounded in their lived experiences and their voices. Quoting a saying that comes from the Native American community: You cannot tell the story of the fish from the fisherman’s mouth. I welcome the reader to continue to the subsequent chapters because therein lies the story of the fish. The following chapter describes how I listened.
CHAPTER 4
Finding Olympians: Research Design and Methods

The methods section of a dissertation is intended to provide both detailed information and reflection on how a researcher approached and conducted his project. As such, my methods began well before the first word was written. Obviously, I have been an African American male since birth, but in my youth, law school was never in my sights. My reflection on my own experiences helped provide the initial impetus for this work. I then turned to established theories to plan my investigation. As always, CRT led the way.

Critical Race Theory Methodology

Solórzano and Yosso’s (2009) methodology provided the framework for integrating critical race theory. Their guidance helped structure the research questions, the gathering of data, and the analysis. They define critical race methodology as:

- a theoretically grounded approach to research that (a) foregrounds race and racism in all aspects of the research process; … (b) challenges the traditional research paradigms, texts, and theories used to explain the experiences of students of color;
- (c) offers a liberatory or transformative solution to racial, gender, and class
subordination; and (d) focuses on the racialized, gendered, and classed experiences of students of color. Furthermore, it views these experiences as sources of strength and (e) uses the interdisciplinary knowledge base of ethnic studies, women’s studies, sociology, history, humanities, and the law to better understand the experiences of students of color (p. 131).

In addition to my focus on race within my conceptual framework, the research questions provided further evidence of how I foregrounded race and racism. This entire work is intended to advance the discussion surrounding the construction of race, specifically within American law schools.

As discussed in the chapter 2 review of the relevant literature, traditional research within this arena has been predominantly quantitative and often grounded in paternalism. My work is intended to challenge prior research as it places the voices of the students at the forefront. Instead of placing the “fault” for the law school “achievement gap,” as articulated by Sander, with the students, I suggest that a heightened critique is much more appropriately placed upon the institutions.

My choices of data sources were intended to provide liberatory or transformative solutions to the crisis examined in chapter 1, of evaluating how race functioned in the lives of 10 former law school students as they strived to succeed. This research was not engaged merely for the sake of contributing to a theoretical debate. The goal remains to provide answers and ideas for those wishing to increase access and equity in higher education, generally, and law school, specifically.

Again, this dissertation is grounded purposefully in the voices of the African American male former law students. As such, the data is rich in the experiences, thoughts, and ideas of
students from historically marginalized communities. Moreover, the participants were being examined by the investigator, me, while simultaneously engaging in examination of their stories, of each other, and, even of me—a continual negotiation of the position of power. I was “one of them” because I had survived many of the same trials and tribulations that formed their law school experiences. Yet, I was not one of them because I was the researcher, the one who asked most of the questions and provided most of the direction. Brayboy and Deyhle (2000) analyzed this “insider-outsider” status. Here, I suggest that because of many similarly shared experiences between my participants and me, I was better able to heed Brayboy and Deyhle’s warning that “researchers … must guard against the imposition of methods of collecting, analyzing, and reporting ‘fact’ in ways that are not culturally sensitive and that fail to safeguard the lives of the people they study” (p. 168). I was better able to hear their experiences from their perspectives as opposed to substituting a lens that was not consistent with their vision.

Finally, this work is intended to integrate my training in education with my background in law and the courses that I have taken in ethnic studies during my graduate student tenure. While each of these disciplines warrants significant research in isolation, their combination provides insight into some of the most critical issues of our day. From Ward Connerly’s ACRI initiatives to Supreme Court cases, we are reminded of the need to coordinate analysis across disciplines.

According to Solórzano and Yosso (2009), one of the elements of critical race methodology is counter-storytelling. Counter-storytelling is necessary because “majoritarian” stories, generated from a legacy of racial privilege, often go unquestioned and become accepted as “natural” parts of everyday life (p. 135). They argue that storytelling and counter-storytelling
not only rebut majoritarian stories but help strengthen traditions of social, political, and cultural survival and resistance.

They suggest that counter-stories be created “from (a) the data gathered from the research process itself, (b) the existing literature on the topic(s), (c) our own professional experiences, and (d) our own personal experiences” (p. 140). I have already explained how the voices (e.g., data) from my study participants provided the foundation for this work. Furthermore, the existing literature on law school admissions, affirmative action, critical race theory, and more, informs the dialogue throughout my work. Lastly, my personal and professional experiences are woven into chapters as prefaces and guides throughout.

Location

As I will emphasize throughout this section, as well as the rest of the dissertation, it was very important to me to make sure that I protected the identities of the participants. Next to the actual study itself, protecting the participants was the most important action I undertook. While the law schools have been given pseudonyms and the locations described in extreme generalities, it is because of my concern for the safety of the individuals who lent their voices, not for the institutions themselves.

I intentionally chose to conduct research at two public law schools located in the same state in close proximity to one another. I chose public law schools because private institutions are not subject to the same constraints imposed by ACRI’s state-by-state, anti-affirmative action ballot initiatives. I chose law schools within the same state because I wanted both to be governed by the same state statutes or case law. I chose law schools within close proximity because I wanted them to, potentially, draw from a similar pool of candidates and have similar
geographical appeal. By similar geographical appeal, I meant to equalize the disparities the
might arise if, for instance, one school was located near a beach while the other was located near
farmland. Moreover, I recognized the importance of selecting law schools ranked in different
tiers according to U.S. News & World Report to better view whether their elite or non-elite status
could affect students’ experiences. As part of making the schools as unidentifiable as possible
and to utilize a non-discretionary marker, i.e., selectivity as defined in percentages by U.S. News
& World Report, I refer to the law schools only as “more selective” and “less selective” instead
of identifying their tier placements.

Rock State University School of Law (RSU) is a more selective law school, whereas
Rock City University School of Law (RCU) is a less selective law school. At the time I began
my data collection, RSU’s building was less than a decade old. Upon entering RSU, one is struck
by the majesty of the edifice and the constantly guarded entrance. The entryway is polished
marble and stone, which leaves the visitor with a museum-like first impression. A badge is
provided to each visitor, and must be worn at all times. New carpeting covers the upper floors,
and the library is well-lit, inviting, and appears technologically advanced. Similar to the library,
the professors’ offices are also well-lit, inviting, and freshly painted. RSU has an acceptance rate
under 20%. In stark contrast, RCU’s building resembles an older office structure, converted to
classroom space. The entryway is dark, and while security is present, it is not in the same
continuous manner as seen at RSU. Students crammed the stairwells at the ends of the building,
scurrying, in hoards, to their various destinations. This stood in stark contrast to my observations
of RSU where nearly everybody rode in elevators that resembled those at a four-star hotel. As
opposed to the library at RSU, which is the centerpiece of the building, RCU’s library is hidden
and is a clearly repurposed space. RCU has an acceptance rate over 40%. Therefore, I am able to
easily argue that RSU is no less than twice as selective as RCU. My argument is buttressed by attrition rate data. While law school graduation rates are rarely reported or discussed, attrition rates are fairly easily located. RCU’s attrition rate is nearly twice that of RSU. ³³

**Participant Selection**

For this study, I located 10 African American male former law school students: five from RSU—what I have previously defined as a more selective law school, and five from RCU—a less selective institution. I chose the number of participants based on my review of similar studies, such as Brayboy’s (1999) study of seven Native American undergraduates, Douglas’s (1998) study of 10 African American students, and De Walt’s (2009) study of six first-generation U.S.-born African students. Additionally, Patton (1990) suggested that for homogenous samples, such as mine, five participants may be ideal. Moreover, having five respondents from each school allowed for in-depth interviews. My goal was to gain a deeper understanding of each institution and each participant’s experiences. As I discuss in detail below, each of the respondents participated in two separate individual interviews about their experiences in law school classes and extra-curricular activities and their experiences after law school, including taking the bar examination and finding employment. To the extent that I was granted access, I supplemented the interview analysis with relevant documents related to the students’ admission credentials and academic records, to paint as complete a picture as possible of the participants’ experiences with studying law and becoming employed. Recall that Sander made several claims about African American students’ failure in law school and on the bar examination, a post-law

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³³ There are other pieces of quantitative data that I researched, noted, and observed. However, I remain highly concerned that as quantitative indices accumulate, the identities of the institutions, the faculty, and the alumni become far more visible. I have, therefore, chosen to limit the demographics to those detailed above.
school experience,\textsuperscript{34} using quantitative data. I intentionally designed a qualitative study to gain more nuanced information about African American males’ experiences in law school and afterwards.

\textbf{Participant Recruitment}

During June and July 2010, I identified the participants through networks established during my years as an attorney. I emailed and telephoned approximately six attorneys with whom I had relationships. I asked them about individuals whom they knew or could contact who attended or may know others who attended either RSU or RCU. As discussed above, both institutions are in close enough proximity to each other to afford similar amenities to their students, including the same in-state tuition, access to the same law firms and courts, and the features of the areas that surrounded them. As I received suggestions, I contacted each and every individual, regardless of which law school they had attended. If the individual was a male, I asked about his willingness to participate in this study. If the individual was a female, I asked about her connections to males who attended either law school and whether they would be willing to participate in this study should I be unable to locate an adequate quantity of males.

Once I secured my 10 participants, I contacted each directly by email or telephone to establish a mutually convenient interview schedule and location. I forwarded the consent form to each individual and requested they return a completed form to me before, or at the time of their

\textsuperscript{34} I highlight the “after” law school nature of the bar exam because students may elect to defer taking the bar indefinitely for a number of reasons (e.g., chose to enter corporate work, clerked for a judge, unsure about what state to live in). Sander’s analysis is confined to those who take and pass the bar exam immediately following graduation. It ignores the population that elects to delay the bar for six months, a year, or longer, if at all.
interview. I supplemented the consent form by having each interviewee state their understanding of the consent form and consent to participate during the initial interview session.

The same process led me to the three law professors from each school who agreed to speak with me. Additionally, I attended networking events to both seek out volunteers and request the assistance of others who had more direct contact with the professors. It was at this phase in my recruitment that I realized the hesitancy, especially of administrative staff, to speak about the issues foundational to this study. One career services administrator, whom I had known for approximately six years, initially stated her willingness to help locate individuals and talk about the issues. However, she soon stopped returning calls to her office and her cell phone. Even messages left with her staff often went without response for weeks at a time, if at all. In another incident during a networking event, I spoke with a male employee who worked in admissions. During our discussions, he voiced nothing but interest in participating in the study. Upon returning to Colorado, I, again, left multiple messages at his office that were never returned. My suspicions were supported during a recruitment telephone discussion with an RCU professor who informed me that knowledge about my study had “caused a stir” and that the professor was having difficulty recruiting others to participate as well. Given such hesitancy, I reiterate my gratitude to each and every individual that took time out of their busy schedules and dared to participate.
Participant Descriptions

The former students.

Table 1: Student Participant List

<table>
<thead>
<tr>
<th>Name</th>
<th>Law School</th>
<th>Profession at Time of Interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>Derrick</td>
<td>RCU</td>
<td>Co-founder of business</td>
</tr>
<tr>
<td>Mark</td>
<td>RCU</td>
<td>Professor</td>
</tr>
<tr>
<td>Dominic</td>
<td>RCU</td>
<td>State legal agency</td>
</tr>
<tr>
<td>Marquette</td>
<td>RCU</td>
<td>Quasi-governmental agency</td>
</tr>
<tr>
<td>John</td>
<td>RCU</td>
<td>Prosecutor</td>
</tr>
<tr>
<td>Ellis</td>
<td>RSU</td>
<td>Solo practitioner</td>
</tr>
<tr>
<td>Gordon</td>
<td>RSU</td>
<td>Legal placement</td>
</tr>
<tr>
<td>Richard</td>
<td>RSU</td>
<td>Professor</td>
</tr>
<tr>
<td>William</td>
<td>RSU</td>
<td>Partner, law firm</td>
</tr>
<tr>
<td>Alpha</td>
<td>RSU</td>
<td>Large government contracting company and solo practitioner</td>
</tr>
</tbody>
</table>

Ten African American gentlemen participated in this study; five from RSU and five from RCU. Coincidentally, all 10 participants graduated\(^{35}\) law school; all but one from either RCU or RSU.\(^{36}\) This was unintentional. I had expected to find individuals who had attended law school but had not graduated. They would have played a valuable role in qualitatively assessing Sander’s suggestion that participation in law school holds a null value absent graduation. I hope to explore this in later research, possibly focusing on the cost/benefit comparison for those who attended law school but did not graduate.

The pseudonyms for the gentlemen from RCU are Derrick, Mark, Dominic, Marquette, and John. The pseudonyms for the gentlemen from RSU are Ellis, Gordon, Richard, William, and Alpha.

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\(^{35}\) I acknowledge that the uniformity of graduation may raise issues of sampling bias; however, my focus was never on quantitative replication. Instead, I wanted to analyze how race was negotiated within a specific space, law schools. All voices that have inhabited that space are relevant and I hope to expand on the breadth of voices in the future.

\(^{36}\) One gentleman visited at one of the law schools in this study from his home law school in another state. He graduated with a degree from his home institution.
and Alpha. To the extent practicable, I asked that each participant provide their pseudonym of choice. While most provided me with full names, I elected to only use first names within the body of the dissertation to both further obscure their identities and, hopefully, to provide for a more personal connection between the reader and the participants. On some occasions, I felt that their pseudonym still left them identifiable and modified them further.

The faculty.

Table 2: Faculty Participant List

<table>
<thead>
<tr>
<th>Name</th>
<th>Law School</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professor Smith</td>
<td>RCU</td>
</tr>
<tr>
<td>Professor Johnson</td>
<td>RCU</td>
</tr>
<tr>
<td>Professor Williams</td>
<td>RCU</td>
</tr>
<tr>
<td>Professor Brown</td>
<td>RSU</td>
</tr>
<tr>
<td>Professor Jones</td>
<td>RSU</td>
</tr>
<tr>
<td>Professor Miller</td>
<td>RSU</td>
</tr>
</tbody>
</table>

I wanted to respect the positions held by the law school faculty, and simultaneously, their anonymity. So, in selecting their pseudonyms, I chose the six most popular last names in the United States according to the 2000 Census.\(^\text{37}\) I randomly assigned each name to a professor. Hereafter, they are referred to as: Professor Smith, Professor Johnson, Professor Williams, Professor Brown, Professor Jones, and Professor Miller.

The importance of their anonymity was heightened because each was African American. Although the U.S. Census stated that African Americans comprised approximately 13% of this nation’s population in 2009,\(^\text{38}\) according to the American Association of Law Schools, the participant professors work in an environment where, in 2009, less than 7% of their colleagues


\(^{38}\) On January 12, 2012, retrieved from: http://www.census.gov/compendia/statab/2012/tables/12s0006.pdf
and less than 2% of the new hires were also African American. With such a lack of critical mass, identifying each participant would likely be fairly simple.

As I attended law conferences that focused on the issues discussed within this dissertation, I learned more about the notoriety and respect that each of these professors have earned. They have researched and published on issues germane to my work and are repeatedly cited by others. Out of respect for each individual’s privacy and to fully conform to IRB regulations, I never mentioned or confirmed another faculty participant during any interviews. But, they often mentioned each other’s names as we talked about shared academic and research interests. Moreover, at the conferences, their names would often arise regarding recent articles, speeches, interviews, and the like. It is because they are so well-known and easily identifiable that I provide limited personal information about each professor. I believe that they risked as much, if not more, than everybody else by sharing their experiences with me.

**Individual Interviews**

In August 2010, I conducted the first round of interviews with each participant. The interviews followed the format established in the interview protocol in Appendix A. Some of my goals were to establish a rapport with the participants, introduce them to the issues critical to my research, and gain their trust. The first-round interviews averaged approximately 86 minutes. The length of the interview was intentional. Since many of the participants were practicing attorneys, their day-to-day existence is driven by the billable hour. For those uninitiated to the practice of law, the billable hour is the “coin of the realm.” It means that an attorney must, essentially, track each and every minute of each and every day. Each of these minutes is expected to be billed to

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some client at a rate (e.g., $400 per hour) that exceeds the rate of pay earned by that attorney (usually in the form of an annual salary). Each attorney usually receives a summary of these figures during a year-end assessment (usually at the end of the calendar year or a fiscal year). For many reasons, it is very important that the attorney bill far more hours (and, therefore, create much more income) than they earn in salary. Some firms have yearly billable hour requirements. Additionally, it is nearly impossible to “catch up” if one has fallen behind on their billable hours. As a consequence, I knew that it was important to keep the time required of each participant to a minimum.

Moreover, Weiss (1994) suggested that “you might ask respondents to plan for an hour and a half, with the option of ending earlier or going on for a bit” (p. 56). He advised that, around this time, participants may start to become distracted, restless, or tired. I considered this as I scheduled the interviews. I was not as concerned about fatigue as I was about the many other responsibilities that were part of my participants’ everyday lives—spouses, children, assignments, and the like.

I engaged in semi-structured interviews. I had a protocol that assured some similarity across interviews (see Appendix A). However, each participant had his own unique story to tell and I was more than willing to hear about the journey that he felt most passionate about describing. As Kvale and Brinkmann (2009) wrote:

It will depend upon the particular study whether the questions and their sequence are strictly predetermined and binding on the interviewers, or whether it is the interviewers’ judgment and act that decides how closely to stick to the guide and how much to follow up the interviewees’ answers and the new directions they may open up (p. 130).
Although maintaining a consistent interview structure was important, I was most concerned with hearing and supporting the development of their journeys. So, if a particular question initiated a litany of thoughts that did not strictly adhere to the order of questions in my protocol, I followed the participant’s lead. After I conducted the first round of interviews, I transcribed, read, and listened to the digital recordings, allowing the themes and issues raised to guide my subsequent contacts.

My theoretical framework acted as a compass to maintain my focus as I listened to each participant’s answers to the questions. I listened for the issues they raised about their lives before law school, during law school, and after law school. I listened for the existence of or lack of any considerations of race throughout these stages of their lives. As I discuss in much greater depth in the next chapter, I focused heavily on Omi and Winant’s theory of racial formation and their guidance of race as a continual political process and struggle. Therefore, I listened for experiences of how race did or did not appear to shape the law school process—before, during, and after. As I read each transcript and listened to more and more interviews, I was able to map responses across transcripts and identify which themes resonated across participants (e.g., community) and which themes were unique to an individual or two (e.g., military experience). I engaged in a constantly developing comparative analysis because I wanted to review the data as quickly as possible and while it was still fresh in my mind. Once all interviews were completed and transcribed, I further reviewed and analyzed the data for themes using a qualitative analysis software package, NVIVO, to more efficiently organize my thoughts and ideas.

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40 NVIVO uses nodes to provide hierarchy to themes, sub-themes, and so on. Nodes may also be compared, contrasted, and analyzed using various models.
Focus Groups

The second round of interviews consisted of discussing the common themes and issues in a focus group setting. Two focus groups were planned for the week immediately following the first round of individual interviews, one for former RSU students and one for former RCU students. At the end of each first-round interview, and via email, every member from each group was invited to his focus group. The participants were asked what locations and times would best accommodate their schedules. The RSU members elected to meet at a member’s office. His office was inside a large, international law firm. The RCU members elected to meet at a coffee shop inside of a national chain bookstore. At their scheduled times, three RSU members appeared for their focus group and two RCU members appeared for their meeting.

Given my previous experience with focus groups as a graduate student, I wanted to initiate momentum in the discussion and then recede into the background as quickly as possible. I participated by offering themes that I discovered during my reading of their transcripts and listening to their interviews. I then tried to say little or nothing as the participants considered their individual and group thoughts about the topic and any collateral concepts that arose. I reappeared in the discussion only when a topic had been exhausted, the discussion went too far off course, I felt that I had similar experiences that would add to the group dynamic, or to offer a disconfirming idea or example for the group’s examination.

The focus groups had multiple purposes. The energy within a focus group allowed participants to delve deeper into topics than they did in individual interviews. Additionally, focus groups appeared to provide an intangible—a sense of security—as participants shared stories and thoughts with others who may have shared that time and space with them. Moreover, focus groups provided participants with the opportunity to remember thoughts and events that were
rekindled by other’s statements. This provided synergy for further consideration and embellishment of the common ideas and potential for the development of new ideas (Kvale & Brinkmann, 2009).

My analysis of the focus group interviews was similar to that done after the first round of individual interviews. I had the focus group interviews transcribed and I analyzed the transcripts alongside the digital audio tapings of each session. Using more traditional methods, I took notes on a paper tablet about repetitive themes and identified themes that helped advance my analysis in response to research questions. Often times, this was done in the front seat of my car as I traveled, at times, over 150 miles between interviews. I listened for a larger or more refined discussion surrounding the themes raised in the individual interviews. I listened for affirmation or confirmation of themes I had found during the analysis of the first round of interviews as well as any disconfirming evidence. Lastly, I listened for new themes, ideas, or concepts.

Starting with the thematic mapping from the first round of interviews, I used this phase to determine themes that were strengthened or expanded based on focus group discussions. I connected individual interview themes with related or emerging focus group themes. For example, during individual interviews, we often talked about each participant’s career choices and trajectory. However, it was during focus groups that a critique regarding the definition of “success” grew. Dialogue and debate amongst participants was required to better develop how they defined success, how others defined success, and the extent to which their law schools were (un)supportive of their career choices, analyses, or actions.

**Final Interviews**

After the focus group interviews were transcribed and I had read them repeatedly, I conducted the third and last round of interviews with the volunteers individually. This round was
used to individually discuss and assess issues touched on during both the first round of interviews and during the focus group discussions. This round was meant to “wrap up” each individual’s ideas, concerns, and positions as they evolved during the previous interview sessions.

By wrapping up, I meant an opportunity to revisit themes that arose during the first and second rounds of interviews. This last round of discussions allowed the participants to hone or clarify positions previously articulated. This round also allowed for an “is there anything else that I failed to consider” moment. My intention was not only to thank each individual for their participation but to uncover any latent ideas or concerns that they thought important or worthy of mention. My goal was to continuously include the participants in the development of my project.

With the exception of one participant, I was able to conduct the second individual interview with each participant. Ellis was called out of town on a family emergency right before we were to conduct his second individual interview. Fortunately, we were able to reschedule and complete our interviews when I returned for meetings with professors. Alpha simply never showed up. He scheduled a time to meet with me for his second interview. I arrived at the location, waited for his arrival, left messages for him, and simply never heard from him again. During my return trip to meet with professors, I reached out to Alpha once again. He stated that an emergency had caused him to miss the prior meeting and we rescheduled the interview. Again, I drove to his location of employment, waited in his reception area, left messages on his phone, and never heard from him again. Ultimately, all participants had two individual interviews except for Alpha.
Faculty Interviews

Finally, in October 2010, I returned to the vicinity of the law schools to interview faculty. I’d hoped to interview four other faculty members, having been fortunate enough to interview two (one from each law school) during my trip in August. While I was grateful to meet with more than one professor in October, I was unable to conduct any formal interviews. Thankfully, I was able to interview all of the other professors over the telephone in November and December 2010. Their interviews were also recorded and transcribed for review. I chose three faculty members from each school in order to create a cross-section of views about each institution. Although the former students were my primary focus, I interviewed faculty to provide some institutional context. Law students tend to situate themselves within a particular law school for no more than three to four years. Law professors may situate themselves within the same law school for decades. Hearing their stories allowed me to consider whether the former students’ experiences were confined to certain time periods or were more engrained within the institution.

Because the former student participants’ experiences were primary to this dissertation, the faculty interviews were analyzed largely pursuant to the themes generated by the former student participants. If a theme already existed in NVIVO, the faculty data joined that theme and was used to compare, contrast, support, or oppose the participants’ data. This allowed me to hone my analysis to the most pertinent and dominant themes. For example, while mentoring emerged during discussions with the former student participants, it was only through faculty interviews that I understood the administration’s interest, or lack thereof, in creating or nurturing that kind of support.
Artifacts

I also reviewed a variety of artifacts. Both law schools had informative websites. RSU’s website seemed more colorful and vibrant. RCU’s website seemed to provide more text that invited the reader into the website, and, subsequently, the school. Both websites provided numerical data and information designed to be beneficial for prospective students. Internet search engines also directed me to newspapers that extolled financial donations given to the schools. I noted that RSU received larger sums of money, which caused me to wonder whether more money was given because RSU was the more selective institution or if RSU became a more selective institution because more money was given.

I also requested personal documents from each participant including information about their current employment, the backgrounds and experiences as articulated in their resumes, their law school transcripts, and any direct correspondence they had with their law school as students.\[^{41}\] In the spirit of legal practice, I entitled the list that I gave them a “Request for Production of Documents.”\[^{42}\] Some participants returned the requested material, some did not. In the end, the artifacts were helpful for providing context, but in no way supplanted the experiences conveyed by the participants. Their memories, their observations, and their dialogue guided my analyses.

\[^{41}\] See Appendix B.

\[^{42}\] Those familiar with the practice of law are now smirking. Those unfamiliar with the practice of law should know that the Request for Production of Documents is one of the most important actions taken during the pre-trial, discovery phase of litigation. Discovery is a controlled process intended to help make a trial fairer by allowing each side to “discover” the most important facets of the other side’s position. At times, discovery leads to settlements or even case dismissals.
Analyzing Data and Developing Themes

Several themes arose from all three rounds of interviews. After preliminary coding immediately following each interview, I coded the data for central categories. Miles and Huberman (1994) suggested this practice because coding “drives ongoing data collection” (p. 65). They posited that coding during data collection helps continually recalibrate the proper direction that a research study should take—much like the way current GPS systems alert a driver when he has veered off course and inform him how to return to his desired route. By engaging in this practice, I actually coded from the first interview through the completion of the dissertation.

Understanding that “codes will change and develop as field experience continues” (p. 61), I began with a provisional “start list” of codes based upon my theoretical framework, research questions, and personal understanding surrounding my dissertation topics (p. 58). After each round of interviews, these codes were used to categorize the data gathered so that each participant’s information could be better understood individually and within the community of participants. In other words, it was important not only to understand what an individual’s particular thoughts meant within his story, but what they meant in combination with the stories of the other participants. I regularly asked myself whether each code helped differentiate, combine, retrieve, or organize the data collected.

I used NVIVO in the coding process. I engaged in both inductive and deductive coding throughout my analysis (LeCompte & Schensul, 1999). As LeCompte and Schensul suggested, this was an unending process. Deductively, I had codes or themes in mind because they were generated from my literature review and my conceptual framework. As I continually read and re-read the interview transcripts, I identified recurrent themes and counter-themes. These became
my initial nodes in NVIVO. I then returned to deductive coding as themes were found in subsequent transcripts.

After developing my own codes and themes, I emailed the participants and asked for their interpretations of the emerging details. This was done so that we, together, constructed the core themes about their experiences. Additionally, this was done, in part, for technical observation of quasi-intercoder reliability and, in part, for ethical reasons. I received responses from four of the participants who stated that the codes, my interpretations, and the drafts of the dissertation “looked good.” While I never expected the participants to review the data or my writing through a qualitative researcher’s lens, I was grateful that some had read my work and found nothing objectionable.

For greater detail, I have attached (as Appendices C and D) two phases of thematic data development. Each is meant to demonstrate the analytic progression that occurred during dissertating. Appendix C was designed in August, 2010, and demonstrates initial themes as the research commenced. While the early codes reflect the literary concepts behind my foci, depth and structure was still being developed. I moved from Appendix C to Appendix D by expanding the list of themes and issues encountered as I reviewed the interviews. I allowed Appendix C to grow into Appendix D because I was learning more about the participants, their experiences, and their issues as I read and re-read their data. Appendix D shows the later stages of analysis as the raw data became a story. Here, the data has been given logical form and structure to help the reader make sense and logic out of all the information.

Procedurally, I analyzed each individual interview to locate themes that resonated in the literature. As I analyzed each individual interview, I searched for common themes by similarity in individual words or ideas conveyed. After identifying those themes, transcripts were, again,
reviewed in search of passages related to the established themes or nodes. The concern was to minimize the possibility of overlooking valuable data.

Next, I included the focus group data. The focus groups allowed me to consider themes that emerged or were strengthened, but within the context of the group dynamic. I used NVIVO to see which themes grew and what subtopics emerged during this analysis. Finally, I used the faculty interviews to both determine which themes dominated as well as define any newly developing topics. I then (re)reviewed the former student transcripts to determine what level of support for the faculty themes could be found in the former student data.

As a researcher, I was concerned that too many researchers have come into historically marginalized communities, asked too much, listened too little, and left—never to return again or better the lives of those who permitted the study to be conducted (Zinn, 1979). This is equally egregious whether it is done by a member of the privileged group or not. By confirming evidentiary interpretations with the participants (and, if necessary, re-confirming), I diminished the likelihood of missing their story and only inserting my own story or interpretation. It is this cyclical process that has led to co-construction and, in some sense, co-authoring.

I model much of my study on Brayboy’s research about American Indian college graduates (Brayboy, 1999, 2000, 2003, 2004, 2005a, 2005b, 2006; Brayboy & Deyhle, 2000; Brayboy & Maughan, 2009). Brayboy has contributed profoundly to the research on Native American students in higher education, as I would like to do with African American males in law schools. His dissertation provided the groundwork for his subsequent research and writing. In his dissertation, he studied the lived experiences of Native American students in Ivy League institutions by living with them for approximately two years. He engaged in their day-to-day activities both on and off campus and analyzed how they “made sense” out of two worlds—
Native American and academic—which sometimes intertwined and sometimes collided. Because my central question is, in part, intended to understand the costs and benefits associated with the choices and experiences of these law school students, I asked them to look back in order to better understand where they are now. Therefore, I adapted Brayboy’s model of hearing and seeing stories as they occurred to a model of hearing and seeing stories as they have borne out.

Guided by Kvale and Brinkmann (2009), I also used narrative analysis to consider the ideas, theories, and concepts conveyed in the participants’ stories. As these authors explained, “Narrative analysis focuses on the stories told during an interview and works out their structures and their plots” (p. 222). The narrative analysis supplemented the more detailed coding. Coding helped explore each individual concept, its potential meanings, importance, and placement. Narrative analysis helped keep stories central throughout the project, with regards to both their individual importance and their collective impact.

Because so many ideas came to mind, by day and by night, I continually returned to the research questions to maintain my focus. Multiple times each day, I pulled out the single page that encompassed the framework of my research questions and their sub-frames. I always tried to review this before I started each day’s work so that intentionality guided the path of analysis.

At least two times, I read through and listened to the first round of interviews that I conducted with each participant. Having also done this before the focus group interviews and the second round of individual interviews, this provided me with a strong understanding of the issues, theories, and ideas the participants were bringing to the table. I then began to write about their individual stories within the framework of the larger community story that they conveyed. However, once the writing began, I often went back and forth between reviewing and re-reviewing their stories and analyzing themes.
Conclusion

Ultimately, my participants’ stories reflected race as best conceptualized by Omi and Winant—it was a process. The process was not necessarily linear; as Omi and Winant envisioned, the process involved contestation and negotiation—both within the community and outside of the community. Not only did their stories provide the substance of this dissertation, I equated their stories to the very process of writing the dissertation, especially this chapter. Both were non-linear, at times. In the end, the goal of this dissertation was to convey “their” stories using the research questions as my guide and lens; the willing participants’ stories of how they engaged and perceived their journey through the elite institution of law school. The following chapter is my attempt to convey them to the reader; however, I acknowledge that they are far more complex and fascinating than I could ever express.
CHAPTER 5
Analyzing the Race: Dialogue from African American Male Former Law School Students

Introduction

The 10 former law school students I interviewed experienced race in myriad ways. Race was encountered at different intensity levels and sometimes responded to in very different fashions. Each participant recognized that race played some role in their time at law school. Importantly and understandably, race played different roles in each of their identities, was always part of their identities, and was never all of their identities.

In the previous chapter, I briefly introduced the participants by name. Next, I provide background on each participant to provide the reader with additional information about the voices that ground this dissertation. Again, I do not suggest that I can fully capture who they are within the body of this text. Each was far too fascinating, engaging, and “successful”\textsuperscript{43} than I could ever find the words to articulate.

\textsuperscript{43} I place this term in quotes because it has many potential meanings within the confines of this dissertation. I would suggest, however, that if a stranger was approached and informed of any participant’s individual accomplishments, the stranger would consider that participant a success.
Rock City University School of Law

Derrick.

As an undergraduate, Derrick attended a Historically Black college or university (HBCU) and worked for approximately five years before attending law school. His work experience included the banking industry and professional sports management. He went to law school to “return to academia [and] get around people that were forward-thinking.” When we met, he was starting a company with two other individuals. He was following the advice of a judge for whom he had clerked, and who told him, “You’re a business guy. If you’re not in a law firm doin’ business deals, go into another business.”

Mark.

Mark was the elder of the participants. As an undergraduate, he’d attended an Ivy League university and was a student at an extremely selective law school before his mother’s health and family finances forced him to withdraw. After taking years to work and support his family, his enrollment at RCU was at the suggestion of his father who reminded him of what he had started and needed to finish. When we met, Mark was a professor at a private university and had published numerous books.

Dominic.

Dominic’s trademark was his bow tie. While the bow tie might hearken to the Carlton Banks reference (from The Fresh Prince of Bel-Air) discussed above, Dominic’s background was closer to Will Smith’s character’s experiences. Dominic was raised in the inner city and found himself in an elite prep school thanks to a philanthropic program that recognized his

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44 I will intentionally use approximations when describing lengths of time to better assure the anonymity of my participants. While no one detail would likely be enough to connect their pseudonyms to their real names, my actions are intended to make sure that no combination of details are sufficient to expose anybody.
potential. His father was a lawyer but never pushed Dominic into the law; instead, his father exposed him to a very close legal community and allowed him to decide for himself. Prior to law school, Dominic worked for the federal government and, at the time that we met, he was the deputy director of a state agency.

**Marquette.**

Marquette was one of the most recent graduates I interviewed. He visited at RCU from another law school, and when we met, was working for a national association. His employment with the association began while he was in law school and required him to travel at least three days each week. He would often return the same morning of a class and go directly to the law school. Marquette felt forced to maintain this job when the first law school he attended asked for a co-signer on his student loans, and he was unable to find a suitable member of his family; he subsequently defaulted on the credit cards he used to fund law school. Despite this, he was continually advancing within his national association.

**John.**

John was a prosecutor and our discussions often involved comparing war stories from the trenches. Case crises would often interrupt our conversation and, because I remembered that life well, I felt as comfortable waiting for John while he put out fires as if they were my own. John felt that law school lacked creativity, especially in the first year. As with most litigators, he knew how to creatively convey his case in order to appease a jury of 12. Unlike most litigators, John spent time as a professional actor with a theatrical company. His choice of law school was largely guided by the residency of his then-girlfriend, and later, wife.
Ellis.

Ellis ran his own law firm, which rented space from another law firm located in one of the most exclusive areas of a major metropolitan city. The views from his office were spectacular and would likely sway a potential client to think that Ellis had “made it.” He, Richard, and William, all knew each other well and had maintained a bond following law school. They participated in each other’s weddings and became godfathers to each other’s children. Ellis attended a religiously affiliated, out-of-state institution as an undergraduate.

Richard.

By other’s accounts, Richard was the most “academic” of all of the RSU participants. Richard, however, contested this label vehemently. He repeatedly pointed to his RSU brethren as more accomplished than he. Richard graduated Order of the Coif from RSU, worked for an international law firm, and was, at the time of our interview, a law school professor. Prior to law school, he attended an HBCU as an undergraduate.

William.

William was the one participant that I knew before this study began and he directed me to other potential participants. He attended RSU as an undergraduate and for law school. After law school, he worked as a prosecutor before joining, and, ultimately, becoming a partner in a

45 The Order of the Coif is an honorary scholastic society the purpose of which is to encourage excellence in legal education by fostering a spirit of careful study, recognizing those who as law students attained a high grade of scholarship, and honoring those who as lawyers, judges and teachers attain high distinction for their scholarly or professional accomplishments (On July 23, 2011, retrieved from: http://www.orderofthecoif.org/). It is an honor usually bestowed upon only the top 10% of a graduating class.
prestigious international law firm. He subsequently transitioned to different law firms\textsuperscript{46} and even changed employers (to another global law firm) during the course of this study. His history of addresses as a lawyer included both domestic and international locations.

**Gordon.**

Gordon’s personality was, in large part, formed from his undergraduate experiences at a military academy. He felt that the academy played a much larger role in defining him than law school. He also attributed much of his interests to his time as an NCAA Division I athlete. He started his own entrepreneurial endeavors before attending law school and, when we met, was employed in legal placement after having worked more traditional legal jobs.

**Alpha.**

Alpha was the most recent graduate of all the participants. He, also, had served in the military and grounded many of his personal strategies in his military training. He emphasized that he had not attended a military academy but had entered the military through Officer Candidate School. He felt that the “eliteness” of the military academies often gave their graduates an overinflated sense of superiority. He conveyed experiences where an academy graduate’s book smarts failed him and Alpha’s “street smarts” proved more valuable in a crisis. He was, additionally, employed by an international consulting firm while simultaneously attending law school.

Having spent considerable time with each participant, I now consider them friends. Yet, there is so much more that I would like to learn about them and from them. I add this because as much as the above introductions may leave the reader wanting to learn more about the

\textsuperscript{46} Transitioning (or moving) multiple times is not unusual for law firm partners and associates who have developed a specialized niche and become well-known for their expertise.
candidates, I still want to learn more too. I imagine that a lifetime might lead one to “know” another; but, that is clearly beyond the limitations of this work.

Next, I offer their collective voices on themes at the core of this dissertation. I follow their collective voices with an analysis categorized by their respective institutions. I conclude by comparing and contrasting institutional and individual themes and implications.

**Connections to Conceptual Framework**

The thematic analysis is grounded in the conceptual framework articulated in chapter 3. First, I consider my data from Omi and Winant’s perspective that race is a tool of the privileged used to subjugate others. Therefore, I analyzed data about how my participants experienced their race in opposition to the dominant race. I then discuss how color-blind theorists, using a modern tool of racial formation, have directly or indirectly contributed to the maintenance of the achievement gap in law schools. The connections to history were both personal and social in that the formation of each participant’s views began before their entry into law school and continued to be shaped during that tenure, a fluid process of racial formation as suggested by Omi and Winant. Moreover, participants examined social definitions of what it meant to be African American from both historic and current timeframes.

**Racial roles – Perspective and Power.**

Derrick (RCU) articulated what race meant to him at his law school by grounding the description in opposition to what European Americans might think or fear:

We didn’t come across as a dashiki-wearing…. We came across as mainstream, friendly. Because in fact, the next year, I ran for the law school student body vice president. I think from what the Dean told me, I was the first African American
that had served that high on the student body board in the entire history of the school.

John (RCU) supported the idea of a constant struggle between European Americans’ perceptions and reality:

The majority, because a lot of people think that what they see on television, that’s their only…. We’ve become a commodity. But the downside of that is that because of what we’re selling, people think that that’s what blackness is, the idea that you don’t talk like Jay-Z, you don’t dress like Jay-Z. ‘You talk like a white guy.’ ‘No, no, I talk like a person that’s educated.’ Or I talk like someone who comes from where I come from. People say that like it’s a compliment, or say that like it’s—you know, like it’s just, ‘You have brown hair.’ But it’s incredibly insulting, incredibly insulting. Because it’s the racism that’s inherent in that system that you associate being educated and having a certain tie and having—knowing about maybe Shakespeare or something like that, you associate that with being white and you associate being poor, uneducated and wearing your pants around your ankles with being black.

Gordon (RSU) found that similar misconceptions existed at his institution. When asked to describe how people accepted him as an African American male in law school, he stated:

I think they were expecting something a little more liberally centered. Like, a little less conservative and a little—just more liberal, really. When people think of a black male, they expect you know to have certain feelings or opinions on issues of race and affirmative action.
When asked how European American students would have responded to a “dashiki-wearin’ African American,” Derrick’s (RCU) view was, “There were some that were extremely liberal, who would say, ‘Hey, right on.’ And there were some that would have been frightened… It probably would have been about 60-40, 60 threatened, 40 cool.”

Furthermore, Derrick’s undergraduate experience at an HBCU contributed to his analysis about race leading up to and during law school. He recognized that the HBCU experience “also helped me see maybe what the majority thinks about. You don’t think about race.” Bonilla-Silva (2006) helps explain Derrick’s experiences. As discussed in chapter 3, Bonilla-Silva developed a theory he named “color-blind racism.” This “type” of racism allows European Americans to declare that they “see” no race amongst others and, therefore, must not be racists. Derrick’s time at the HBCU presented him with a population that was directly opposite of what exists throughout the majority of America. He saw that the dominant race does not have to think about race because they are *the* race and everything is measured against *their* standards.

During his focus group, Dominic (RCU) raised his experiences with perception. “[European Americans] still have such a limited perspective. Which means two things: The majority population has not done a good job of broadening their perspective, their horizon, and the image that’s been presented by our community to a broader audience is also problematic.” This is consistent with the idea of racial formation because formation only occurs to the extent information, good or bad, is received, consciously or sub-consciously, by the privileged group. In Dominic’s case, he considers this the responsibility of both (or all) races.

John (RCU) also noted the difference in how racial perceptions and reality affected his connection with European American students during his education. He stated:
There is—[pause] there is a typical educated Black male and there’s an atypical educated black male. And I think this is part of television, more or less, whatever you want to call it. And I think that there is a certain majority expectation of you to fit into the typical educated black male stereotype, just like there’s a—you’re a little ghetto. There’s not really any other way to put it. People expect you to be a little bit ghetto. And if you—and I don’t know that a lot of majority individuals, if they’re familiar with code-switching, where you know how to act in certain situations around certain people and you can fit in a lot of different places. They don’t understand what code-switching is at all. If they saw it, they’d be, ‘Why are you talking like that with those people and you talk so different in class?’ It’s like, ‘Well, ‘cause I’m in class, fool!’ [laughter] ‘I’m not at home.’ And people don’t understand that.

**Negative Effects of Contesting Racial Perceptions.**

However, the energy required to maintain the “proper” level of Blackness clearly took its toll. As Derrick (RCU) opined:

> As an African American, you get used to overcoming, overcoming, overcoming. That’s good, but it’s not. Because somewhere in there, if you ever lose, well, you already knew the cards are stacked against you anyway. You just get tired…. It’s like it’s invisible. I was working as a stockbroker for [a large multi-national stock brokerage corporation]. Back then we had to cold call. I would work harder than anybody else. I still wasn’t gettin’ accounts. I went and told my manager, I was like, ‘I don’t know what the problem is. There’s somethin’ I’m missin’’. I didn’t want to just say it was because I was Black. It probably is, but I try not to use it.
You can’t just throw that in front of White people all the time. They’ll eat that up and spit it out.

Derrick’s belief that someone who has power over him will respond to his reality and experiences by “eating it up and spitting it out” highlights a continual struggle for members of marginalized communities. The attempt to address the very concern that may be inhibiting their ability to “succeed” may backfire and further repress any assent. How does one address a problem when merely addressing the problem is a problem? As Augoustinos and Every (2007, 2010) explain, such accusations are often met by privileged communities with moral outrage because a political climate exists that creates “what is tantamount to a social taboo against making accusations of racism in the first place” (p. 251).

Derrick’s statement is evidence that he understood these social stigmas and the role that they played in a professional environment. The fear of addressing racial issues due to social stigmas impacts the ability of members of historically marginalized communities to ever feel confident about institutional support. Why would anyone speak out or question the status quo when the charge is “often treated as more extreme than racism itself” (p. 251)? Sander failed to acknowledge the role that institutional support must play in the “matching” of students with law schools. The critical analysis must come from those empowered and privileged within the institution, lest those from historically marginalized communities become further marginalized for raising the taboo.

**Independence.**

Ellis (RSU) described his reality about being African American, generally, and an African American law student, more specifically, as well as the African American community’s actions, in a historical context. He remembered his father’s experience and advice:
My dad was raised—his father, my grandfather, stressed independence. So I remember growing up, our lawnmower might break down or something, and I know our neighbor has two lawnmowers because I know their kid. ‘Why don’t I just go ask if we can borrow their lawnmower?’ ‘No!’ [laughs] My dad couldn’t stand asking folks for help and never really understood that, but I think again, from a societal standpoint, there’s an incredible amount of depth there, particularly because we were an African American family in a neighborhood—I think the neighborhood where I spent my teen years, we were the only black family in that neighborhood. And it didn’t occur to me until years later that it wasn’t just asking a neighbor if you can borrow their lawnmower, it was so much more than that and what going to a neighbor and saying, ‘Hey, I need your help’ represented to a black man that’s trying to stand on his own, too. .. My father, I don’t believe, ever said to me, ‘You shall not ask for help,’ but his actions clearly were—and his teaching was, ‘You can be resourceful and get things done on your own. It all comes back to you and what you are prepared to do in order to overcome the obstacles life throws at you and get it done.’ So that certainly is the way I grew up, and I think that in terms of my education, college and law school, that underlying philosophy was supplemented, to my detriment, by the fact that none of the folks that came before me in my family suggested to me that, ‘Hey, a great way to—.’ And particularly in undergrad, where it is not a blind grading system, none of them suggested, ‘You know, if you want to cozy up to your professors, if you show interest, they will reward you for that.’ So I didn’t start
out that way in terms of preparation for law school. I had no foundation in engaging professors. So it didn’t go over to law school, either.

Ellis’s experiences bridge the analysis between perception, reality, and outcome. His father’s unspoken rules required him to approach life, and its challenges, independently. Requesting help was frowned upon and self-sufficiency was expected. As Ellis explained, the act of at least portraying independence was intended to “push back” on the perception that African-Americans were dependent upon other people or social programs. Again, this aligns with Bonilla-Silva’s analysis of color-blind terminology, that dependent is associated with blackness (Bonilla-Silva, 2002). The reality was, at least, an attempt for independence. That grounding in independence led Ellis to not seek academic support.

The color-blind philosophy suggests a “pull yourself up by your bootstraps” approach to life (Clarke, 1991). The illusion of historically marginalized communities’ dependence on social programs (and therefore, on European Americans, because they have historically been the primary administrators of such programs and had the income to fund said programs) can negatively impact educational growth. As Ellis stated, he failed to seek critical guidance from professors and advanced law students based on a historic perception of African Americans as societal leeches. Ellis stated:

It wasn’t until midway to two-thirds through law school where I was asking people, ‘What’s the key to your success?’ I know that I’m an average student, maybe a little bit above average, but I have friends that I study with that are excelling, and I’m like, ‘All right, what are you doing that I’m not seeing? Because we study together, we take practice exams together, and we’re going
over the answers, and I’ve got all the same information you do, and I know our writing styles may be a little different, but you’re consistently scoring higher grades with one professor.’ And that was the answer. … People were like, ‘After every class, I’m in with the professor.’ And they didn’t see it, but my thought has always been that professors are smart. They know the people that they wish to reward for whatever reason. And they can give them in those one-on-one meetings information.

Professor Johnson (RCU) saw similar reluctance on the part of African American students to engage their professors. Hir\(^{47}\) noted that “many of them are quite intimidated, and there’s nothing I can do about that.” When asked about whether hir approached professors when hir was a student, hir remembered: “No. I would never have gone—I never went to a professor to ask them something I wasn’t sure of. I felt that the professor delivered their class, and now it was my turn to make sense of it.” But, for today’s students, hir advised, “Whatever you think about . . . the proprieties and how you should do it, I’m telling you, the White kids are in my office. They’re here. I just want to let you know, you’re not.” Richard (RSU) supported Professor Johnson’s assessment when he observed, “White students knew that that kind of guidance was available and sought it out.” These definitions of how race is defined, understood, and experienced are meant to enlighten our perspective about race’s relationship to law school outcomes. The attitudes of one’s law school peers and the safety with which one can approach faculty and administration with critical concerns all factor into the “success” of one’s law school experience.

\(^{47}\)Instead of using the pronouns he or she, I intentionally use “hir” as a gender-neutral pronoun. My goal is to mask the identities of my faculty participants to the greatest extent possible.
Framing within a Law School Timeline

As with many historically marginalized communities, the participants collectively spoke of a process of progress. They conveyed their fears, uncertainty, and ignorance of the process and institution. As a former law school student, I saw a model develop that resembles the symmetry of the law school itself. Basing my thoughts on the typical day or full-time law school program that lasts over three years or three phases, I considered the participants’ journeys in three stages. Most considered themselves novices as they started the journey. Sometime around their second year they found themselves integrating experiences unfamiliar to most and moving to a more nuanced understanding. I call this the amateur level because they are beginning to, but have not fully grasped, the many variables affecting their experiences in law school. The final stage occurs near graduation when the participants spoke of experiences gleaned, strategies developed, and advice for those following in their footsteps.

Table 3: The Process of Progress48

<table>
<thead>
<tr>
<th>First Year</th>
<th>Second Year</th>
<th>Third Year</th>
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<tbody>
<tr>
<td>Novice</td>
<td>Amateur</td>
<td>Veteran</td>
</tr>
<tr>
<td>Marginalized</td>
<td>Tolerated</td>
<td>Included</td>
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Preparation for law school.

The issues that I’ve presented about how participants viewed race and how they felt it affected them individually and as students, were initially formed prior to their entering law school. As they entered, their individual histories placed them at a variety of points along the preparedness and confidence spectrum. It is important to note that it is not merely their

48 The fluidity surrounding the process of progress is best exemplified below (see appendix E). The following text is meant to describe the action, interaction, and reactions that all make up the process. Constraining the process at any point constrains results. Stimulating the process at any point stimulates results.
undergraduate experiences to which they refer with regard to their law school preparation, it is their very life histories that prepared, or in most cases, failed to prepare them as they would have liked, for law school. Since most of the participants related knowing little to nothing about the law school experience prior to matriculation, I label them as novices at this point. I will discuss such labels more in depth in a coming section.

As novices, they entered law school without knowledge of what would have most benefited their transition. While arguably all law students enter as novices, I contend that students from non-marginalized communities tend to enter as amateurs. This is evidenced by the fact that “even among white and African American students with identical entry credentials, African American students typically receive somewhat lower law school grades than whites” (Chambers, et al., 2005, p. 1877). This nuance, however small, provides a gap that remains insurmountable by most over only a three-year period. A variable repeatedly identified by the participants that led to the academic gap in law school was the level of preparedness they brought with them to law school.

When the participants were questioned about changes they would make to their own law school experiences or suggestions for similarly situated future students, preparedness emerged as a theme. Preparedness became relevant because, as they suggested, it would positively modify the place from which they began negotiating their space within law school—mentally, socially, and I would suggest, racially. For example, Derrick (RCU) stated, “What I would change with mine is just to be a little more prepared.” Based upon his observations, only about 25% of the student body at RCU entered prepared. According to Derrick, of that 25%, only 2% were African American. He observed that:
[European American students] didn’t just have a relative that was an attorney. They had relatives that were successful [emphasis added] attorneys. It wasn’t just this small firm. These relatives had worked in large firms and now even had their own practices, partners in large firms, judges . . . . [T]hey didn’t just have that relative. They had … their relatives’ network.

For Dominic (RCU), even though his father had attended law school approximately 25 years ago, “There was no law school preparation for me….I would just see [people] with their nose in a book, so I figured that’s what I had to do.” During a focus group discussion, William echoed a similar sentiment concerning his entry into RSU:

I don’t feel like I was prepared for law school at all. I think I mentioned it to you, I don’t think it was until my third semester, actually, I got in a little under two years, where I figured it out. I think the first three semesters of law school, I was in a completely different universe. It was just very new to me, and most of my survival during that time was purely based on instincts. It wasn’t until really I became comfortable in my third semester that I started to do actually well in law school. Before that, I wasn’t prepared.

During the same focus group session, Gordon (RSU) agreed with William (RSU), but Richard (RSU) noted:

I think my life experience prepared me well for law school particularly. My mother was an English teacher. My father was more into mathematics, very much about logical thinking, and I think I told you in our individual interview that a couple things we did in my house, we always talked about grammar, literally, over dinner we’d talk about grammar, diagram sentences and things. It’s bizarre,
but that’s what we did. [laughter] And then my father and I, throughout the course of my life, would have conversations, not so much arguments, but just discussions that revolved around how to logically address an issue. We would be discussing the logic of it, and I think that’s a lot of what law school is about, language, precision of language, about logical thinking. So I was prepared for law school thinking, but not at all by design. It was not because I was in any kind of well-structured pre-law program. I really do think it was incidental to my upbringing.

Richard recognized the cultural capital that he brought with him into the law school environment. It was grounded in the family practices present during his upbringing. He did not absorb it over a week or even a summer—he absorbed it over a lifetime.

According to Mullen (2010), Pierre Bourdieu (1984) attributed academic achievement largely to the type and quantity of cultural capital passed down to children by their families, as opposed to being the result of innate intelligence. Cultural capital includes a wide variety of linguistic competencies, general cultural awareness, preferences, and information about the schooling system (pp. 34-35).

Importantly, for purposes of our discussion, these commodities can be described as color-blind. While Sander, Connerly, and others lobby for a color-blind system, they re-enforce a system where non-European Americans will be worse off because, as Mullen exposed, what is left is European American affirmative action, called cultural capital.

Richard (RSU) went on to further analyze this issue within the focus group:

[W]e might even have to talk about what it means to be prepared for law school, because I felt prepared, like I said, incidentally, but I think even in my thinking,
I’m evaluating that by the grades that I got. William said he didn’t feel prepared at first but figured it out and started getting good grades. So in some regard, we’re defining this by getting good grades, at an early point in law school. And that really, again, ties into this notion of law school success being, you have to get good grades early on, which helps you get, right out of law school, a big firm job, the expected big job, and that’s what it means to be prepared. But, the fact of the matter is, we all went to law school, we all graduated, we all passed the bar, and we all now, over some course of time, we’ve worked as lawyers, or we’re still working as lawyers, and are working professionally on a path that we’ve now chosen. So really, if we’re—to be critical about it, I’d say we were all prepared for law school, because we made it through.

Again, so far, most experiences analyzed occurred before, or as, the participants transitioned to becoming law students. These factors set the stage for the competition as “the players” began to take the field. And few could argue that a competition was not about to ensue. According to Sander, law firms, judges, and others, the players (the students), are competing for rankings, recognition, and access to more success. I intentionally framed the outcome as more success because, to many people, being accepted to law school is already a sign of an individual’s success. Yet, for many of these players, in their view, the path to success was only beginning.
First year – novices.

Confidence and belonging.

Unlike Hester Prynne in Nathaniel Hawthorne’s *The Scarlet Letter*, first-year law students do not enter law school with their UGPA or their LSAT score sewn on their clothes. Arguably, all students should enter law school believing that they are amongst equals since each and every student was admitted. Moreover, even assuming that each student has done the research to discover the median LSAT and UGPA for a particular institution, they are still left “in the dark” about which students fell below the median, at the median, and above the median. Yet amongst the African American males that I interviewed, almost *all* felt that they entered law school clueless to the practice of being a law school student, much less the practice of a lawyer. This unfamiliarity existed across all ranges, from students who ultimately excelled in law school to those who struggled just to graduate.

When Richard,⁴⁹ who graduated Order of the Coif from RSU, was asked about his confidence entering law school, he replied:

I was scared out of my mind. There is an—again, I’ve told it this way for so long that I believe this to be true. There was an honest belief I had at the time that I had been let in by mistake. That I had somehow slipped through the cracks. I was there, I don’t know how I made it, but they let me in … I really had this view of lawyers and doctors and such as being higher thinkers, and I didn’t see myself that way. And so it was really the state, the kind of personal view, the self-view that I wasn’t qualified to be there … an honest phony.

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⁴⁹ It is also important to note that Richard considered himself a likely recipient of affirmative action (“it was entirely possible if not likely that I was an affirmative action [recruit]”).
Recall that in an earlier section, Richard spoke about how he felt prepared for law school. However, Richard’s statement summarized the feelings of many of the participants that they didn’t belong. It is important to recognize that this disconnect from the rest of the community occurred just as Richard started his law school journey. Richard is at the starting line of a race. The other competitors are lining up next to him. None has any significant history with another so no “scouting” has occurred. The race has yet to even begin. Yet, Richard had already determined that he “had been let in by mistake.”

Richard’s self-confidence is highly relevant to this study because evidenced by his status as part of the Order of the Coif, he ultimately was one of the most academically competitive students within his law school class and in fact over a decade’s worth of classes. He personified what most, if not all, law schools identify as the ideal student, from a historically marginalized community, or otherwise. Yet, even he finds himself struggling to belong before he has any real assessment of the “competition.”

William (RSU) conveyed similar feelings about beginning law school:

When I first walked into that school, to law school, I’m thinking about everything. It’s like, there’s so much going on, and not all of it’s academic. Most of it is just everything else. In fact, most of it isn’t academic. It’s worrying about every little thing, and it’s because you’re not comfortable in that environment, you’re not familiar with it.

William conveyed the same concern prior to and outside of the academic setting. As with Richard, William’s initial response aligns with the flight choice in the fight or flight dichotomy. Richard used the term “scared” while William chose “not comfortable.” While I acknowledge
the differing definitions of each, they both place the speaker in a location where they do not feel as though they belong.

Given that Richard (RSU) noted he was likely a recipient of affirmative action, one subscribing to the mismatch theory might suggest that a less selective law school would minimize that effect. Other researchers have analyzed this potentiality using quantitative tools, including Sander, who would advocate for Richard’s placement in a less-selective institution, as well as Ho and Dauber, who would suggest that Richard would, at least do no worse, and possibly do better, at the more-selective institution. I do not intend to repeat the studies of so many others. Instead, I looked across individuals in this chapter and across institutions in the next chapter to view how an issue changed or remained the same.

For instance, Derrick, reflecting on his entré into RCU, stated “I didn’t feel like I belonged there. And then struggling with some classes, I started feeling more outside.” Derrick also struggled with the idea of belonging. He suggested that the classroom setting intensifies the issue of belonging but does not, in and of itself, explain it.

Another RCU student, John, not only spoke to the issue of belonging but he located belonging specifically within the framework of race. When asked about the role that race played in his law school experience, John replied:

On the one hand, [race] provided a community of people who were going through the same thing and a community of people who understand where you’re coming from, they understand the kinds of things that you’re dealing with. I think on the other hand, there is a level of isolation that it creates. I think in just about any higher education, it is gonna create that level of isolation. Until we become more diverse, I think there will always be that slight level of isolation, that feeling of
being the other.

During the first year of law school, the participants, for the most part, existed in what I have framed as novice status. They “don’t know what they don’t know” and they are learning how to build from there. John spoke most eloquently about this period when he stated:

[O]ne of the things that I noticed in first year is that everyone is so—it’s like a bunch of people running around being stressed out about something that they don’t know how to figure out. You know? So everybody is saying, ‘I spent 14 hours on this,’ ‘I study with a TV on my head and my fingers on fire, and that’s how I got it.’ Everybody’s just saying these ridiculous things. Saying you studied for 14 hours is absurd…. But then you’re sitting there listening to them being stupid, and then you start thinking, ‘Maybe I should study for 14 hours with a TV on my head.’ Because they were doing it.

This novice period was formative because it set the stage for their development and their potential ability to aid in the development of others. Given their understanding of where they stood as a group, historically and academically, this was the moment where support would seem very important. Support would have enhanced their confidence surrounding their roles as law students.

Yet, as Ellis, an RSU student, conveyed:

[My confidence level] was a roller coaster. It dropped way down after that first semester. The one thing that was great was—let’s take it starting in August, confidence level about a 7 [on a scale of 1-10 with 10 being the highest level of confidence]. We got into classes and everything and I was digesting the information pretty well, so I would say that it went up to probably an 8, which, I
will say, was probably the highest it would be at until my third year. [laughs] I think the next thing, I skated along, wavered a little bit as you get closer to those first exams, because you just don’t know what’s gonna be on the exam and there’s obviously a ton of material to prepare for. And then those grades came, because I thought I did—the first semester exams were tough—but I thought I did OK. And I wound up getting two C’s my first semester, and I was like, ‘Whoa! This isn’t what I expected!’ And so it dipped a little bit, I would say to a 5 in terms of confidence. By the time I hit that end of the third semester, I would say it was a 3 or 4.

John, an RCU student, found himself in a similar downward spiral. He stated:

I remember when I got my first-year grades, I was so down on myself. I got them when I was working at this job [while] people who got better grades than me were unemployed. I had this job that people would have killed to have, and I’m sitting there, you know, ready to throw up over my first-year grades. So no, I don’t think it was reflective [of what I knew]. And it was a weird experience to be getting such positive feedback from all the partners, the attorneys I worked with, ‘You’re doing really good on your—’ and I thought that—I was like, ‘They’re just being nice.’

Later, John witnessed an incident that allowed him to reconsider the possibility that ‘they were just being nice.’

I saw how harsh they could be … my third year there was this kid who had worked … who came into the summer program, and man, they tore him up. They tore him up a couple times. They were just like, ‘How can you give this to an
attorney? This is ridiculous.’ Blah-blah-blah. So I realized that it wasn’t just being nice, that they were really impressed with what I was doing.

Two participants, Alpha (RSU) and Gordon (RSU), were officers in the military prior to entering law school. They both suggested that their experiences in the military and their discipline were significant factors in their law school experience. Alpha suggested that:

Something else interesting, in my entering class I also had two more military people, so we were the only three military people in the class. All of us made law review. So I do think that did give me—I pretty much can with certainty say it gave me a competitive edge.

He went on to add, “I know I keep going to the military, but it did really shape my law school experience.” Similarly, when asked about the basis for his strong sense of self confidence during his first year, Gordon explained, “Because I’d gone to [a military academy].”

**Courseload.**

Interestingly, though he entered law school feeling that he was unqualified to be there, Richard (RSU) was one of approximately four participants who felt pretty positive about their first year. Mark transferred from another law school to RCU and considered his first year to be a blessing because he was seeing all of his classes for a second time, as he was forced to start over, while most, if not all, of his fellow students were discovering the topics for their first time.

Some law schools already engage in something similar when they suggest to students from historically marginalized communities that they enroll in part-time or evening classes but treat them as full-time classes. In other words, administrations may suggest that students take fewer credits but act as if they are taking a full load. The additional time that might be spent working, taking care of family responsibilities, or otherwise, is available for academics. This
essentially extends the length of time that the student will be in law school, unless they choose to
catch-up by taking summer classes or using other options. Simultaneously, it allows them to
compete against a class of students for ranking within that class and for the potential
opportunities that follow. For example, a full-time student taking a part-time class load ranked
against other part-time students working full-time jobs may present as a stronger student in
comparison. Greater analysis than is immediately available here is needed to determine how
often this holds true. However, since most law schools attempt to enroll their best and brightest
(according to the measures like the LSAT and UGPA) in their full-time class (for purposes
including, but not limited to, *U.S. News & World Report* rankings), this eliminates the
opportunity for all types of students with all types of backgrounds to learn from each other
(Coleman, et al., 1966; Grutter, 2003).

Students have also learned how to utilize the full-time/part-time structure for their own
benefit. Sometimes they use it for the academic flexibility it can provide, as described above, and
other times they use the structure for financial reasons. As Dominic (RCU) pointed out, “I was in
theory supposed to be going full-time, not working, so I went part-time and cashed out my
vacation time with the federal government, and that allowed me to pay my tuition for the first
semester.”

*Black Law Students Association.*

Almost every one of the participants found some semblance of familiarity and safety in
an organization known as the Black Law Students Association (BLSA). Pronounced “balsa,” like
the wood, participants routinely found voice, direction, and a safe community within. Sometimes
it was actually within the walls that contained a BLSA office; at other times, it was at a BLSA
conference, event, or party. Either way, for most, BLSA was a place they went where they felt
less challenged and more accepted. It is important to note that they did not feel unchallenged, but less challenged. BLSA was a place where ideas could be challenged, but in an environment where BLSA members knew that it was only their idea being challenged, not their intelligence, experiences, or validity as a human.

As Derrick (RCU) noted:

I’d be walking down the hall and someone would say, ‘Hey, how are you doing? Do you need anything? Let me know if you need any help. Come into BLSA, there’s probably some people there who can help you out.’ And I really appreciated that.

Dominic (RCU) supported BLSA’s importance when he stated:

BLSA at my school was in flux in the leadership, and African American law students approached me and asked me to come in as—yeah, as the head of BLSA for the rest of the semester or something like that… We had a lot of support in our school for BLSA because of our dean.

John (RSU) echoed BLSA’s importance: “I was involved with the Black Law Students Association [BLSA], and I—it felt more diverse. It may not have been, because you just see more people that look like you.” But not all of the participants contributed to BLSA as officers. Some had other methods for supporting the organization. William (RSU) said, “Not an officer. I just didn’t—I had a hard enough time just tryin’ to get through school. I didn’t think I could do anything else. So I didn’t do any offices. I was a mentor.”

Alpha (RSU) also chose to support BLSA by mentoring the members on how to overcome law review anxiety. Because the process of gaining entry onto law review can
be horrific, Alpha wanted to provide mechanisms for overcoming those anxieties and increase the quantity of law review members who came from historically marginalized communities. He recalled:

We got all the students in BLSA in a room, about 40 showed up, ready. I made it very informal. I was like, ‘Look, everyone in here can do it.’ I gave examples … because I used to have to grade the petitions after I was on… ‘Everybody can make up in your mind right now that you will turn in a finished petition…. You already know you don’t feel like doing it. That’s why you got to sign now.’ I wrote out a little promise and had everybody sign it.

Already beginning to “practice like a lawyer,” Alpha not only provided exemplars, but had BLSA members enter into a “contract” in hopes of heightening their level of commitment to the process.

**Second year – amateurs.**

Continuing with the concept of a process of progress, by second year, most of the participants began to convey some sense of acclimation into the law school environment. They began to feel comfortable there. This was often reflected in better grades as well as more positive attitudes. When asked to evaluate his confidence level over this period, using 1 as a low and 5 as a high, William (RSU) explained:

[I]t was third semester that I became focused, I really did. I became more focused on what I needed to do to succeed… somewhere along the third semester, going into my fourth semester, I kind of just got it, and it was just—it just made sense to me. I got it. And I went from . . . I was probably first semester .5, second semester 1, third semester, like a 2.5—getting more confident. And somewhere
right about fourth semester, midway through my second year, I just kind of got it, and then I went to, like, a 5. I just got it. Probably from that point on, my GPA was 3.8 or 3.9. I just got it. And it wasn’t because I could take the classes I wanted to, it was because I understood what it was about. I understood law school. I was comfortable with the professors. I was comfortable—I was like, ‘Man, these guys are just like anybody else.’ I didn’t put them on a pedestal. I was just more confident in who I was and what I was about.

When asked about the factors that contributed to his development, William added:

I think it was experience, exposure. It’s just the—I went from the unknown to the known. It was going from an unknown quantity to a known environment. I just—I was more—it’s all about, to me, comfort. I was comfortable. I was in an environment where I was—I could—I didn’t have to—I wasn’t so concerned about—there’s this saying about an athlete. I’ve played sports all my life. When athletes are on the field or on the court and they have to think about everything, they don’t play. It’s that millisecond of thinking about something that separates you from being able to get from A to B or covering. And you just kind of go on instinct. You just do it. You just do. It’s the same thing at school.

By the second year of law school, the participants all either began to find or increase their sense of belonging. The process of progress had them moving from novice to amateur in this educational environment. They had not come to recognize all that they did not know, but they had started to recognize that they did not know, that others knew, and that this knowledge was instrumental to their success.

An impactful description of the transition from first year to second year was captured by
Derrick (RCU):

[B]y your second or third year, it’s like, ‘Hey, look, we have an understanding here. You survived [your first year]. You’re [now] taking classes you’re interested in. I just want you to learn what you need to learn.’ And they teach you that way. It’s not this, ‘OK, let’s see who’s gonna make it.’ It’s totally different . . . . I felt like in my second or third year, grades actually really reflected who was really working.

It is important to note the themes Derrick raised as he addressed the atmosphere of first year in contrast to second year. In first year, Derrick raised a goal of survival and the potential for elimination. While Derrick’s response was “only” in response to questioning about the law school environment, his response is a metaphor for the history of African Americans (and other historically marginalized communities) in America. For Derrick, such a hostile climate would call into question the very mission and purpose of his law school as an educational institution. Is the purpose of educating students to eliminate or eradicate? If so, who is to be eliminated and why? If not, what actions are taken institutionally to counter these beliefs and feelings?

As Derrick entered his second year, he noted a stronger sense of choice. That choice suggested a heightened sense of ownership in the process he had undertaken. Moreover, his articulation that “we” had an understanding denoted a more positive connection to the institution than clearly existed when the goal was survival and a struggle against elimination. The end result was that Derrick felt like his grades better reflected what he had learned in law school and what he understood. Regardless of what his grades were, he felt recognized. He felt that his grades reflected his work and his knowledge. This pattern can be seen in other participants.

Mark (RCU) affirmed Derrick’s ideas that elimination was an institutional goal during
the first year of law school. Mark opined:

Well, I think the whole first year is false anyway. I don’t think it reflects what anybody knows. I think that whole model is stupid. I think it’s a weeding-out model. I think in terms of teaching skills, it doesn’t do that. Because when you reflect before you take the bar exam, it’s those same subjects, but all of a sudden you know it. You sit there and go, ‘Why the hell didn’t he tell me that these were the elements of—’ They teach you the trees and they expect you to see the forest.

Mark used the process known as “bar prep” to uncover the futility he experienced during his first year. He used the term “weeding-out” where Derrick chose “survival” and “whose gonna make it.” For both participants, the terms they chose signaled an unwelcoming atmosphere; one in which the central theme was not to learn and grow, but to endure.

John (RCU) supported the same designation for first year when he said, “your first year of law school, it’s like they’re trying to figure out how to get people they can make not succeed.”

John described the difference between first and second year:

Second year, I mean, it was like night and day. But it was—because I realized that it wasn’t a matter of understanding the material, it was never a matter of understanding the material, it was a matter of being able to take that material, put it in a form that is understandable and digestible, and then to break that down into a way that I can remember it for a test.

Importantly, as an example of oppositional data, during this same interview, John also suggested that many of these difficulties were not linked to race. He added:

It’s such a foreign experience, you know? … So you’re worried, ‘What do these guys know that I don’t?’ It’s—I mean, the whole experience is overwhelming….
But it wasn’t because of anything involving race. It was just the normal student stuff. ‘I don’t know what’s going on here.’

Ultimately, sometime during the second year, the participants found their stride. The problem is, if options are to be maximized, second year is too late. As Alpha (RSU) explained:

[A]ll of a sudden, in second year, they hit this aha moment and now they’re kicking ass. But that job market depends a lot on that first year. So if we’re selling that first year, we automatically are predisposed to get worse job prospects than our peers, even though upon graduation we were performing at the level that’s right with them. So my theory is what I call shellshock. It’s an initial shellshock which basically determines our fate in the job market.

Alpha’s use of the term “we” was noteworthy because, during his tenure in law school, he identified himself as a guide for other African American law students. He described how he organized informal law review preparation sessions. His goal was to convey processes that had proven successful for him to other African American law students so that they might replicate or modify his strategies for their own success. However, the scale to which Alpha’s actions could be replicated was extremely limited because, as he described, he was one of fewer than five African Americans to ever sit on the law review in the school’s history.

**Third year – veterans.**

By their third year, students moved into what I recognize as veteran status. They have learned the rules of law school and have a significant understanding of how the game is played. They are beginning to feel comfortable, “successful,” and included in the process of becoming a lawyer. As William (RSU) described:
I evolved quite a bit from first year to third year, [I was] a very different person, not only in terms of my approach to my studies, but also I think as an individual I think I grew quite a bit. I came from someone who was in an environment that was completely foreign to him, as in, I’m the first person in my family to go to graduate school…. I’m one of the few who actually graduated from college. So it was an environment that was strange because I had no point of reference, had no one who was able to sort of tell me what I could expect, not only in terms of education, but the types of people I would be running into there. So I started off as someone who was very sort of unsure and learning the ropes to someone who became comfortable in his environment, both from a personal standpoint and an educational standpoint and actually ended up doing fairly well. But I tell you, man, that first year and a half was a transition, it really was.

Simultaneously, the participants were figuring out how to enter into a new game, the world of legal practice. They likely spent significant time thinking about and beginning to prepare for the bar exam and figuring out how they would most like to use their degrees. As John (RCU) described:

Third year I thought I had it going on. I mean, third year, I mean, I had it—I had figured out the system [snaps fingers], I knew how to get an A, I knew how to study. The third year I was captain of the trial team. I had my job set up. ‘Oh, I got this.’
Comparison across Demographics

Each of the participants evidenced enhanced feelings of competence and security in their environment that was absent two years prior. While this could be expected of all students, it is the enormity of the change and development that is unique to students from historically marginalized communities. I would also agree that similar phenomena likely occur across socio-economic divisions, but that is an important discussion beyond the limitations of this dissertation (Gaertner, 2011).

It is important to consider that the change discussed is not only intra-generational, in the sense that the students or groups of students in the midst of the process of progressing through law school are being changed, but inter-generational changes are occurring as well. Note that the participants spoke of how they would advise prospective students following in their paths and how the experiences of the participants could locate the current students closer to their peers from historically privileged communities. However, it remains difficult to close the gaps criticized by Sander and his colleagues with any quickness because both communities (historically privileged and historically marginalized) will progress, that is, become wiser, stronger, and more efficient. Gap closure would require that either the historically privileged group was somehow stymied from progression (an unlikely event) or that the historically marginalized group’s advancement was supplemented (possibly as a result of affirmative action).

This form of communal advancement, generational conveyance of knowledge specific to an environment, is curtailed under Sander’s argument. Cohorts are unable to progressively help their descendants advance toward equality because Sander called for immediate equality in the individual. In the alternative, he called for migration—from the elite law school to the non-elite law school. He asked for and recommended no change from the larger, more resourced structure,
the institution or the institutional leaders. Sander’s accusations are analogous to blaming the
bank failures on customers who did not deposit enough money.

Institutions

In the next chapter, I transition from the individual issues discussed above to the
institutional issues grounded in RSU and RCU. My institutional perceptions were shaped by
various inputs: the former students, the faculty, my personal visits to each law school building,
and artifacts. Particular artifacts that helped included each school’s website. As I reviewed the
websites, I looked for indications that historically marginalized communities were recognized
and supported. I searched for both textual and pictorial indications. Since the participants had
indicated the importance of seeing people who looked like them, I assumed the position of a
prospective student and analyzed what the website conveyed. By reviewing each school’s site, I
was able to find examples of historically marginalized communities at the law schools and gauge
the level of commitment to racial diversity that each school chose to depict on its website.

Conclusions

My evidence suggests that, for former law school students, racial formation, as Omi and
Winant envisioned, takes place both inside and outside of their law school. While the perceived
intensity varied, each participant stated that race played some role in shaping their perspectives
about the law school experience. Moreover, each described experiences unique to being
identified as a member of a historically marginalized community. While there were a variety of
methods for negotiating these experiences, each was required to find techniques that “worked”
with little to no ongoing systemic support and sparse precedent. The participants’ voices
conveyed that racial formation in law school began before entry, was contested throughout, and was still relevant as they graduated.
CHAPTER 6
Looking at Different Racetracks: Mismatched or Maligned?

Apparently, I am Sander’s exemplar. I arrived at Southern State University School of Law, likely, as an affirmative action recruit. My first year grades fell across the spectrum and placed me in the bottom half of my class. Like my participants, with each passing year I found my way and my grades improved. By graduation, I displayed capabilities as a student but would never rise to the rank deemed appropriate by Sander and his followers. Fortunately, others did not follow the quantitative criteria considered determinative by mismatch theorists. After graduation, I was hired for a federal clerkship, a state clerkship, a local prosecutor’s office, a federal prosecutor’s office, and into academia. From any standpoint, these would all be considered successful results.

Perhaps Sander is right. Perhaps my benefits would have been greater at an institution “better matched” to my supposed abilities. Then again, perhaps better results would have occurred if I had pursued racing motorcycles in Europe or a career in the military. I’ll never know, because I made a choice based upon what I thought was best for me at that point in time. Southern State University School of Law put its faith in me.
The participants of this study and countless other law students from historically marginalized communities made similar choices. For better or worse, I live with the consequences of my choices, as have they. These choices are, and should be, decisions made by the individual who must live out the consequences—the prospective law school student, not a societal or institutional parent. The law school should decide if it believes that a student can successfully complete its program. The law school cannot guarantee a result, any more than the military can guarantee successful completion of basic training or officer training school. Once the analysis is completed, individual applicants must decide the most appropriate location to launch the next phase of their lives. Standardized variables should factor in as little as possible.

**Introduction**

This chapter brings together what I, as a researcher, have read and analyzed with what my participants, as former students, have said about their institutions and their place within them. I begin by reiterating that this is not another quantitative duel with Sander about the psychometric conclusions he raised. This is a qualitative response that will highlight the voices he ignored and their perspectives on the traits of an “appropriately matched” institution.

I separate this chapter into three sections. In section one, I address the institutions’ relationships with race, using the professors as a proxy for the institutions. I do this knowing that the professors are, at times, at odds with the law school (and possibly university) administration. However, generally, the professors also have substantially more time than students invested in the institutions. In section two, I consider whether significant differences exist across students’ experiences at each institution. Lastly, I suggest that following Sander’s suggestions will only lead to maintaining societal inequalities.
Racing – Inside the Racetrack

Coaching a race team – An institutional faculty perspective.

The previous chapter detailed the perspectives of students looking at the racetrack (i.e., law schools). Now, given their tenures at their respective law schools, we can consider the law professors as a proxy for the law schools themselves. For example, Professor Jones (RSU) explained the role that the system (e.g., administration and faculty) must play. Hir stated that hir has been “simply blessed with the courage of deans . . . deans who have been very supporting.” Professor Jones further noted that the dean who hired hir did not place a priority on diversity. When asked how hir dealt with an administration unsupportive of diversity, hir responded, “I didn’t have to . . . he died” before it became an issue.

Moreover, for maintained advancement, the historically marginalized communities must remain quantitatively as well as qualitatively populated. By that, I mean that there must be enough bodies (quantitatively) to sustain progress in a positive direction and those bodies must be determined (qualitatively) to work toward continued advancement. As Professor Brown (RSU) stated, that has not been hir experience. Hir noted that,

I think Black students, despite the persistent inequality in education and the concentration of Blacks in predominantly nonwhite public schools, primary and secondary, Black students that I see are coming into law school better prepared than they were 35, 40 years ago. But also fewer Black males are coming into law school than 35, 40 years ago . . .

Specific to the focus of this dissertation, with regard to African American males, “what is happening is that many of the Black men who are coming in are coming in from more
prestigious undergraduate schools than women.” Therefore, according to Professor Brown, the African American males are not only similarly achieving in comparison to other matriculants’ qualifications, they are overachieving.

Moreover, as Mullen (2010) highlighted, socio-economic and cultural capital issues intersect with racial demographics. Professor Brown observed this as well when hir noted that, in law schools, “There are also very, very, very few people who come from impoverished or even lower middle-class backgrounds.” To the extent that historically marginalized communities disproportionately populate lower middle-class backgrounds, it further exacerbates their absence at more selective law schools.

Professor Miller (RSU) particularly reflected upon the students’ cultural capital as they entered the institution. Hir suggested that students are

… not appreciating the expectations of law school. That can, for any given student, capture a number of things, among them being the amount of time required to do well, the amount of sacrifice, and this kind of ties in with the first, but the amount of sacrifice of other things that one is used to doing and having time to do, on the other hand. So those really tie together, so how much time law school requires me to commit to working on, and how things I normally would just consider to be a part of my life that I always do that I have to give up. I can’t go out as much, I can’t expect to spend my weekends with my family all the time, and so the expectations in terms of social support, community, sense of community I think have to change for every law student, but I think there may be some regards in which African Americans may be affected by that… It includes appreciating how to write to a law professor audience.
Hir repeated this assertion later in the conversation, stating, “it really comes from a lack of appreciation of the expectations of law school.”

Turning to RCU, Professor Smith noted similar experiences as Professor Jones (RSU). Professor Smith pointed to the institution’s office of admissions and “how committed [they are] to ensuring that … the initiative and the push and the paying attention to make sure that the numbers are sufficient.” This demonstrates the need for the institution, not the individual, to remain the focal point of long-term inclusive progress. I highlight this because ownership of a seat within the law school must remain with the law school, not the individual students. I use the term ownership pursuant to Harris’s (1993) analysis of Whiteness as a property interest. Only through law school ownership can institutions continue to drive the institutional (and arguably, societal) process of progress. In contrast, individual ownership will, by nature, likely be guided by self-interest.

The larger, institutional directive is important because, otherwise, there is too much potential for variance by individuals. As Professor Johnson pointed out, attitudes, behaviors, and confidence levels can vary across groups. Hir stated, “The Black students tend to be very polite. ‘Why would I bother you with what I don’t know?’” Such inaction is not connected to intelligence or capability. Instead, as Mullen (2010) informed, it has much more to do with how one is raised, experienced high school and college, and engaged adults from an early age. Again, this is cultural capital, a form of color-blind preference that is replicated throughout time until those advantages are leveled or neutralized.
Race time – The students’ perspectives on the institutions.

In the previous chapter, I analyzed how the participants experienced race within their law schools. Here, I consider the role the institution played in their lives. I looked for data that suggested whether a school’s selectivity affected student experiences. I wanted to look beyond obvious differences. For example, a student at RSU would have different choices of professors and (some) classes than a similarly situated student at RCU. Instead, I looked for differences that heightened or diminished self-determination.

The former law students all saw their institutions as important to their individual and professional development. Ellis (RSU) noted that, “The benefits, I think it’s been an exceptional education. I’ve learned how to challenge the status quo.” Gordon (RSU) agreed and stated, “I think the school did a great job of teaching the law and teaching— [pause] yeah, teaching the law and opening up minds a little bit. Definitely giving people access to some different perspectives.” Alpha (RSU) experienced a similar level of growth, noting, “It made me a stronger writer. It taught me a lot about myself. It gave me a lot of confidence.” For Richard (RSU), “I honestly think those were three of the best years in my life in terms of just personal growth and making friends and social development, all of those kinds of things.” And for William (RSU), the development was extensive. He remembered:

I grew a lot during that period, and I think—this sounds terrible, not that I outgrew her [his then-girlfriend], but it was just very different. So part of the cost is the effect that it had on my personal growth and the way it affected not so much me, but some of the people around me, as well as myself.

Only Gordon (RSU) appeared less than completely enthusiastic about the institution’s effect. He opined:
I still think a lot of it was a waste of time. I think generally, yeah, I was pretty happy. I was in school. It was like a vacation, kind of, for me, a chance to learn, and I just love learning. It was a great opportunity to learn and interact with people and get into some healthy, spirited debate.

The RCU students described a similar recognition. Derrick (RCU) stated that, “[law school] definitely increas[ed] my network. There are people I can call now for a myriad of things I would have never known had it not been for law school. And that really was the reason I went.” For Dominic (RCU), “it gave me the framework and the two initials behind my name that will open doors.” Marquette (RCU) recognized that “law school was a benefit. I do feel now that in the sight of others, you get a certain level of respect as far as your intellectual capabilities, your perseverance, your knowledge base.” John (RCU) poignantly opined, “If you can survive it [law school], you will be stronger for it.” Interestingly, Mark (RCU) reflected the same cautious optimism expressed by Gordon (RSU). He said, “I think it was a good training ground for how to deal with the world, with these people out here in the real world. But in terms of direct assistance, I thought it was a chore, I thought it was more horrific than it needed to be.”

Regardless of whether I was interviewing a former student from the less-selective or more-selective law school, these alumni all found more benefit than cost to their law school experience. Each saw their choice as a method for advancing their life. While Mark (RCU) and Gordon (RSU) suggested ways in which the experience could have been better, all concluded that the cost-benefit ratio swayed in their favor.

What none openly stated, but I observed, was that with regard to my participants, RSU alumni had a greater range of post-graduation choices than RCU graduates. Again, my intention is not to turn this work into a survey piece. I did not intend to search across initial salary ranges
or the array of geographic opportunities. I merely listened and noted from whence they came as well as where they suggested they hoped to go. Examples included Gordon (RSU) speaking about working for boutique law firms in New York City and Washington, D.C.; Richard (RSU) practicing in Los Angeles; as well as William (RSU) living and working as a lawyer in Washington, D.C. and London. The RCU alumni did not share this same breadth of exposure.

Mismatched or Maligned

What I learned from listening to each participant is that upon entering either RCU or RSU, they were where they wanted to be and, therefore, where they needed to be. Assuredly, some may have wished that they were at Yale, or Harvard, or Stanford due to the additional opportunities and notoriety they would likely have encountered in their careers. Most recognized that RSU was viewed as carrying greater stature than RCU and that Ivy League schools carried even greater stature still. As Derrick (RCU) noted, “unofficially, the students that had the higher LSATs and higher GPAs went to RSU; those that did not, went to RCU.” In the same vein, John (RCU) pointed out:

At RCU, if you’re going to have a curve, it needs to be one that’s comparable to RSU. RSU has a much higher curve . . . because it creates an illusion that the students at RCU are doing worse than the students at RSU, when in fact, the curve is just higher.

Professor Williams confirmed, “[RCU has] always been kind of the stepsister of the law schools between the two . . .”

However, it was the various facets of their lives that led them to choose RCU or RSU as their appropriate law school. These facets included: family illnesses, family finances,
employment during law school, campus diversity, ease of acceptance, and more. Sander’s language may label these as costs that each participant managed during law school. The factors suggest that the appropriate law school is more than a numbers game. It has to do with the real life plans, limitations, aspirations, and goals of these participants and the thousands of others just like them.

The benefits the participants received from law school were as varied as the costs. Their trajectories since law school have taken them to various, yet similar, places. One from RCU (John) and one from RSU (William) were or are employed as prosecutors. One from RSU (Richard) and one from RCU (Mark) were or are currently employed as professors. Two from RSU (Gordon and Alpha) and one from RCU (Derrick) were or are involved in non-law firm business pursuits. Two from RCU (Dominic and Marquette) were or are employed by governmental or quasi-governmental agencies. One from RSU (Ellis) and one from RCU (Derrick) were or are solo practitioners and, although others had experienced large-firm employment, only one, from RSU (William), was at the time of the interview employed by a large, multi-national (“elite”) law firm. Although this is a small sampling, this is also a small population. To achieve the analytical benefits of comparing across major similarities (e.g., public law schools in close proximity to one another) reduced the potential sample to an even smaller population.

I sought to evaluate each graduate’s post-law school success. I never asked for their current incomes. I had no intention of creating a quantitative equation holding constant for income or any other outcome variable. Instead, I listened to their stories of life, struggle, success, and more. From their stories, it was clear that, on average, RSU graduates were earning higher incomes from their current positions than RCU graduates. But, neither I, nor my participants,
solely conflated income with success or law school benefit. Income is, assuredly, one benefit of attending law school, but it cannot stand alone. Otherwise, there would be fewer people, of all races, departing from careers in law firms.

Society’s conflation of income with success was recognized by the participants. Mark (RCU) noted that people told him, “You didn’t parlay the success into what we thought would be success. [Which for them was—]—power and money.” Gordon (RSU) questioned the income metric for success even for students emerging from the most selective or elite institutions:

For a lot of people now, coming out of the top five law schools with great, great credentials, there’s nothing for them, and their definitions of objective success are forced to change, and they’re forced to change before they’ve probably identified or really thought about what is personally ‘successful’ to them, how they can define that. And that’s why a lot of people are lost. They don’t know where to go. Their ideas and their goals that they thought they were achieving, which are obviously someone else’s goal, aren’t there.

Sander (2004) suggested questioning the benefit of a more selective law school education for only one group, African Americans. Gordon’s experience placing lawyers with employers suggested that the benefit question can be raised for all individuals, not just certain races. Instead, success or benefit were defined by a variety of measures.

In answering one of my primary questions, I consider each of these students maligned because a believer in Sander’s mismatch theory would have to conclude that these lawyers were inappropriately attending their law school of choice. I reference each of these students in response to Sander’s assertion that “the use of these [racial] preferences by elite schools gives nearly all other law schools little choice but to follow suit” (p. 418). The logical conclusion of
his assertion is that nearly all African American law students are inappropriately matched to their law schools. Yet, the participants have each achieved and continue to achieve along a path that was, in large part, formed by that law school attendance. In addition, next, I suggest that adherence to the mismatch theory is not only detrimental to individual students, but that it damages law schools specifically, and, more generally, damages society.

**Institutional Benefits**

Lest it be forgotten, the students are not the only beneficiaries of their law school attendance. The institutions have benefitted from their presence and continue to benefit as well. Whether one considers the diversity label an illusion or a reality, were the law schools not beneficiaries, one would not find an ode to diversity on nearly every law school’s website and brochures. Law schools continue to promote diversity because it has value to their two major clientele: prospective students and prospective employers.

One institutional benefit is that of greater recruiting potential. Prospective students look for evidence of diversity, especially where diversity is most lacking—in elite or more selective law schools. As Ellis (RSU) pointed out:

Certainly the law school I chose was—the decision I made was based in part on the diversity of the population. I wanted to go to a school where there was inclusion, where I was gonna see other folks that looked like me and thought the way I did. I certainly looked forward to debate of issues. And I didn’t want to be alone in terms of my position.

William (RSU) echoed Richard’s thoughts:
One reason I went to RSU was, talking about race as a factor, was because at the
time it had one of the largest minority populations in law schools, at the time. And
that was one of the reasons I wanted to go there.

Professor Jones (RSU) summed up the need for evidence of diversity across all levels when he said, “It’s helpful to see somebody who looks like you around, it’s helpful to have people who want you to succeed, but it’s probably helpful for White students also.” The difference is that in nearly every law school, White students will see students and graduates and faculty who look like them, who have already succeeded.

Students’ connections to fellow students, graduates and faculty provide significant benefits. While rarely, if ever, quantified, these mentoring relationships are invaluable (Fagenson, 1988). Students are literally shown images of their future careers. Students are able to plan each strategic step in their ascension because the characteristics of their mentor virtually match their own. In opposition, a discordant relationship has less value than a concordant relationship because commonalities are decreased.

Ellis’s (RSU) statement above suggests another institutional benefit derived from diversity that would be less attainable if, following the mismatch theory, affirmative action in law school admissions were to be eliminated. A heterogeneous student population has greater potential for the discussion and analysis of a larger breadth of knowledge, experiences, and perspectives (Antonio, 2001; Chang, 1999; Gurin, et al., 2002). Following Ellis’s suggestion that he did not want to be alone in terms of [his] positions, for students that found a critical mass or those that felt secure enough without a critical mass, their voices added to a dialogue that would likely have failed to exist within a homogenous learning environment (Addis, 2007-2008; Etzkowitz, Kemelgor, Neuschatz, Uzzi & Alonzo, 1994).
The term dialogue has a heightened significance in law schools. From time immortal, law schools have relied upon the Socratic method (Friedland, 1996) for teaching law students how to “think like lawyers.” This method depends upon a clash of ideas from various perspectives to make classroom experiences meaningful. Moreover, law schools argue that the Socratic method prepares problem solvers to compete in a complex global society, one that requires a continually emerging diversity of ideas. By definition, the homogeneity supported by the mismatch theory decreases the variety of potential perspectives.

Beyond the dialogue that a heterogeneous population can bring to a law school, the lack of a critical mass has immediate results on how the students from historically marginalized communities experience law school. As Alpha (RSU) pointed out:

One of the reasons that we as African Americans ended up studying together is because there’s this perception that African Americans don’t do well in law school. I guess it’s more of a perception, but it’s a perception that we don’t do well in law school. What does that mean? No one wants to study with us, reach out to us.

A critical mass of fellow African American students allowed Alpha and other students to find a “safe place” where they felt their thoughts would be challenged on their strength, not their race. Solórzano, Ceja, and Yosso (2000) considered “the advantages of having a critical mass of African American students on campus” (p. 64). Their conclusions suggested that without a critical mass students often felt “‘invisible’ with the classroom setting,” (p. 65) leaving them susceptible to microaggressions within academic spaces. These microaggressions played a negative role in students’ collegiate success, academically and socially.

Some law students sought that space, even if it existed by perception instead of reality.
As John (RCU) stated, “Because I was involved with the Black Law Students Association . . .
[the law school] felt more diverse. It may not have been, because you just see more people that
look like you.” BLSA provided a space where a critical mass appeared to exist, even if it did not
exist when placed within the entire student population.

Nor should the attainment of critical mass be limited to the student body. As Ellis (RSU)
pointed out about faculty:

What can’t be discounted is, it is going to be more comfortable, I think, for me to
go see an African American female professor that reminds me of my Aunt
Josephine, one that I share something in common with, not only just to—I think
it’s all on one level when you’re talking about, ‘Hey, I just have a particular
question about this, that’s all I want, thank you for enlightening me, I’m out, and
you won’t see me again unless I have another question.’ But if I’m going weekly
to sit down, I’m not gonna be in your face unless I can talk to you about
something on a more personal level. And I think that’s got to be easier for us with
somebody that we might have shared experience with, that we just feel
comfortable being in close quarters with.

It is this attainment of critical mass across every possible category that is an institutional benefit.
By increasing a law school’s diversity, the school receives educational benefits including a
greater breadth of discussions and more critical learning opportunities, and heightens the
potential for its graduates to enter the job market with the ability to critically analyze the law
from multiple perspectives. This improves the educational experience and global comprehension
students can bring to the fore throughout their careers.
Finally, for purposes of this discussion, enhanced diversity brings greater recognition of a law school in the marketplace. As a variety of corporate interests pointed out during *Grutter* (2003), businesses are looking for attorneys with a greater diversity of life experiences and perspectives. The law schools that identify these potential students and groom them for practice will lead the market. However, should someone argue that the market alone will solve all diversity issues, one must remember that businesses still tend to hire the largest law firms because those law firms have the resources to cover the wide array of issues businesses bring with them. For multiple reasons, these law firms tend to recruit students only from the most elite law schools. Some, but not all, of these reasons include a history of law firm founders and members who graduated from these elite law schools, the desire to have the prestige connected to these law schools carried to the firm, and various forms of social capital that network these graduates with these employers.

Lastly, when considering institutional benefits, there are a range of outcomes from which the largest institution—society—benefits when the mismatch theory is not advanced. Law schools play a role within the larger society that can either advance equal access to resources or inhibit that access. While perceptions of and respect for one another may be far more difficult to encourage, citizens can make a conscious choice about supporting distribution of resources. Education is one such resource that has undergone dramatic changes over time.

From the first contact between people of European descent and people of African descent, European Americans recognized the danger in educating a marginalized community. Slaves were not to be educated, under penalty of death. With no higher penalty available, European American society conveyed what it feared most and what resource would best maintain the *status quo* (Anderson, 1988).
With the termination of legalized slavery, the next best strategy was to make inter-racial education illegal (*Plessy v. Ferguson* (1896)—“separate but equal”). Theoretically, making slavery illegal meant that European Americans had no more control over the choices African Americans made and the education they pursued. Realistically, societal racism, economic limitations, Jim Crow laws, the Ku Klux Klan, and more, made free African Americans’ choices only slightly better than slaves’. By separating resources that were “permissible” for European Americans from those permissible for African Americans, European Americans were “legally” able to restrict access to whatever was deemed most precious, for example, education.

With the termination of legalized racial segregation (*viz.*, *de jure*) under *Brown* (1954), the next best solution for European American hoarding became economic apartheid. Through a variety of transitions, education has been re-segregated as is evidenced by spending per pupil in districts whose residents predominantly come from historically marginalized communities. This is exacerbated by the increase in charter schools and any school that uses a test or lottery for admissions (Bell, 2004; Irons, 2002; Welner, 2010).

Since most public secondary schools do not test for admission, the next logical strategy was to use testing to further segregate the attainment of a societal commodity. Higher education achieved this, but through a number of phases. Admission into higher education used to be through a system of recommendations. Those who had access to institutions recommended those that they felt would most likely continue the institutional interests. When standardized testing threatened to disrupt the established system, the testing became standardized to the experiences and understanding of historically privileged communities and the results were detrimental to historically marginalized communities (Brookover, 1985; Crouse & Trusheim, 1988; Lemann, 2000; Sedlacek, 2010). Today, Sander’s suggestions lead to a maintenance of social inequalities.
I suggest this because my study’s participants proved that they can do the work and reap the benefits in a variety of ways. Most did not graduate first or even in the top 10% of their class. But each moved further along their chosen life trajectory, in part, due to their law school experiences.

Moreover, their conscious and sub-conscious ability to “pay it forward” was highlighted when John (RCU) stated,

> When I graduated law school, my mom had a graduation party at my mother’s house. A lot of my friends were there. My mom gave a speech I don’t particularly remember in front of everybody. I’m sure I was a little embarrassed. My friend actually went back to college after that, she said, “You know, your mom’s speech at your graduation party made me want to go back to school.” And I said, “Why?”

> And she said, “Because I wanted someone to be that proud of me.”

Like ripples from a stone in a pond, John’s success provided the impetus for another person’s success in a community that has historically been disproportionately less academically successful than their privileged counterparts. According to his friend, John provided the springboard to her potential success. In the process of progress, her ripples will advance the momentum initiated by John.

**Conclusion**

Sander put forward a nearly perfect argument. Not that his argument had not been previously raised, but his was nearly perfect in its inability to be contested. It is impossible to determine whether, over a lifetime, an individual would have been happier or better off attending law school Z instead of law school A, with or without affirmative action. No individual can go
back in time and repeat every aspect related to their time during and after law school. This is the eternal quandary connected to quantitative analysis: there is no perfect counterfactual.

Instead, it is individuals who must determine their “appropriate match” at any point in time, especially upon choosing a law school. The former students in this study all used law school as a tool. It helped shaped who they were and who they’d become. They encountered costs and benefits whether they attended RCU or RSU, and dealt with them regularly, both while they were in law school and after. But they chose the location they felt best fit their needs and succeeded under a variety of measures. Importantly, after graduation, they were using skills acquired while in law school. Additionally, each participant graduated and found employment. Moreover, they contributed to the institutions they chose to attend and that chose to admit them through the diversity of perspectives they brought with them into the classroom as well as extracurricular and social settings. It is because of their successes, individually and collectively, that I argue against anyone—Sander, former teachers, or academic counselors—telling them where they belong or their most appropriate match. Instead, I argue that it is the individual student who must decide the location where their particular aspirations, hopes, dreams, and goals can best be nurtured and achieved.
CHAPTER 7
Crossing the Line: Conclusions and Recommendations

This is a good idea if you think that separate but equal is a good idea. However, if you don’t think separate but equal is a good idea, this is not a good idea.

Professor Williams (2010)

Introduction

I am grateful for the opportunity that this research provided to investigate thoughts, ideas, and concerns that originated from my own experiences. By collecting data from two separate groups of African American males who attended different law schools from my own, I was able to access sources of data newer and different than mine. All of the students and some of the faculty were eager to share their experience and perspectives. Other faculty, I contacted or that my faculty participants contacted, were either hesitant or uninterested. Finally, most, if not all, administrators that I contacted displayed an extreme hesitancy to participate. I report this so that the reader and future researchers can make their own decision about who is accessible and the positions taken and decisions made by different law school groups (e.g., students, faculty, administrators).\(^\text{50}\)

\(^{50}\) I have included a redacted copy of the letter I distributed requesting dissertation participants as Appendix F.
The Research Questions

The experiences and voices of the African American male former law school students revealed much about race and how it functions in law schools. They all acknowledged the presence of racial issues within both of their law schools. Even the participants who suggested that race did not significantly affect them personally, conveyed stories about other students who they observed struggling with racial issues. I would argue that the observance creates its own set of issues and struggles. The fact that these instances remained somewhat fresh within the minds of the participants suggests that they are not insignificant. Irrelevant or insignificant observations are likely forgotten; however, each participant’s memory held numerous experiences of instances when they had either witnessed or encountered racialization (Omi & Winant, 1994; Webster, 1992).

I intentionally use the term “much” because each participant’s statements revealed that race was something that they had to consider. Obviously, degrees varied by individual, but each reflected on time in which race was an issue. Critiques might call this as a “normal” occurrence. However, remember Derrick’s (RCU) experience at an HBCU. According to Derrick, studying at an HBCU “helped me see maybe what the majority thinks about. You don’t think about race.” Because White is equated with normal (Flagg, 2005), European American students are without the same conflicts, struggles, and microaggressions experienced by students from historically marginalized communities. These conflicts, struggles, and microaggressions are not quantified by Sander or other mismatch theory proponents.

Importantly, the conflicts, struggles, and microaggressions were observed at both the less selective and more selective institutions. This observance, at both levels, suggests that the impact
of race exists across any hierarchy of law school tiers. Confronting racial issues is a responsibility of all law schools. Moving from one school or one tier of schools to another does not eliminate the issues that hinder academic achievement. Until critical quantitative and qualitative analysis is moved from the individual student to the institution themselves, researchers will fail to address the systemic nature of inequality in law schools and elsewhere.

Omi and Winant (1994) suggested that the process of racialization is a continual contestation. Within the law schools, a balance is sought that provides support for historically marginalized students while “treating them the same” in order to minimize the ire of historically privileged students. We have seen this through numerous legal challenges, including, but not limited to, *Sweatt* (1950), *Hopwood* (1996), *Grutter* (2003), *BAMN* (2011)\(^{51}\), and *Fisher* (2012). These cases, and CRT, suggest that the contestation over race and access to limited resources that has existed for well over half a century will continue to evolve and situate within American lives.

Every action has the potential to contribute to the construction of race. From the perceived stigma that a participant of a summer program may feel to the Order of the Coif honor bestowed upon a self-identified affirmative action admit, every act involving a student from a historically marginalized community has the potential to shape what it means to be raced within that law school. In this way, the students influence the construction of race but their construction does not stand on its own. Their construction interacts and negotiates with societal constructions that have gained traction and strength through time and intensity. Intensity has been heightened through (mis)education, the media, and other (counter) cultural influences (e.g., the elimination

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\(^{51}\) BAMN is an abbreviation for Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary.
of all “ethnic” classes in some states). As one might expect, and as the participants explained, these spaces are very similar, and must be negotiated whether one attends a more-selective or less-selective law school.

**Sander, the Mismatch Theory, and the Process of Progress**

I offer the Process of Progress model as a replacement for the mismatch theory. In my analysis of students’ fluid movement from novice to veteran, the Process of Progress provides a crystalline lens, capturing the nuances of navigating one of society’s eldest institutions. Alternatively, the mismatch theory provides a blurry Polaroid, static in its assessment of how historically marginalized communities navigate an historically racialized environment.

Essentially, Sander’s theory allowed for assessment at only two points in time, after first-year grades and during the bar exam. Sander treated all three phases of the process as condensed into one. He failed to allow for continuation past this solitary level absent immediate success—individually and communally. Sander called for historically marginalized prospective law students to complete a process within a time frame acceptable to him and historically privileged communities. Sander suggested that an alternative venue would be the preferred route for the majority of historically marginalized students. Yet, by all accounts, the optimal location to learn how to compete in an environment is in that environment. On a common-sense level, what elite athlete learned to compete at the elite level by remaining confined to the junior varsity team? In professional football, announcers often greet college players who have made the transition with, “Welcome to the NFL!” In professional baseball, players are questioned about their ability to compete when they are “brought up from the minors.” In racing, riders and drivers spend countless hours at the club level only to be re-introduced to beginner status upon their
advancement to the highest tiers (e.g., F1, MotoGP, NASCAR). It is only when they are given the chance to try, and sometimes fail, and learn, and grow, that they are able to progress to the elite standard. One would be hard pressed to argue that historically marginalized communities have not toiled for far too much time in non-elite educational status. Now, they must be given the time and opportunity to try, and fail, and learn, and grow, so that they are able to participate at the highest levels. Proportionate to the amount of time that historically privileged communities have owned and operated law schools, historically marginalized communities have simply not had that kind of opportunity.

Sander chose to adopt a position of exclusion, instead of a position of inclusion. By exclusion, I suggest that Sander focused on methods for removing a student or group of students from an environment. That removal would have a rippling effect for historically marginalized communities’ participation in law firms, legislatures, the legal academy and more. Given his quantitative background, Sander knew, or should have known well, the strong correlation between law school attended and law firm partnerships, corporate leadership, federal legislative positions, and more. Therefore, he also knew or should have known the limitations he ascribed to all that followed his recommendation of attending a lower tier, supposedly better-matched, institution. On the other hand, if he had viewed his data through a lens of inclusion, Sander would have asked: What needs to be done for all admitted students to be as competitive with each other as possible? This would not only stretch what it means to “do” law school for historically marginalized students, but for historically privileged students as well. Historically marginalized students would gain instruction on the skills and actions currently prioritized in most American law schools. These include, but are not limited to, issue spotting, critical analysis, Socratic debate—both oral and written, and conveying knowledge in a dialect and
manner most comfortable for the assessing professor. Historically privileged students would learn perspectives and analyses different from their own—a skill in increasing demand as the American economy becomes more dependent upon a world economy, global clients, and an increasingly diverse American citizenry.

Instead of feeling included, a sense of survival is often the mentality possessed by law students from historically marginalized communities as they enter law school. As my study’s participants noted often, if not in these exact words, they wanted to “win.” By win, I mean that they wanted to get good grades, they wanted to rank well among their peers, they wanted to garner academic accolades, and they wanted to graduate and pursue a professional career path. For most, however, upon law school entry, they soon found themselves in the same place as the novice racer—racing to survive.

It is not that the students from historically marginalized communities are not smart. In fact, the participants of this study are, arguably, smarter than their peers from historically privileged communities. Though they came from historically marginalized communities, they have already demonstrated dexterity in maneuvering within academia, an institution that is dominated by individuals from the highest levels of privilege. They were judged (by Sander, faculty, employers, even their institution) by how quickly they could attain the metrics set by Sander and his followers: A GPA equivalent to those from historically privileged communities and bar passage on the first attempt. Instead, former law students in my study tended to gradually develop into what Sander and his contemporaries define as an ideal law student. Their developmental time was used to analyze how those with cultural capital used that capital to access information about success in classes, success on the bar exam, and success in employment.
The concept of cultural capital (Kalmijn & Kraaykamp, 1996) is pertinent and can be applied to other economic examples. A child who buys a house sooner because a parent provided the down-payment is privileged but no better, stronger, or beneficial to society than the child who manages to save a down-payment on their own. One will enter the realm of ownership sooner and pay property taxes earlier, but the other will join thereafter and play a similarly crucial role in the economy. To suggest that because one was able to enter that arena sooner makes them more financially adept detracts from the fortitude demonstrated by the other.

So it is with the 10 former law students in this study. They learned what others often entered school possessing. But it took time and the process was usually not complete until they were between half-way and two-thirds done with law school. In most scenarios, this would be incredibly rapid and beneficial to equalizing outcomes. However, in the law school arena, the first year sets the stage for much of one’s entire legal life. As discussed herein, the first year can catapult a student onto law review, moot court, summer associate positions with the most prestigious law firms, clerkships with the most prominent judges, and more.

Instead of labeling these former students from historically marginalized communities as mismatched, one could just as easily label them as adaptive. Within a relatively brief span of time, my participants evaluated the factors that separated them from the rest, implemented changes to make themselves competitive from that point forward, and continued to compete despite the reality of the “extras” possessed by students from historically privileged backgrounds.

What Sander asked is that the racer entering the track at his first competition be comparable to a racer that could finish on the podium. Few, if any, can. Instead, even those who have spent years languishing in the lower divisions (e.g., 125cc, 250cc, Moto2, Moto3) learn
through actual track time. They learn by finishing last, but finishing. They learn by moving up from last, to second to last, and so on. Our society is myopic, seeing only the winner and, possibly, the podium. But, the other racers also win each time they better their performance. Their instinct allows them to settle for nothing less than first place, but logic and sensibility acknowledges all positive development.

Reflections

In hindsight, there are things that I wish I had done to make this study stronger. These items will guide my future research as well as, hopefully, inform those that advance the baton. I recognize my place in the relay and that I am merely hoping to support and advance the work of many who came before me.

First, I wish that I had inquired more into how each participant spent their summers between first and second year as well as between second and third year. In law school, summers are very formative periods. During this time, many students are employed as summer associates at small, medium, and large law firms. Based on Wilkins’ (2005) assertions and my own experience, there appeared to be a positive correlation between the selectivity of the law school and the size of the law firm. Large (elite) law firms are heavily populated by students from highly selective law schools. Smaller law firms and smaller governmental agencies are more likely the employer for most students from less-selective law schools.

As I will discuss further below, the large firm–elite law school relationship is part of the rationale for discounting the mismatch theory. The summer associate position acts as an (in)formal interview. It gives the law firm an opportunity to see how the student will perform within that law firm’s environment and it allows the student to gain a sense of what it would be
like to join that firm after law school. Many other summer opportunities exist (e.g., summer classes, domestic or abroad; employment with governmental agencies; employment with non-profits), but the summer associate job holds primary significance because, if for no other reason, the students can earn astronomical amounts of money.

For example, in major metropolitan areas, firms may pay an annual salary of $150,000 or more to an attorney joining the firm during their first year. Summer associates are often paid the same salary on a weekly basis. Thus, a very young adult, only out of undergraduate college for approximately one year, may find himself with a check in the range of $2,900 per week (pre-taxes). With a potential monthly income of approximately $12,500, law students may find themselves earning more than their parents.

Moreover, these employment opportunities can come with a variety of perks. The firm wants to impress their current crop of summer associates in hopes that they will see the firm through rose-colored glasses, as well as share that vision with fellow students who will then apply and increase the potential field for the firm the following year. In order to fully aggrandize the experience, firms will take their summer associates on trips, to professional sports contests, to concerts, and to many, many restaurants. While firms can obviously use this time to see how the students might behave in similar situations with clients, these events also lull the students into adopting the elitist lifestyle associated with their jobs. This is part of gaining the cultural capital discussed throughout this work.

Second, on issues of race, I instinctively followed up to ask “why” when participants suggested that they felt that race played a role in some aspect of their law school lives. I was not as aggressive about following up with “why” when a participant said that they felt that race did not play a role. I attempted to be super-vigilant and not force race as a participant’s conclusion or
answer. I feared that asking the “why not” question would signal that I had some desire for them to find some significance with race that they would not otherwise have identified. In hindsight, it is equally important to investigate why a participant felt race was not a factor, even if additional questions lead them to change their answer. Ideally, I would have identified their first answer, that race was not an issue, and subsequently tracked any modified answer that might have suggested race as an issue.

**Recommendations**

One aspect of data collection that I would modify is the order of initial contact. Individuals who are unfamiliar with the investigator tend to be hesitant to openly discuss some topics. From this experience, I believe that initially meeting each participant during a focus group would provide a sense of safety and assurance that others were willing to freely engage the issues presented. Instead, here, the focus group seemed to accelerate certain individual’s acceptance of the research and the researcher.

**Before law school – The summer session.**

Pre-law school sessions have the ability to train students about law school with a variety of goals. They can be used to socially prepare students to know who their peers are, what the physical environment will look like, how the building is laid out, who the professors are, and more. The same programs can also be used to academically prepare entering students. They can demonstrate the fundamentals behind different subjects taught during law school. They can teach how to brief a case found in a casebook and explain why that process is helpful to law students. These are skills that are not inherent to a student commencing law school, yet some students are
clearly more efficient and proficient at them. Future studies might inquire into defining the cultural capital that students who identify as belonging possess as they enter law school.

The following are my suggestions for a summer preparation program. I acknowledge that there are already programs in existence that do a superb job at preparing historically marginalized students for law school (e.g., Council on Legal Education Opportunity, The JD Project’s Law School Boot Camp). Problems with these programs center around three key issues: (a) availability of seats, (b) costs, and (c) location. I suggest that each law school, highly selective or not, offer its own unique program so that its students become acclimated with its atmosphere, its physical structure, its professors, and more.

It is extremely important that during this pre-law school time frame any materials that are graded do not count toward a student’s GPA. This alleviates the pressure to outperform one another and advances the goal of learning. As Richard (RSU) stated:

To benefit African American males or to make the experience different, I think that I might be inclined to do away with grades. As a practical matter, it’s never gonna happen, because if you’re not at Yale or Stanford, the elite law schools, you can’t compete on the market if you don’t have GPAs. At Yale, for example, they have pass, high pass, and low pass. So effectively, if you graduate from Yale, you haven’t failed, and you’re viewed effectively the same across the board. They figure you’ve graduated from Yale, you’re qualified to do anything they might ask you to do. Same thing with Harvard or Stanford.

With the grade pressure gone, students can take risks. They can discover who they are as law students, how they orally communicate, and how they write. They can use the instructor’s
feedback as a compass as they tweak who they are with who they need to be to complete law school with the best possible outcome.

Most importantly, the law school must “buy into” the program as a community. The student groups must be given space and support to help guide students. For example, BLSA (and other affinity) groups must be involved in the planning and provided with resources to organize lunches, happy hours, and other “meet and greet” events. I emphasize the need for all affinity groups to be provided space during this time period. This includes the Federalist Society, religious organizations, as well as those structured to support historically marginalized communities. This recognizes the suggestions of the participants that a key factor in moving from exclusion to inclusion was the opportunity to meet other students with whom they felt comfortable and safe.

I expect the largest push-back for institutions to be cost. However, as I witness the funding going toward any number of endowed chairs as well as the money directed toward faculty and administrative trips and retreats, I consider the use of funds as I suggest here to be merely a choice. If law schools are committed to diversity, democracy, and excellence for students within their own settings as well as the legal community, this work provides a guide on how to minimize the gap in grade point averages, graduation rates, and employment differences for students from historically privileged communities and students from historically marginalized communities, while simultaneously supporting and building community for all groups.

**During law school.**

Mark’s (RCU) experience of transferring from another law school was unique when compared to all of the other participants, but it brings up the question of the fairness of his ranking against students who were not similarly experienced. Initially, Mark was not happy to
have to repeat a year of law school. As with most young adults, Mark’s initial thought
surrounded the value (in terms of tuition costs, income loss, and time) of the loss of that year.
However, in hindsight, he realized the value that his experience meant to his grades and how a
higher rank within his class increased his options upon graduation. While many law schools are
considering reducing the amount of time it takes students to graduate, further research could
investigate the potential value of increasing time in law school. If there was a structured period
or program that replicated Mark’s experience, more students would have access to the cultural
capital that plays a role in law school success. Moreover, each student would have to choose
their path: one that leads to a shorter law school experience and quicker entry into the practice of
law, or the other, which leads to a greater understanding of the law school experience although at
the cost of tuition and immediate income.

Instead of, or in addition to, the recommendations made above, law schools could
restructure the historic method of teaching to assist students in maximizing their comprehension,
and thus, their grades. One way would be to increase the number of assessments. Law schools
are notorious for having only one exam, usually at the end of the semester, but occasionally at
the end of an entire school year. In an environment where grades are almost entirely contingent
upon the student’s ability to communicate their knowledge in a manner most preferred by that
course’s instructor, those that are most novice to the environment would seem at a distinct
disadvantage. Currently, some professors hide exactly what they are looking for in an ideal
student response, the students do their best to seek out advice from a variety of sources to give
them a leg up over their peers, and, ultimately, the students hope that they guessed correctly,
framing their answers in a manner pleasing to the assessor. As Professor Miller (RSU) pointed
out:
The hardest thing, honestly, as a professor, is when you read an essay answer and you can tell that the student knew the information, [but] the student simply doesn’t give you enough in writing to be able to give the student as good a grade as somebody else who nailed it in terms of how they communicate.

An example of a solution would be to provide three written assessments over the course of the semester. I intentionally used the generic term, assessment, because these assessments could take various forms. A professor could give three different exams or two exams and a paper, or two papers and an exam, or any variety of possible tools. Each assessment would have a higher value than the previous. Then, assuming proper and valuable feedback from the professor, each student would have an opportunity to learn the styles, techniques, and preferences of each professor. It would cease to be a matter of hide, seek, and hope.

**Final Words**

Mismatched or maligned? The data that the participants provided suggests that individuals labeled as mismatched with their appropriate law schools likely have a claim against their detractors for being maligned. To be mismatched suggests that one object is “inaccurately” paired with another (Webster’s II New Riverside University Dictionary, 1988). The students who chose to be in, and were admitted to, an environment that their detractors would identify as mismatched are not only appropriately within the boundaries of their law school (by their own evaluation and the law school’s), but, they are serving an important function within themselves, their institution, and society.

My contention with Sander’s mismatch theory is not about what his numbers say; it is with the fact that the “recipients” of the mismatch theory had no say. Sander never asked how
they felt, what they experienced, what they needed or lacked, or whether they described themselves as mismatched according to his calculations. Sander articulated his vision of why mismatch matters but he never asked what matters to the affected community. According to my participants, what matters to them is simply the opportunity to compete. They never suggested that they equated law school success with being ranked first in their class, or even in the first half of their class. Instead, they equated success with the growth and development that occurred during their law school tenure. While one might argue that such growth and development could occur at any law school, my data suggests that the student’s choice of venue plays a very important role. Self-autonomy influences self-development.

The participants chose their respective law schools and the law schools chose each of them. Each had a purpose for the other. Each student decided that their school met their expectations for educational, social, and career advancement. Each law school decided that accepting each participant would strengthen their community. Law schools need some students who will live in their books, some students who will extensively compete in moot court competitions, some students who will serve in clinics, and others that will represent the law school in a myriad of ways. A mechanical, computerized admission process that relies solely on quantitative measures homogenizes a law school, decreases diversity in people and interests, and stymies a law school’s potential for receiving and articulating global perspectives. This is an unacceptable cost, to the law school and society.

Moreover, and perhaps more importantly, if one follows Sander’s directions, the institution’s growth would be simultaneously stunted with the students’. As has been pointed out earlier in this work and by many others, most of our nation’s leaders in economic, legal, and legislative matters come from the very institutions from which Sander intends to further restrict
access and isolate. To send forth leaders with little interaction and understanding of various communities does not bode well for America’s global success. Law schools, our nation, and our democracy benefit from increasing understanding and dialogue between all individuals and communities.

In November 2008, Barack H. Obama was elected President of the United States of America. While I have found no credible source detailing his LSAT score(s), Sander’s analysis would likely frame him as an affirmative action admit because Sander suggests that all elite schools use these preferences (Sander, 2004). How likely would this moment in history have been if Obama graduated from Howard Law School instead of Harvard Law School? How much did that benefit historically marginalized communities, our nation, or the world? The mismatch theory would suggest that the costs outweigh the benefits. Nonetheless, individually, communally, and institutionally, my study’s participants, President Obama, and others like them have played an integral role in the process of progress.
References


Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), et al., v. Regents of the University of Michigan, et al., Nos. 08-1387/1389/1534; 09-1111 (6th Cir. 2011).


predominantly White institution of higher education (Doctoral dissertation). Available from ProQuest Dissertations and Theses database (UMI No. 3366587)


Fisher v. University of Texas at Austin, Supreme Court of the United States Docket Number 11-345; Petition for a writ of certiorari granted on February 21, 2012.


Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).


Plessy v. Ferguson, 163 U.S. 537 (1896).


United States v. Thind, 261 U.S. 204 (1923).


Appendix A

Interview Protocol

Interviews will be conducted with students, faculty, and staff who agree to participate. Whenever possible, I will conduct interviews in person. If necessary, I will conduct them by telephone or e-mail.

Questions:

1. To which law schools did you apply? Which law school admitted you? Why did you choose your law school? Did you receive any scholarship offers?

2. How would you describe your confidence level as a student before entering law school? Half way through law school? At completion of your law school experience?

3. Do you feel like your first-year grades reflected your level of understanding in law school? Second-year? Third-year? Why or why not?

4. Did you participate in any externships, internships, or summer jobs?

5. How would you describe your law school experience? Related to other students? Faculty? Administration?

6. Do you feel that your race played any role in your law school experience? Why or why not?

7. Do you feel like you benefitted from your law school experience? How? Why?

8. Do you feel like there were costs associated with attending law school? What were they? How did they affect your experience?

9. Did the costs outweigh the benefits of law school?

10. How many years of law school did you complete? What led to your exit from law school?

11. What career/job opportunities arose from your law school attendance?
12. How many times did you take the Bar Exam? Did you pass? When?

13. Would you “do law school again?” Why or why not?

14. What would you change about your law school experience? About THE law school experience?
Appendix B

Document(s) Request

- Current business cards
- Resume/CV
- Transcripts
- Relevant letters/emails written during law school
- If still maintained, personal statement(s) used in law school admissions application

Please forward to:

Darrell D. Jackson  
Doctoral Candidate  
University of Colorado  
School of Education  
Room 437  
249 UCB  
Boulder, CO 80309-0249
## Appendix C

### May 2011 NVivo Coding

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<td>Describes the role that affirmative action (or something that might have been called affirmative action) played during law school</td>
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<td>Age</td>
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<td>Alumni</td>
<td>Describes participants' involvement with law school alumni</td>
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<td>Application process</td>
<td>Describes getting into law school</td>
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<td>Architecture</td>
<td>Describes the look in and around their law schools</td>
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<td>Bar passage</td>
<td>Describes the entire process (i.e. applying, studying, understanding) around the bar</td>
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<td>Describes a sense of belonging while at law school</td>
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<td>Blackness as Property</td>
<td>Pushing on Harris's &quot;Whiteness as Property&quot; concept</td>
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<td>Describes participation in and the importance surrounding BLSA</td>
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<td>Describes community inside and outside of the law school</td>
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<td>Describes community service during and after law school</td>
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<td>Describes the effects of commuting on the law school experience.</td>
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<td>Comparing the costs v. benefits</td>
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<td>Benefits</td>
<td>Responses to costs vs. benefits, which one outweighed</td>
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<td>Competitiveness</td>
<td>Comments about competitiveness both individually and within law school</td>
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<td>Describes the role that minority population played</td>
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<td>Describes differences in the two programs</td>
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<td>Describes the effect that deferring did or could have had on participants</td>
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<td>Demographics-Admin</td>
<td>Describes the role and numbers of administrators (usually of color) in participants' law school experiences</td>
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<td>Demographics-Faculty</td>
<td>Describes the role and numbers of faculty (usually of color) in participants' law school experiences</td>
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<td>Describes the participants path after leaving law school</td>
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<td>Describes the style and impact of faculty (usually of color) on the participants' law school experiences</td>
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<td>Describes the role and relevance of family in the participants' journey</td>
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<td>Describes whatever role that gender may have played in this analysis</td>
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<td>Describes suggestions for and wishes of guidance</td>
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<td>Happiness</td>
<td>Participants talk about what makes them happy</td>
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<td>Describes internships and externships participants held while in law school</td>
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<td>Describes feelings of isolation experienced by participants</td>
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<td>Describes job offers received coming out of law school</td>
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<td>Describes the role a judicial clerkship played in participants' lives</td>
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<td>Describes participants' involvement with law review</td>
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<td>Describes the analysis that went into a participant's decision on law school choice</td>
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<td>Describes effect the law school exam process had on participants</td>
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<td>Describes who participants called friends</td>
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<td>Describes participants' relationships with all students</td>
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<td>Law school wand</td>
<td>Describes how each participant would &quot;fix&quot; law school</td>
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<td>Describes characteristics that make up a good (successful?) lawyer</td>
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<td>Leadership</td>
<td>Describes leadership positions held by participants</td>
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<td>Describes the relevancy of grades in law school</td>
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<td>Describes participants' perceptions of how gender may have played a role</td>
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<td>Describes participants' contact with a &quot;minority program&quot; to support access</td>
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<td>Describes the role that maturity plays in &quot;surviving&quot; law school</td>
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<td>Media</td>
<td>Describes the role the media played in participant's perception of law school or lawyering</td>
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<td>Role model</td>
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<td>Describes the role that the military played in one participant's law school life</td>
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<td>Describes the role that money played before, during, and after law school</td>
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<td>Describes the role of networking in law school and in life</td>
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<td>Night school</td>
<td>Describes differences in going to night vs. day classes</td>
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<td>Order of the Coif</td>
<td>Describes one participant's feelings about being named to the Order of the Coif</td>
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<td>Describes the role that outlines played in &quot;doing&quot; law school</td>
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<td>Describes different views of how to prepare for &amp; what preparation looks like in law school</td>
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<td>Describes how participants prioritized their lives during law school</td>
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<td>Professors</td>
<td>Describes how professors acted, could have acted, should have acted</td>
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<td>Quotes</td>
<td>List of REALLY memorable quotes from participants</td>
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<td>Describes views and perspectives that the participants held on race inside and outside of their law schools</td>
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<td>Answers whether participants would &quot;do&quot; law school again</td>
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<td>Describes the role of confidence in the participants' lives and in law school</td>
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<td>Describes ways in which participants described themselves</td>
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<td>Describes perspectives on how SES affected law school experiences</td>
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<td>Describes how to “fix” law schools</td>
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<td>Describes how participants felt about student rankings in law school</td>
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<td>Describes thoughts about the use of study groups while in law school</td>
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<td>Describes the study habits used by participants</td>
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<td>Describes different perspectives and definitions held by participants about how to define success</td>
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<td>Describes choices made by participants with regards to success</td>
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<td>Goes beyond whether one is successful or not to whether something makes one MORE successful</td>
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<td>Describes how to find one's passion</td>
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<td>Describes the role the religion or spiritual faith plays</td>
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<td>Describes moments of questioning one's own success</td>
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<td>Describes different forms or types of success</td>
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<td>Describes the summer program attended by some; they talk about structure and perception</td>
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<td>Describes the role or effect of transferring law schools</td>
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<td>Describes participants’ undergraduate GPAs</td>
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<td>Describes where participants attended college</td>
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<td>Describes the effect and impact of US News on the participants</td>
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<td>Suggests the participant was wait-listed before admission</td>
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# Appendix D

## February 2012 NVIVO Coding

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Appendix E

The Process of Progress
Appendix F

Recruitment Letter

April 8, 2010

Good Morning:

My name is Darrell Jackson and I am a doctoral candidate at the University of Colorado at Boulder (CU). Immediately prior to enrolling at CU, I served as Assistant Dean and Director of Diversity Services at [ ], My current research is an expansion of the thoughts and concerns developed during that time at [ ] and surrounds issues at the intersection of law, education, and race/cultural studies. I am writing to request your help finding people who are willing to discuss those issues.

Specifically, I am searching for African American former law school students from [ ]. I’d like to start with those who graduated or left their law school within, approximately, the last 10 years. From my time working on the east coast, I recognize that your organization likely has members and allies within that community and I would greatly appreciate your connecting me with them.

If you’d like confirmation about my research, or me personally, please feel free to contact my advisor Michele Moses, PhD. Our contact information is placed below and details about her can be found at:

http://www.colorado.edu/education/faculty/michelemoses/

I cannot express how much I appreciate any support that you are able and willing to provide.

Respectfully,

Darrell Jackson, JD
Darrell.Jackson@Colorado.edu
703.407.5112

Advisor:
Michele Moses, PhD
Michele.Moses@Colorado.edu
303.492.8280