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HELPING OUR STUDENTS REACH THEIR FULL POTENTIAL: THE INSIDIOUS CONSEQUENCES OF IGNORING STEREOTYPE THREAT

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A psychological phenomenon may be a significant cause of academic underachievement by minorities and women in the legal profession. This phenomenon, called stereotype threat, occurs as a result of the fear of confirming a negative group stereotype (such as African-Americans are not as intelligent as Whites). When subject to this threat—as a consequence of being confronted with environmental or explicit triggers—people perform worse in academic settings than they otherwise are capable of performing. In this article, I explain the research on stereotype threat, discuss its implications for law schools, and make several recommendations to combat the threat.

When an individual is subject to stereotype threat, she is confronted with the fear of providing evidence that a negative group stereotype is true. This fear, and its associated anxiety, creates a cognitive load that affects working memory, ability to focus, confidence, self-esteem, and effort. This partial occupation of the brain's functioning, in turn, impedes performance. This phenomenon has been documented across racial/ethnic and gender groups. Fortunately, the effects of stereotype threat can also be ameliorated through a variety of interventions designed to disrupt the stereotype threat-affected brain's preoccupation with worry about confirming the negative stereotype.

The findings on stereotype threat present natural implications for law school admissions, of course. If a portion of our applicant pool is affected by stereotype threat, then we cannot trust the accuracy of the metrics we typically use in law school admissions, i.e., prior academic performance and LSAT scores of law school applicants. Indeed, those

credentials actually may under-evaluate the academic potential of these applicants, who are often minority students. This should cause law schools to reevaluate their admissions policies.

After students are admitted, law school provides fertile ground within which stereotype threat can flourish. This, of course, means that the performance of minorities in law school—in class, on exams, and in other areas—is likely to be diminished, such that many minorities will not perform up to their academic capacity. Obviously, we would expect this same dynamic to occur on the bar exam. I also posit that stereotype threat can affect performance when affected law graduates enter practice.

Law schools can address stereotype threat at each of these levels, and they should do so. This article lays out a framework for understanding and dealing with the threat.

Introduction

Imagine two law school applicants. One is an African-American. The other is White. Both from a middle class background. Assume both have the same IQ, have had the same educational opportunities, and have the same capacity for performance. They are applying for law school and are taking the LSAT. Assume that they have prepared for the exam in the same way. But they get different scores on the exam. Why would that be? And when an admissions committee compares their credentials, can the following data be trusted?

Student	"Raw" LSAT	Undergraduate Grade Point Average
X	155	3.45
Y	157	3.65

In other words, the question is whether a law school admissions committee can say, definitively, that Student Y is more qualified (or academically prepared), and hence more deserving of admission, than Student X. Or, put yet another way, the question is whether the admission of Student X over Student Y must be the result of some kind of affirmative action, in the most pejorative sense.

Imagine these same two people as law students. They are sitting in identical law school classes with identical racial compositions. These students, who have the same work ethic, have prepared fully for a law school class and are asked the same kind of Socratic questions from the same kind of professor. Why does one—who otherwise is equally capable as the other—do worse in response to the questioning, or on law school exams, or in law review petitioning, or on the bar exam?

The only difference between these students is the level of risk they face at all levels of academic development. Both bear the risk of embarrassing themselves if they do not answer well or perform worse on school exams or standardized tests. But only the African-American student bears the additional risk of confirming the widely-known negative stereotype that Blacks are not as intelligent as Whites. And this additional burden on the African-American student's cognitive processing may, in turn, impede this student's ability to perform up to capacity at any given moment of academic

consequence.

Obviously, all I have described is hypothetical. No two people are exactly alike. Nor can they be reduced just to their credentials. But this is often how we view and treat them. To the extent that our treatment of law school applicants, law students, and others is influenced by reliance on credentials, we run a risk of misevaluating, and thus mistreating, stereotype threatened individuals. Identifying the threat and the performance effect that it has on some students is the focus of this article.

Since the civil rights era, there has been concern about underrepresentation of African-Americans and (later) other ethnic minorities and women in the legal profession. In the late 1960s and early 1970s, only about one percent of attorneys were black, while the percentage of blacks relative to the total United States population was more than ten percent. These numbers were due, in large part, to systematic discrimination against Blacks, generally, and marginalization of the Blacks who were lawyers. In response to these disparities, law schools began to enact affirmative action admissions policies designed to grow the number of black lawyers. These policies were moderately effective at increasing the number of Blacks in law schools. Over the decade of the 1970s, first-year minority enrollment nearly tripled and, by the mid-1980s, minority enrollment was at an all-time high.

But the admission of greater numbers of minorities was followed by other concerns. Blacks and other students of color got lower grades than Whites, attrition rates for minorities were higher, and minority students failed the bar exam at higher rates. It became clear that increased admission of minority students, alone, would not sufficiently resolve issues of underrepresentation in the profession. In other words, not only was admission of blacks a significant issue, but so was retention. These remain issues of concern. Minority law school enrollment has fallen, and those black and brown students who have enrolled still overpopulate the bottom rungs of the class, still fail the bar exam in greater numbers, and still are substantially underrepresented in the legal profession.

For the past twenty years, the study of stereotype threat has flourished in the psychology discipline. As an explanation for dramatic suppression of minority performance, stereotype threat studies show that, in certain situations, African-Americans, Latinos, and others perform worse due to the psychological pressure caused by the fear of confirming negative group stereotypes. This psychological experience is profound and pervasive, but its

effects can be mitigated. Stereotype threat affects law school applicants and, subsequently, law students. Any admissions policies or curricular efforts that ignore stereotype threat work, then, to the detriment of these students. In this article, I explain why law schools should take stereotype threat seriously, and I propose admissions and curricular reforms that account for stereotype threat and address its effects.

In Part I, I discuss stereotype threat, describing in detail the work and findings of Claude Steele, Joshua Aaronson, and a host of others on the topic of stereotype threat.[1] As I will explain in more detail below, stereotype threat is a psychological effect that negative group stereotypes can have on members of a stereotyped group. In short, stereotype threat can cause members of a group to perform at levels lower than that at which they are capable. This underperformance is due to psychological pressure placed on members of a group when engaged in tasks for which there is a threat of confirming a negative group stereotype. For example, women will perform worse on math tests when the negative stereotype about women being bad at math is put at issue (or "primed"). Or, African-Americans will perform worse on tasks when the negative stereotype about Blacks being less intelligent that Whites is primed. Though the effects of stereotype threat are well-documented by empirical work, they are difficult to quantify. But it is undeniable that stereotype threat exists and that its effects are substantial.

In Part II, I discuss the lack of sufficient consideration of stereotype threat by the legal academy and the courts. While a few legal scholars have focused on stereotype threat as a primary issue, most have discussed it only in passing or in very discrete contexts. And in the courts, it is even worse. Stereotype threat has been addressed in only one reported decision, and only marginally at that, and attorneys have missed significant opportunities to use stereotype threat as a serious foundation for their arguments in affirmative action litigation.

In Part III, I will discuss the implications of stereotype threat for law schools. There are three obvious areas where stereotype threat is likely to have an impact. The first is law school admissions. If they show nothing else,

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[1] *See generally* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997) [hereinafter *A Threat in the Air*]; Claude M. Steele, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (2010) [hereinafter WHISTLING VIVALDI].

stereotype threat studies demonstrate that the standardized test scores of African-Americans and other groups understate the true ability of these students.[2] Accordingly, affirmative action admissions policies should take stereotype threat into account. But the implications of stereotype threat reverberate beyond the world of admissions. Given the myriad opportunities in law school for minority students to experience stereotype threatening situations, stereotype threat provides a plausible and likely explanation for some of the low performance by minorities in law school and on the bar exam.

In Part IV, I discuss how law schools should take this into account and implement programs and teaching methods that are designed to ameliorate rather than reinforce stereotype threat. Academic support programs, which already are set up to implement programs designed to help students reach their academic potential, can be used to achieve some of these goals. In addition, law school professors should be trained to avoid exacerbating the threat and to mitigate the threat by using better teaching methods.

Finally, in Part V, I discuss possible criticism of my recommendations.

I.   The Insidious Brain: Negative Conscious and Subconscious Dynamics that Affect Human Judgment and Academic Performance

Many explanations have been offered to explain low academic performance by African-Americans and other students of color. In general, theories can be divided into three categories relating to: (i) intellectual capacity, (ii) environmental factors, and/or (iii) psychological influences. In the first set, writers argue, essentially, that blacks do not have the same

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[2]   This is not to say that these tests are a valid measure of ability. *See, e.g.*, Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1071-73 (1997) (LSAT and GRE are poor predictors of academic success in general; and "[f]or minority students, moreover, studies by several admissions scholars reveal small or no meaningful statistical relationships between test scores and academic performance."). *See also* Allen R. Kamp, *The Missing Jurisprudence of Merit*, 11 B.U. PUB. INT. L.J. 141, 163 (2002).

intellectual ability as their white counterparts.[3] The second set of theories look to environmental factors—including economic and social causes of low performance.[4]

Yet a third set of theories focus on psychological factors that may affect performance. These theories include aspects of implicit (or subconscious) bias and the focus of this paper, stereotype threat. The study of human psychology as it relates to race has grown in recent decades. Specifically, the

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[3] *See, e.g.*, RICHARD HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994). *See also* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004). Even though I have put Professor Sander's mismatch theory into the intelligence category, I imagine that he would not characterize his theory in the same way. The essence of Sander's argument is that lower-credentialed minority students cannot compete with their higher-credentialed, and, hence, more qualified, white colleagues. Taken at his word, Sander intends his analysis to benefit blacks by suggesting that they go to less elite schools, where they will be better matched and have a better chance for academic success, bar passage, and ultimate happiness. *Id.* at 453. Thus, he argues against affirmative action policies that create these mismatches, i.e., admissions policies that admit racial and ethnic minority applicants who have lower than typical entry credentials. But it seems that a suggestion that students with lower credentials cannot compete at least implicitly suggests that they lack the capacity to do so. Otherwise, the suggestion that "mismatched" students should go to lower tiered schools with lower admitted student credentials makes little sense. A better solution would be to provide more effective academic support for lower-credentialed students so that they can compete more effectively with their higher-credentialed counterparts. *See* discussion of mismatch theory, *infra.*

[4] These factors include socioeconomic status, quality of prior educational opportunities, quality of teaching, and other factors that may affect students' preparedness to engage in particular educational opportunities. Some theories cannot be put squarely into these categories, but even these theories are hybrids of these concepts. *See, e.g.*, Deborah Zalesne & David Nadvorney, *Why Don't They Get It?: Academic Intelligence and the Under-Prepared Student as "Other,"* 61 J. LEGAL EDUC. 264 (2011) (speaking generally to low performance but not specifically to performance disparities among different racial or ethnic groups). Professors Zalesne and Navordney suggest the following: "We propose an additional 'intelligence' of sorts—'academic intelligence.' We use that term to refer broadly to a student's actual level of academic preparation, i.e., a student's readiness or ability to engage productively with an academic environment and to benefit from that interaction. We believe a student's academic intelligence is about more than simply cognitive skills; it's akin to culture, including not only cognitive, but also affective and social skills, all of which contribute to a student's level of success." *Id.* at 264.

study of implicit bias and stereotype threat has flourished.[5]   Implicit bias, simply put, refers to subconscious presumptions that affect human decision-making.   Stereotype threat, on the other hand, refers to conscious and subconscious reactions to known negative group stereotypes.   It is outside of the scope of this paper to discuss whether implicit bias and stereotype threat are the same phenomenon (which they probably are not) or if their functions overlap (which they probably do).   This section will describe implicit bias generally, and then stereotype threat in detail, to show how cognitive processes affect human behavior in significant ways.

A. Background – The Study of Implicit Bias

The term implicit bias refers to subconscious distinctions people make, specifically as they relate to issues of race.[6]   In general, the study of implicit bias has shown that people react differently when confronted with differing "images" of race and gender.   Most profoundly, the study of implicit bias has shown that people are more likely to make negative associations with blacks that they do not make with whites.   These subconscious biases have been shown to make a difference in situations involving employment[7], suspected criminal activity[8], and in other areas.

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[5]   Courts have relied on the social sciences to assist in determining the outcome of some cases.   *See, e.g.*, ROSEMARY J. ERICKSON & RITA J. SIMON, THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS (1998).   Legal academics regularly use studies on psychology and cognition to further their arguments on important topics.   And implicit bias alone has been discussed in hundreds of law review articles.

[6]   *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563 (2013).

[7]   *See* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009); Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010).

[8]   *See* Bassett, *supra* note 6, at 1577 (describing potential effects of implicit bias on eyewitness identifications and jury deliberations); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012); Ali Eacho, Comment, *Surviving Implicit Bias: Why the Appellate Court's Interpretation of the 2012 Amendment to the Racial Justice Act Will Be a Life or Death Decision for North Carolina Death Row*

The breadth of evidence of implicit bias is compelling, and many legal scholars have discussed how implicit bias should be considered in connection with law and policy. In 2005, Professor Jerry Kang produced his seminal work on implicit bias.[9] In *Trojan Horses*, Kang showed how race affects conduct in a variety of ways. Drawing on social cognition research, Kang explored "how race alters interpersonal interactions."[10] Kang shows that biases cause people to automatically categorize others based on perceptions of race.[11] So, for example, a black person may be more likely than a white person, as a result of this implicit bias, to be perceived as dangerous.[12] The possibilities explored by Kang are vast and are the basis for great concern in a variety of ways. Kang defines implicit bias broadly, casting a wide net to include all matter of ways that race can affect human behavior.

The scholarship on implicit bias is well-developed. The research shows that the human brain operates efficiently by using schemas. This means that, based on available external stimuli, the human brain makes extremely quick—as Kang puts it, "automatic and nearly instantaneous"[13]—categorizations. In addition, we ascribe common characteristics to different categories. This subconscious process of categorization is critical to prevent the conscious brain from being overwhelmed by the massive volume of external stimuli.[14]

Kang and others point out that the human brain—as a result of socialization—applies the same categorization operation when it comes to race.[15] So, when presented with an image triggering the conception of a particular race, people are likely both (i) to categorize the image as belonging to that racial category, and (ii) to assign to that image the characteristics the brain already has associated with the category. This becomes insidious, as

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Prisoners, 21 AM. U. J. GENDER SOC. POL'Y & L. 647 (2013); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012); Casey Reynolds, Note, *Implicit Bias and the Problem of Certainty in the Criminal Standard of Proof*, 37 L. & PSYCHOL. REV. 229 (2013).

[9]   Kang, *supra* note 6.

[10]   *Id.* at 1497.

[11]   *Id.*

[12]   *Id.*

[13]   *Id.* at 1499.

[14]   *Id.*

[15]   Kang, *supra* note 6, at 1499–1504.

studies have shown, when it appears that, when confronted with a stimulus that rings as African-American (i.e., a stereotypical African-American name or an image of a black person), people are more likely to associate negative characteristics with that person. This means that black people are more likely to be viewed as suspicious or guilty of criminal activity, for example.[16]

Kang refers to stereotype threat in his exploration of implicit bias, describing the effects of stereotype threat as an example of implicit bias.[17] I am not at all convinced that stereotype threat is a type of implicit bias. On the one hand, implicit bias involves the categorization of a stimulus and the application of preset characteristics to that stimulus—i.e., I see a man with dark skin and curly hair whom I simultaneously categorize as black (category) and unintelligent (characteristic). On the other hand, stereotype threat, as discussed below, seems to operate a little differently—i.e., I am black, and although I do not view myself as unintelligent I know the stereotype exists. And my worrying about this stereotype affects my ability to perform up to my pre-existing capacity. By making this point, I intend to distinguish between how conscious or unconscious perceptions of race affect humans' treatment of each other and how explicit and known racial stereotypes affect how humans behave relative to themselves.

Now it is entirely possible that stereotype threat is really just implicit bias operating in the most insidious way, classifying oneself as fitting within a category to which one's own brain has assigned negative characteristics. But it seems that there is a difference between viewing another person as suspicious, for example, and viewing oneself as suspicious. And stereotype threat is even a step away from this dynamic—for example, blacks, recognizing that they will be viewed as suspicious, may elect to behave differently in order to avoid confirming that stereotype.

It may not be important to define stereotype threat as either being separate from or as a subset of the broad category of implicit bias. It is important to recognize that, in the context of implicit bias, generally, or with respect to stereotype threat, specifically, the human brain can operate in insidious ways.

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[16]   *See, e.g.*, Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk for Confessing Falsely*, 17 PSYCHOL. PUB. POL'Y & L. 562 (2011).

[17]   *See* Kang, *supra* note 6, at 1519–23.

B. *Stereotype Threat*

Stereotype threat focuses on the deleterious effect that negative group stereotypes can have on the performance of members of those groups.[18] Empirical work on stereotype threat shows that members of groups about which there are negative stereotypes will perform worse on tasks that purport to test a characteristic of the individual relating to those negative stereotypes. The lower performance occurs because the psychological impact of the existence of a risk of confirming the group stereotype works to limit the individual's ability to perform up to capacity on the task. Outside of the psychology academe, stereotype threat has been discussed very little.

While the study of stereotype threat was novel twenty years ago, it now is in the mainstream inside the psychology academe. Its effects have been measured and replicated across dozens of studies and among many different groups. In the paragraphs below, I will explain the findings of those studies. The level of detail I provide here is intended (i) to give the readers a useful and comprehensive understanding of this psychological dynamic, (ii) to show how pervasive the effects of stereotype threat can be, and (iii) to show that the study of stereotype threat is not fringe science, but, rather, a prominent area of psychological study. And for all of these reasons, stereotype threat should be taken seriously.

Stereotype threat has been studied most often in the context of standardized testing, not because stereotype threat is believed to exist only in the context of standardized testing, but because it is easier to perform statistical analysis when measuring and comparing standardized test results. To test the theory of stereotype threat, Steele and others set up tasks for members of particular groups to see how they would perform on tasks that appear to measure a stereotype-related characteristic. The experiments examined group performance under conditions where the stereotype threat was "primed" and compared those results to performance where the primer was neutralized. In every study, the groups being studied performed worse when stereotype threat was primed than when the primer was eliminated.

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[18]   *See generally*, *A Threat in the Air*, *supra* note 1; WHISTLING VIVALDI, *supra* note 1.

1. The Scope of the Threat

Since the mid-1990s, dozens of studies have tested the existence of stereotype threat and replicated Steele and Aaronson's original results.

Stereotype can be found to exist broadly, but the two most studied negative stereotypes are (i) African-Americans are not as intelligent as Whites, and (ii) women are not as good as men at math. In this section, I will describe in detail the leading studies of stereotype threat. Individually, each of these studies describes a profound psychological dynamic that affects individual performance. Collectively, they show a shockingly pervasive threat that, left unaddressed, significantly and measurably depresses group performance.

a. Negative Stereotype 1: African-Americans are not as intelligent as Whites

One of the two most studied areas of stereotype threat involves African-Americans and intelligence.[19] Dozens of studies have shown that African-

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[19] *See, e.g., A Threat in the Air, supra* note 1, at 613–29; Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1999; Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995); Michael J. Cullen, Chaitra M. Hardison & Paul R. Sackett, *Using SAT-Grade and Ability-Job Performance Relationships to Test Predictions Derived From Stereotype Threat Theory*, 89 J. APPLIED PSYCHOL. 220 (2004); Nalini Ambady et al., *Stereotype Susceptibility in Children: Effects of Identity Activation on Quantitative Performance*, 12 PSYCHOL. SCI. 385 (2001); Robert E. Ployhart et al., *Understanding Racial Differences on Cognitive Ability Tests in Selection Contexts: An Integration of Stereotype Threat and Applicant Reactions Research*, 16 HUM. PERFORMANCE 231 (2003); Ryan P. Brown & Eric Anthony Day, *The Difference Isn't Black and White: Stereotype Threat and the Race Gap on Raven's Advanced Progressive Matrices*, 91 J. APPLIED PSYCHOL. 979 (2006); J. Thomas Kellow & Brett D. Jones, *The Effects of Stereotypes on the Achievement Gap: Reexamining the Academic Performance of African American High School Students*, 34 J. BLACK PSYCHOL. 94 (2008); Gregory M. Walton & Geoffrey L. Cohen, *A Question of Belonging: Race, Social Fit, and Achievement*, 92 J. PERSONALITY & SOC. PSYCHOL. 82 (2007); Paul G. Davies et al., *Clearing the Air: Identity Safety Moderates the Effects of Stereotype Threat on Women's Leadership Aspirations*, 88 J. PERSONALITY & SOC. PSYCHOL. 276 (2005); Joshua Aronson & Michael Inzlicht, *The Ups and Downs of Attributional Ambiguity: Stereotype Vulnerability and the Academic Self-Knowledge of African American College Students*, 15 PSYCHOL. SCI. 829 (2004). *See also* Kay Deaux et al., *Becoming American: Stereotype Threat Effects in Afro-Caribbean Immigrant Groups*, 70 SOC.

Americans perform worse when confronted with a task that primes the negative stereotype that Blacks are less intelligent than Whites. The primer can be something as pernicious as "this test has been shown to reveal differences between black and white performance," something slightly less obvious, such as having test subjects identify their race before taking an aptitude test, or a seemingly non-race-based primer, like simply telling subjects that a task measures "strategic intelligence." No matter the primer, the effect is still real and measureable: subjects confronted with the threat do worse. On the other hand, when the primer is eliminated, performance improves.

In 1995, Claude Steele and Joshua Aronson published the results of their then-groundbreaking series of studies of stereotype threat.[20] In the first of these studies, Black and White subjects, all college students, were given a thirty-minute version of the Graduate Record Examination (GRE). The questions on the thirty-minute test were on the more challenging side of the difficulty spectrum, picked to present a meaningful degree of frustration for the subjects. The subjects were broken up into three groups. The first group, the diagnostic group, was tested under the stereotype threat condition, meaning that subjects were negatively primed with a stimulus that the test was "diagnostic of intellectual ability."[21] Thus, if stereotype threat was real, then a statement that intellectual ability was being tested should have triggered in African-Americans a fear of confirming the negative stereotype that Blacks are not as smart as Whites. This stimulus was removed for subjects in the second group, the "non-diagnostic-only" group, who were told that the test was "simply . . . a laboratory problem-solving task that was nondiagnostic of [intellectual] ability."[22] The third group, the "non-diagnostic plus a challenge" group, was positively primed with encouragement to "view the difficult test as

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PSYCHOL. Q. 384 (2007); Jim Blascovich et al., *African Americans and High Blood Pressure: The Role of Stereotype Threat*, 12 PSYCHOL. SCI. 225 (2001); Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCHOL. 1213 (1999); S. Christian Wheeler et al., *Think Unto Others: The Self-Destructive Impact of Negative Racial Stereotypes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 173 (2001). *But see* Paul R. Sackett et al., *On Interpreting Stereotype Threat as Accounting for African American-White Differences on Cognitive Tests*, 59 AM. PSYCHOL. 7 (2004).

[20]   Steele & Aronson, *supra* note 19.

[21]   *Id.* at 799.

[22]   *Id.*

a challenge."[23]

The results of these studies showed a dramatic difference in the performance of Blacks on the test when stereotype threat was triggered and when it was not. In the diagnostic group, Blacks performed markedly worse than Whites when primed for stereotype threat. But in the non-diagnostic group, the performance gap was virtually eliminated.[24] These results were replicated in related studies using similar stereotype threat stimuli.[25]

Even minor primers produced these results. For example, the seemingly innocuous stimulus of requiring participants to record their race immediately prior to testing had a dramatic impact on performance.[26] In this case, as Steele and Aronson describe:

> Priming racial identity depressed Black participants' performance . . . even when the test was not presented as diagnostic of intellectual ability. It did this . . . by directly making the stereotype mentally available and thus creating the self-threatening predicament that their performance could prove the stereotype self-characteristic.[27]

Stereotype can have a measureable impact even in seemingly transparently benign situations. A Princeton experiment tested black and white college students' performance on a miniature golf course.[28] When told the test was a measure of "ability to think strategically" and that demands on strategic intelligence would increase along with the test's difficulty, black students golfed worse than those who were not so primed.[29] In the same study, black students who were required simply to record their race prior to the test golfed worse than those who were not.[30]

Each of these studies, along with dozens more, shows that the ability of

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[23]   *Id.*

[24]   Results were controlled for the subjects' SAT scores.

[25]   *See* Steele & Aronson, *supra* note 19.

[26]   *Id.* at 806–08.

[27]   *Id.* at 808. *See also* David M. Marx & Phillip Atiba Goff, *Clearing the Air: The Effect of Experimenter Race on Target's Test Performance and Subjective Experience*, 44 BRIT. J. SOC. PSYCHOL. 645 (2005) (showing that the race of the experimenter can prime race salience and thereby trigger stereotype threat).

[28]   Stone et al., *supra* note 19.

[29]   *Id.* at 1216–17.

[30]   *Id.*

black subjects was suppressed simply by the presence of a concern that the subjects might confirm a negative stereotype. In other words, out of fear of confirming the negative stereotype, the stereotype was confirmed.

b.   Negative Stereotype 2: Women are not as good at math as men

Many experiments have focused on exploring the existence and scope of stereotype threat in another commonly recognized underachievement dynamic, the performance of women in mathematics.[31] There is a pervasive

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[31]   *See, e.g.*, Michael Johns et al., *Knowing Is Half the Battle: Teaching Stereotype Threat as a Means of Improving Women's Math Performance*, 16 PSYCHOL. SCI. 175 (2005) (discussing gender performance gap eliminated under conditions when primer was eliminated or when primer was present but subjects were informed about nature of stereotype threat); Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4 (1999); Jennifer A. Mangels et al., *Emotion Blocks the Path to Learning Under Stereotype Threat*, 7 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 230 (2012); Diane M. Quinn & Steven J. Spencer, *The Interference of Stereotype Threat With Women's Generation of Mathematical Problem-Solving Strategies*, 57 J. SOC. ISSUES 55 (2001); Ryan P. Brown & Robert A. Josephs, *A Burden of Proof: Stereotype Relevance and Gender Differences in Math Performance*, 76 J. PERSONALITY & SOC. PSYCHOL. 246 (1999); Michael Inzlicht & Talia Ben-Zeev, *A Threatening Intellectual Environment: Why Females Are Susceptible to Experiencing Problem-Solving Deficits in the Presence of Males*, 11 PSYCHOL. SCI. 365 (2000); Emily Pronin et al., *Identity Bifurcation in Response to Stereotype Threat: Women and Mathematics*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 152 (2004); Christine Logel et al., *Interacting with Sexist Men Triggers Social Identity Threat Among Female Engineers*, 96 J. PERSONALITY & SOC. PSYCHOL. 1089 (2009); Brian A. Nosek et al., *National Differences in Gender-Science Stereotypes Predict National Sex Differences in Science and Math Achievement*, 106 PROCEEDINGS NAT'L ACAD. SCI. U.S.A. 10593 (2009); Robert J. Rydell et al., *Multiple Social Identities and Stereotype Threat: Imbalance, Accessibility, and Working Memory*, 96 J. PERSONALITY & SOC. PSYCHOL. 949 (2009); Ulrich W. Weger et al., *Mindful Maths: Reducing the Impact of Stereotype Threat Through a Mindfulness Exercise*, 21 CONSCIOUSNESS & COGNITION 471 (2012); Priyanka B. Carr & Claude M. Steele, *Stereotype Threat Affects Financial Decision Making*, 21 PSYCHOL. SCI. 1411 (2010); Mara Cadinu et al., *Why Do Women Underperform Under Stereotype Threat? Evidence for the Role of Negative Thinking*, 16 PSYCHOL. SCIENCE 572 (2005); Catherine Good et al., *Problems in the Pipeline: Stereotype Threat and Women's Achievement in High-Level Math Courses*, 29 J. APPLIED DEVELOPMENTAL PSYCHOL. 17 (2008). *See also* Jenessa R. Shapiro & Amy M. Williams, *The Role of Stereotype Threats in Undermining Girls' and Women's Performance and Interest in STEM Fields*, 66 SEX ROLES 175 (2012); Diana Jill Burgess et al., *Does Stereotype Threat Affect Women in Academic Medicine?*, 87 ACAD. MED. 506 (2012); Joshua Aronson et al., *When*

negative stereotype that women are bad at math. As with the negative stereotype involving African-American intelligence, different primers consistently triggered the threat and its corresponding lower performance. Removal of the threat reduced or eliminated the drop in performance.

To test the effects that this negative stereotype can have on women, Steele and his colleagues gave a very challenging math test to male and female college students who were equally proficient at and invested in mathematics as a discipline.[32] When negatively primed with stereotype threat, women performed worse than men on this test. Steele theorized that the women did worse because, once they encountered frustration on the very difficult math test, they were saddled with the added burden of confronting concerns about confirming the negative stereotype that women are worse at math than men.[33] Two additional aspects of the experiment seemed to confirm this hypothesis. First, the performance disparities failed to appear on an easier exam.[34] Second, the performance disparities did not appear when a challenging literature test was given to equally proficient male and female students, presumably "because women are not stereotype threatened in this area."[35]

To confirm their hypothesis that the academic performance of women was being affected by stereotype threat—and to counter the argument that women were simply worse at *difficult* math than men—Steele and his colleagues conducted a follow-up experiment where, as before, the same challenging math test was given to equally proficient male and female students.[36] This time, however, the test was represented as either (i) showing gender differences, or (ii) not showing any such differences.[37] In this iteration of the experiment, women scored equally as well as their male peers when told that the test did not tend to show gender differences, but they scored lower than men when told that the test tended to show gender differences.[38]

White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat, 35 J. EXPERIMENTAL SOC. PSYCHOL. 29 (1999).

[32]   *A Threat in the Air*, *supra* note 1, at 619.

[33]   *Id.*

[34]   *Id.*

[35]   *Id.*

[36]   *Id.*

[37]   *Id.*

[38]   *A Threat in the Air, supra* note 1, at 619–20.

In a fascinating manipulation of this threat, Harvard professors validated the diminishment of performance under stereotype threat.[39] They gave a challenging mathematics test to Asian-American women—women who potentially are subject to two stereotypes, one negative (i.e., women are bad at math), and one positive (i.e., Asian-Americans are good at math). The study found that study participants did better than the control group when their Asian-American identity was primed—prior to the test, these participants were asked several questions designed to cause them to think about their Asian-American identity.[40] But when their female identity was primed, they did worse than the control group. In a related study, these same effects were shown to occur for elementary and middle school children.[41]

     c.   Negative Stereotype 3: Students from lower socioeconomic backgrounds are not as intelligent as those who are more affluent

Like the studies regarding race and gender, psychologists also have established that stereotype threat affects other groups. One of primary relevance here is socioeconomic status. There is a negative stereotype that persons from lower socioeconomic backgrounds are not as intelligent as those from higher socioeconomic classes. Predictably, in studies exploring this stereotype, persons from lower socioeconomic classes performed worse on tests when this negative stereotype was primed.[42] When the primer was

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[39]   Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80 (1999). This raises the issue of stereotype lift, a psychological phenomenon that exists in situations where non-stereotype-threatened persons may perform better than normal due to an increase in confidence that arises when competing against stereotype-threatened persons. *See* Gregory M. Walton & Geoffrey L. Cohen, *Stereotype Lift*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 456 (2003). For example, a white male may perform better on a math test than a woman due to the boost in confidence provided by stereotype superiority.

[40]   To summarize, participants were asked (i) what languages their parents spoke, (ii) what languages they knew and spoke, (iii) when and how often they spoke other languages on campus, and (iv) how long (i.e., for how many generations) their family had lived in the United States. Shih et al., *supra* note 39.

[41]   Ambady et al., *supra* note 19.

[42]   *See* Jean-Claude Croizet & Theresa Claire, *Extending the Concept of Stereotype Threat to Social Class: The Intellectual Underperformance of Students from Low Socioeconomic Backgrounds*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 588 (1998).

removed, performance improved.

d. Other Stereotype Threats

Stereotype threat is not limited to African-American intelligence and female proficiency at math. Stereotype threat can affect any individual who is subject to a negative stereotype. Indeed, studies show that stereotype threat is pervasive and profound.

Whites have less natural athletic ability than Blacks. In the aforementioned Princeton golf experiment,[43] white students who were told that "the golf task measured natural athletic ability golfed worse than white students who were told nothing about the task."[44]

Older people have worse memories. When primed with the stereotype threat that aging people have worse memories, older people performed worse than those who were not primed with the stereotype.[45]

Young people are bad drivers. Other studies have shown that, when primed with the stereotype that young people are bad drivers, provisional license drivers performed worse on a hazard recognition task than when they were not primed with that stereotype.[46] The study also showed that explicit stereotypes can cause stereotyped-threatened individuals to expend less effort on a task.

Whites are worse than Asians at math. White men performed worse on a math test when told that the purpose of the test is to evaluate why Asians outperform Whites in math.[47]

College students from underrepresented high schools are not as capable as others academically. Students performed worse when primed with the negative stereotype that students from their high schools were not as highly

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[43]   Stone et al., *supra* note 19, at 9.

[44]   WHISTLING VIVALDI, *supra* note 1, at 8.

[45]   *See* Sarah J. Barber & Mara Mather, *Stereotype Threat in Older Adults: When and Why Does It Occur, and Who Is Most Affected?, in* THE OXFORD HANDBOOK OF EMOTION, SOCIAL COGNITION, AND EVERYDAY PROBLEM SOLVING DURING ADULTHOOD 302 (Paul Verhaeghen & Christopher Hertzog eds., 2012).

[46]   Daniel P. Skorich et al., *Stereotype Threat and Hazard Perception Among Provisional License Drivers,* 54 ACCIDENT ANALYSIS & PREVENTION 39 (2013).

[47]   Aronson et al., *When White Men Can't Do Math, supra* note 31.

represented at the university level as students from other schools.[48]

2.   Stereotype Threat is More Acute for Higher Performing Students

Stereotype threat studies show that stereotype threat is as bad or worse for those who "identify with a domain."[49]   For example, if women identify with the mathematics domain—i.e., it is important to them to do well in mathematics—they are more likely to be subject to the effects of stereotype threat.[50] The increased intensity of the effect is the result of the increased risk associated with confirming the stereotype. In other words, a woman who is good at math and who wants to achieve highly in math will care more about confirming a stereotype that women are bad at math. In turn, this intensified threat creates intensified anxiety, further impeding performance. This means that stereotype threat substantially affects high-performing students. Thus, stereotype threat may explain not only why certain students have low performance, but also why *high-performing* students do not perform at an *elite* level.

The higher the level of education, the more likely the threat is to be felt by those whom it affects. The more important success in a particular field is to a person, the greater the consequences of not achieving success in that field.

3.   Effects of Stereotype Threat

Stereotype threat is not a fuzzy, unmeasurable, psychological phenomenon. Indeed, studies show that the effects of stereotype threat are both measureable and profound. Stereotype threat affects working memory, cognition, and mental processing.[51]   In simple terms, stereotype threat

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[48]   Adam L. Alter et al., *Rising to the Threat: Reducing Stereotype Threat by Reframing the Threat as a Challenge*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 166 (2010).

[49]   Johannes Keller, *Stereotype Threat in Classroom Settings: The Interactive Effect of Domain Identification, Task Difficulty and Stereotype Threat on Female Students' Maths Performance*, 77 BRIT. J. EDUC. PSYCHOL. 323 (2010).

[50]   *Id.*

[51]   *See generally* Jessi L. Smith, *Understanding the Process of Stereotype Threat: A Review of Mediational Variables and New Performance Goal Directions*, 16 EDUC. PSYCHOL. REV. 177 (2004).

undermines the capacity of the brain to process information. Steele has summarized the profound effect of stereotype threat as follows:

> When a stereotype indicts the intellectual abilities of your group, the implication is that, as a member of that group . . . you lack a critical fixed ability. It's a narrative that makes any frustration a plausible sign that you can't do the work, that you don't belong there. And it discourages your taking on academic challenges, for fear you'd confirm the fixed limitation alleged in the stereotype.[52]

And, the threat Steele identifies is pervasive:

> Identity threat isn't a passing threat that happens just on tests. It's a cloaking threat that can feed on all kinds of daily frustrations and contextual cues and get more disruptive over time.[53]

Stereotype threat has an identifiable and measurable impact on its victims. In various ways, though, the effects work to the detriment of those affected by the threat. Many of the outcomes discussed below work in conjunction with each other, so it is not entirely fair to discuss them separately. But, I expect readers will see the overlap rather clearly.

Anxiety. In a study of more than 20,000 African-Americans, Whites, Latinos, and Native Americans taking an aptitude test, anxiety was significantly (though not fully) correlated with the gap in achievement on the test.[54] Another study showed that test anxiety increased relative to the amount that subjects based their self-worth on academic performance.[55] And stereotype threat has been shown to increase worry in women who were primed with a negative gender stereotype.[56] This anxiety appears to exist even when the subjects do not report it verbally,[57] and the effects of this anxiety

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[52]   WHISTLING VIVALDI, *supra* note 1, at 168.

[53]   *Id.* at 177.

[54]   Jason W. Osborne, *Testing Stereotype Threat: Does Anxiety Explain Race and Sex Differences in Achievement?*, 26 CONTEMP. EDUC. PSYCHOL. 291 (2001).

[55]   Jason S. Lawrence & Allegra Williams, *Anxiety Explains why People with Domain-Contingent Self-Worth Underperform on Ability-Diagnostic Tests*, 47 J. RES. PERSONALITY 227 (2013).

[56]   Amanda B. Brodish & Patricia G. Devine, *The Role of Performance-Avoidance Goals and Worry in Mediating the Relationship Between Stereotype Threat and Performance*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 180 (2009).

[57]   *See* Jennifer K. Bosson et al., *When Saying and Doing Diverge: The Effects of Stereotype Threat on Self-Reported Versus Non-Verbal Anxiety*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 247 (2003)

can be measured by an electroencephalograph (i.e., these results are not imagined).[58]

Mind-Wandering. Psychologists studied women who believed they were about to complete a math test.[59] After priming the subjects with a threat of stereotype confirmation, the investigators presented the subjects with three very challenging sample questions, which served to further prime the threat. Then, the participants were given an attention measurement test. The study found that stereotype threat substantially increased mind-wandering.[60]

Working Memory. Literature shows that stereotype threat can significantly affect an individual's working memory capacity. This obviously affects one's ability to process information effectively.[61]

Cognitive Load. One explanation for the effects of stereotype threat is that the anxiety and other psychological effects of stereotype threat create a cognitive load that prevents brains from operating at peak capacity.[62]

Performance Confidence. In a study of African-Americans who took a test made up of GRE Verbal questions, black students' ability to evaluate their own knowledge or ability was unstable: meaning that their self-evaluation fluctuated.[63] As a result, those subject to stereotype threat are more likely to engage in conduct designed to avoid a bad result rather than achieve a good one—this is called "performance avoidance behavior".[64]

Effort. Stereotype threat can affect effort in multiple ways. Depending on the context, stereotype-threatened students might (i) use less effort on a given task, thus fulfilling the negative performance prophecy, or (ii) use more

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(demonstrating that non-verbal anxiety cues showed higher than reported levels of anxiety).

[58]   Mangels et al., *supra* note 31.

[59]   Michael D. Mrazek et al., *Threatened to Distraction: Mind-Wandering as a Consequence of Stereotype Threat*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 1243 (2011).

[60]   *Id.*

[61]   Toni Schmader & Michael Johns, *Converging Evidence that Stereotype Threat Reduces Working Memory Capacity*, 85 J. PERSONALITY & SOC. PSYCHOL. 440 (2003); Sian L. Beilock, *Stereotype Threat and Working Memory: Mechanisms, Alleviation, and Spillover*, 136 J. EXPERIMENTAL PSYCHOL. 256 (2007).

[62]   Jean-Claude Croizet et al., *Stereotype Threat Undermines Intellectual Performance by Triggering a Disruptive Mental Load*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 721 (2004).

[63]   Aronson & Inzlicht, *supra* note 19.

[64]   Brodish & Devine, *supra* note 56.

effort pursuing unsuccessful methods.[65]

Inflexible Persistence. Steele and a colleague tested whether undergraduate women who were primed with stereotype threat would persist in using unsuccessful strategies.[66] Investigators primed subjects with the threat by having them identify their gender before taking a math-based problem solving test. When presented with the test, stereotype-threatened women were more likely to persevere in strategies that previously were successful but no longer worked.

Perceptions of Bias. Stereotype threatened students have a greater tendency to find bias in situations than non-threatened students.[67]

The work on stereotype threat does not purport to explain all causes of underachievement. Indeed, there are a variety of factors that can explain low achievement, including "socioeconomic disadvantage, poorer access to good schooling, less parental support, low participation in social networks that enable the timely development of critical skills and cultural capital, historically rooted patterns of sex-role socialization, and so on . . . ."[68] But the effects of stereotype threat are substantial.

4.   The Effects of Stereotype Threat Can Be Ameliorated

The study of stereotype threat is not limited to proving its existence. Following up on the studies demonstrating the existence of stereotype threat, cognitive psychologists have done extensive work exploring what kinds of interventions can help militate against the effects of stereotype threat.[69] These studies show that the effects of stereotype threat can be reduced or even eliminated, through deliberate modifications of the environment for learning,

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[65]   *See, e.g.*, Jeremy P. Jamieson & Stephen G. Harkins, *Mere Effort and Stereotype Threat Performance Effects*, 93 J. PERSONALITY & SOC. PSYCHOL. 544 (2007).

[66]   *Id. See also* Carr & Steele, *supra* note 31.

[67]   Stone et al., *supra* note 19.

[68]   WHISTLING VIVALDI, *supra* note 1, at 182. Indeed, not all agree that stereotype threat is as significant as I have suggested here. *See* Sackett et al., *On Interpreting Stereotype Threat*, *supra* note 19.

[69]   *See generally* WHISTLING VIVALDI, *supra* note 1, at 169–90; David S. Yeager & Gregory M. Walton, *Social-Psychological Interventions in Education: They're Not Magic*, 81 REV. EDUC. RES. 267 (2011).

the process by which students approach learning, or the way that students think about themselves and the task with which they are confronted. Following up on the studies demonstrating the existence of stereotype threat, cognitive psychologists have done extensive work exploring what kinds of interventions can help militate against the effects of stereotype threat.[70] These follow-up studies do more than show that differences exist when stereotype threat is primed and when it is not; they focus on affirmative interventions that have a measurable, reductive impact on the effects of stereotype threat:

Explicit Discussion of Stereotype Threat. At least one study has shown that directly acknowledging the existence of stereotype threat has the effect of neutralizing the primer.[71] In this study, women were given a challenging math test, which was presented to them in two different ways. One set of women was assigned the test and told it was a standardized test presented for the purposes of studying differences in gender performance in mathematics.[72] A second group was given the same instructions but told to consider that any anxiety they experienced on the test might be the result of stereotype threat.[73] Women in the second group performed substantially better, nearly eliminating the gender performance gap.[74] Researchers concluded that this showed that "informing members of stereotyped groups about the effects of stereotype threat can buffer their performance on stereotype-relevant tasks."[75]

High Standards/Effective Feedback. Studies show that black students tend not to trust neutral or overly positive feedback. Instead, the best feedback—meaning the kind that was trusted by students and motivated them to improve—both held students to a high standard and also affirmed a belief

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[70] *See generally* WHISTLING VIVALDI, *supra* note 1, at 169–90; Yeager & Walton, *supra* note 69.

[71] Johns et al., *supra* note 31.

[72] *Id.* at 176.

[73] *Id.* Specifically, the participants were told "It's important to keep in mind that if you are feeling anxious while taking this test, this anxiety could be the result of these negative stereotypes that are widely known in society and

have nothing to do with your actual ability to do well on the test."

[74] *Id.* at 176–78. Yet a third group was instructed to treat the task as a problem solving task—something about which there is not a negative stereotype connected to gender. Women in this group not only eliminated the performance gap; they outperformed men.

[75] *Id.* at 178.

that the students had the capacity to meet that standard.[76] This reduced the effects of stereotype threat in that by holding the students to a higher standard, rather than a lower standard, and by affirming students' ability to meet the standard, feedback providers were able to defuse the internal narrative suggesting that poor initial performance was confirming a negative stereotype.[77]

Presenting Positive Group Examples. Several experiments have shown that presenting stereotype-threatened students with positive group images can improve their performance.

    i. *Group Achievement Identification*.[78] Female math students who were presented with stories of high-achieving women have been found to perform better on academic tasks, even if the stories did not relate to success in the math domain.

    ii. *Role Modeling.* Black college students who were given essays from successful black upper classmen about academic frustration and subsequent success got higher grades than those who did not receive the essays.[79] In a study of women in mathematics, women who were "interviewed" by a high-achieving woman performed at high levels, even where they were primed with a stereotype threat.[80]

Conscious Reflection. A number of studies show that positive internal reflection can have a positive effect on performance.

    i. *Self-affirmation.*[81] Black seventh graders who were asked to write for 15-

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[76] Geoffrey L. Cohen et al., *The Mentor's Dilemma: Providing Critical Feedback Across the Racial Divide*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1302 (1999).

[77] *Id. See also* WHISTLING VIVALDI, *supra* note 1, at 162–63.

[78] Rusty B. McIntyre et al., *Alleviating Women's Mathematics Stereotype Threat Through Salience of Group Achievements*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 83 (2003).

[79] WHISTLING VIVALDI, *supra* note 1, at 165–66. In a twist on this idea, black college students who were asked to write essays to elementary school students about expandable intellect got higher grades than other students who were not asked to write those kinds of essays.

[80] David M. Marx & Jasmin S. Roman, *Female Role Models: Protecting Women's Math Test Performance*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1183 (2002).

[81] David K. Sherman & Gregory L. Cohen, *The Psychology of Self-Defense: Self-Affirmation Theory*, 38 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 183 (2006); Akira Miyake et al., *Reducing the Gender Achievement Gap in College Science: A Classroom Study of Values Affirmation*, 330 SCI. 1234 (2010); Geoffrey L. Cohen et al., *Recursive Processes in Self-Affirmation: Intervening to Close the Minority Achievement Gap*, 324 SCI. 400 (2009); Geoffrey L. Cohen et al., *Reducing the Racial*

minutes about their most important personal values at the beginning of each school term received higher grades during each term than students who were asked about their least important personal values.[82] (This positive effect did not occur for the white students who were given the same tasks.)   The key to the success of this particular intervention is that it changed the students' internal narrative—from one infused with threat to one about personal motivation to face challenges–for students early in the educational process, thus avoiding a feedback loop of failure and threat confirmation.[83]

ii. *The nature of intelligence.*[84]   Another experiment focused on writing about the nature of intelligence. When prompted to write about whether intelligence was innate and fixed or was something that could be nurtured and grown through effort, students tended to perform better in a testing environment.

iii. *Mindfulness.*[85]   Mindfulness refers to meditative relaxation induced by focusing on the present moment. This kind of reflection, by design, is not substantively focused. But even this has been shown to reduce or eliminate the threat, most likely by letting the mind focus on the task at hand and by reducing anxiety related to the task.

iv. *Emotion Regulation.*[86]   Persons subject to stereotype threat may tend to suppress the stressful emotions they experience as a result of the threat. Properly regulating these emotions, rather than suppressing them, can reduce the threat.

Achievement Gap: A Social-Psychological Intervention, 313 SCI. 1307 (2006). *See also* Gerardo Ramirez & Sian L. Beilock, *Writing About Testing Worries Boosts Exam Performance in the Classroom*, 331 SCI. 211 (2011); Andy Martens et al., *Combating Stereotype Threat: The Effect of Self-Affirmation on Women's Intellectual Performance*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 236 (2006).

[82]   WHISTLING VIVALDI, *supra* note 1, at 174–75.

[83]   *Id.* at 176.

[84]   Joshua Aronson et al., *Reducing the Effects of Stereotype Threat on African American College Students by Shaping Theories of Intelligence*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 113 (2002); Lisa S. Blackwell et al., *Implicit Theories of Intelligence Predict Achievement Across an Adolescent Transition: A Longitudinal Study and an Intervention*, 78 CHILD DEV. 246 (2007).

[85]   Weger, *supra* note 31.

[86]   Michael Johns et al., *Stereotype Threat and Executive Resource Depletion: Examining the Influence of Emotion Regulation*, 137 J. EXPERIMENTAL PSYCHOL. 691 (2008).

v. Social-Belonging.[87]   Stereotype threat can be reduced by teaching students that academic struggles are normal and temporary, rather than signs that one does not belong in a particular academic environment.

Presenting the threat as a challenge.[88]   Two studies showed that stereotype threat-affected students performed better on tasks that were presented as formative rather than evaluative.   In other words, when the task was presented as a measure of ability (e.g., "This test will measure your academic ability."), subjects did worse.   On the other hand, when the task was presented as a positive tool of academic development (e.g., "This test will help you learn."), students did better.

Establishing Mastery Goals.   Focusing on mastering skills or subject matter, rather than focusing on performance, can improve performance in stereotype-threatened students.[89]

Engagement Regulation.   As a positive means to protect self-esteem, non-stereotype-threatened students may disengage from negative feedback and engage positive feedback.   In other words, for these students poor performance is less likely, in these individuals, to reflect on the person's character. (This is the difference between "I failed the test" and "I am a failure.")[90]   Likewise, good performance is more likely to resonate with these persons.   This engagement regulation is healthy.   On the other hand, stereotype-threatened individuals may be less capable of regulating their engagement to positive and negative feedback.   Coaching students to regulate their engagement positively can reduce the threat.

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[87]   Gregory M. Walton & Geoffrey L. Cohen, *A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students*, 331 SCI. 1447 (2011).

[88]   Alter et al., *supra* note 50.

[89]   Jane G. Stout & Nilanjana Dasgupta, *Mastering One's Destiny: Mastery Goals Promote Challenge and Success Despite Social Identity Threat*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 748 (2013).

[90]   Jordan B. Leitner et al., *Succeeding in the Face of Stereotype Threat: The Adaptive Role of Engagement Regulation*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 17 (2013).

II.   Stereotype Threat in the Legal Scholarship and the Law

While stereotype threat is solidly within the mainstream of psychology academe, it has yet to become so in the legal academy or in the courts.

A. Stereotype Threat in Legal Scholarship

Though some legal scholars and litigants have focused on stereotype threat theory, few have given it its due regard.

It would not be fair to say that stereotype threat has no traction among legal academics. More than 350 law review articles written since 1995 have made reference to "stereotype threat", but most references are very limited. A few law review articles are wholly focused on the effects of stereotype threat in specific contexts. [91] A few others do a very good job of summarizing stereotype threat and its effects.[92] Otherwise, most law review articles that discuss stereotype threat discuss it only in passing.

In 2004, Richard Sander introduced his mismatch theory.[93] Essentially, Sander argues that wrong-headed affirmative action admissions policies work to the detriment of minorities by placing them at schools where they are at a competitive disadvantage with their peers. Sander suggests that outcomes—i.e., performance in law school, on the bar exam, and in subsequent employment—would be better for minorities if they went to lower ranked schools; schools, Sander concludes, for which they are better suited (or matched). This argument necessarily implies that the relevant minority groups

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[91]   *See e.g.,* Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 SO. CAL. L. REV. 307 (2015)(Thoroughly analyzing stereotype threat in the context of education inequality); Catherine Martin Christopher, *Eye of the Beholder: How Perception Management Can Counter Stereotype Threat Among Struggling Law Students*, 53 DUQUESNE L. REV. 161 (2015); Jeff Stone, *A Hidden Toxicity in the Term "Student-Athlete": Stereotype Threat for Athletes in the College Classroom*, 2 WAKE FOREST J.L. & POL'Y 179 (2012); Najdowski, *supra* note 16.

[92]   *See, e.g.,* Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 71 (2013); Deidre M. Bowen, *American Skin: Dispensing With Colorblindness and Critical Mass in Affirmative Action*, 73 U. PITT. L. REV. 339 (2011).

[93]   Sander, *supra* note 3.

are, on the whole, less capable then their white counterparts. Obviously, Sander's work is controversial. Many have criticized his methodology and analysis. But there is a clear deficiency in the dialogue concerning mismatch theory. Sander and his detractors acknowledge stereotype threat as playing a role, but, for the most part, their treatment of stereotype threat seems like an afterthought. So, it is worth exploring, in depth, how stereotype threat theory plays a significant role in the dynamics addressed in mismatch theory.

It seems clear from Sander's initial article that he did not take stereotype threat seriously at all. Sander devoted only two sentences to stereotype threat, marginalizing it completely. Grouping stereotype threat along with other critiques of standardized testing that he called "small answers"—referring to them collectively as the "fairness critique"—Sander characterizes stereotype threat theory as a following from "[t]he widespread perception that blacks perform badly on [standardized] tests [which] has produced a 'stereotype threat' among blacks that further hinders performance."[94] In explaining away stereotype threat, Sander says only that "'Stereotype threat' does appear to exist, but it is hard to pin down how much of the black-white gap proponents believe it explains."[95] In the article, challenging the fairness critique, Sander explains why he believes this critique is not meaningful:

> There is a more fundamental problem with the fairness critique. If it were true that academic indices understated the potential of black applicants, then admitted black students would tend to outperform their academic numbers. But this is not the case. A number of careful studies, stretching back into the 1970s, have demonstrated that average black performance in the first year of law school does not exceed levels predicted by academic indicators. If anything, blacks tend to underperform in law school relative to their numbers, a trend that holds true for other graduate programs and undergraduate colleges.[96]

In the ten years since his article, Sander's work has been criticized on a variety of grounds.[97] For the purposes of this article, I will focus only on the critics who discussed stereotype threat.

Only a handful of Sander's critics have raised stereotype threat as a

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[94]   *Id.* at 419.

[95]   *Id.* at 424.

[96]   *Id.*

[97]   The 2005 Sander article has been cited over 150 times.

reason to reject his mismatch theory.[98] Most of them, like Sander, mention stereotype threat only in passing, though each of them discusses fully other valid criticisms of Sander's work.[99] One pair of critics spent nearly three law review pages discussing stereotype threat.[100] Only a few months after Sander's initial article, Yale Professors Ayres and Brooks issued a comprehensive rejection of his theory. By far the most extensive (though far from extensive) discussion of stereotype threat in opposition to Sander's article, Ayres and Brooks still cited only to Steele's prepared comments in a law journal[101] and one psychology journal article on "stereotype lift."[102] They criticize Sander for simply "dismiss[ing stereotype threat] as intractable and hard to measure." Ayres and Brooks concluded their discussion of stereotype threat by saying:

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[98] See, e.g., Stacy L. Hawkins, *Mismatched or Counted Out? What's Missing From Mismatch Theory and Why it Matters*, 17 J. CONST. LAW 858 (2015).

[99] *See* L. Darnell Weeden, *Raising the Bar in the Affirmative Action Debate: A Pragmatic Comment on Professor Richard H. Sander's Systematic Analysis of Affirmative Action in American Law Schools Article*, 15. S. CAL. REV. L. & SOC. JUST. 195, 224 (2006) ("The fairness critique further suggests that African Americans are faced with a 'stereotype threat'—the prevalent view that African Americans are simply poor test takers—which could impair their performance."); Beverly I. Moran, *The Case for Black Inferiority? What Must Be True if Professor Sander Is Right: A Response to* A Systematic Analysis of Affirmative Action in American Law Schools, 5 CONN. PUB. L.J. 41, 50–51 (2005) (asking whether stereotype threat might explain differences in LSAT scores, grades, and bar passage and explaining, in a footnote, that stereotype threat and stereotype lift might explain the performance gap); Darrell D. Jackson, *Sander, The Mismatch Theory, and Affirmative Action: Critiquing the Absence of Praxis in Policy*, 89 DENV. U. L. REV. 245, 262–64 (2011) (suggesting a need for "a deeper analysis of . . . 'stereotype threat'" and identifying the stereotype threat critique of Moran, *infra* this note); andre douglas pond cummings, *"Open Water": Affirmative Action, Mismatch Theory and Swarming Predators- A Response to Richard Sander*, 44 BRANDEIS L.J. 795 (2006) (discussing stereotype threat, primarily, in the context of criticizing Sander's failure to consider stereotype threat and other possible causes of underachievement as well as discussing, in several footnotes, more about Steele's work on stereotype threat).

[100] Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1838–40 (2005).

[101] *See id.* at 1839. *See also* Claude M. Steele, Expert Report, *Gratz et al. v. Bollinger et al., No. 97-75321 (E.D. Mich.) Grutter et al. v. Bollinger et al., No. 97-75928 (E.D. Mich.)*, 5 MICH. J. RACE & L. 439 (1999) [hereinafter Expert Report].

[102] Ayres & Brooks, *supra* note 100, at 1839.

> While we are confident that affirmative action has not been demonstrated to be the dominant cause of black-white disparities in the chance of becoming a lawyer, we do not have a compelling theory as to what is causing the shortfall. *But pursuing the possibility of "stereotype threat" . . . is an important place to start.*[103]

Since Ayres and Brooks's call for more exploration of the stereotype threat topic, very little has been written on the topic, at least in law reviews.[104]

Sander has responded to his detractors several times in follow-up law review articles.[105] Unfortunately, his discussion of the stereotype threat-based criticism is nearly as anemic as it was in his original article. In response to the suggestion that he failed to properly consider stereotype threat, Sander makes several arguments[106]:

(1) *Stereotype threat is unproven.* Sander's first criticism appears to be that the research into stereotype threat is too scientific, as he complains that "the research on stereotype threat has been almost entirely confined to laboratories."[107]

(2) *Stereotype threat does not explain the law school performance gap.* Sander next counters stereotype threat-based criticism by saying:

> Black underperformance in law school grades, when controlling for entering credentials, explains less than a tenth of the black-white gap in law school grades. Blacks graduate at the same rate as whites—when one controls for law school grades—and they pass the bar at the same rate as whites with the same grades and background characteristics. So exactly what is there for stereotype threat to explain?[108]

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[103]   *Id.* at 1840 (emphasis added).

[104]   *But see* Stacy L. Hawkins, *Mismatched or Counted Out? What's Missing From Mismatch Theory and Why it Matters*, 17 J. CONST. LAW 858 (2015).

[105]   *See, e.g.*, Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005).

[106]   I will document these criticisms here and respond to them in part IV of this article.

[107]   *Id.* at 1996.

[108]   *Id.* In support of this argument, in 2011, Sander cites one psychological study that proposes that stereotype threat may not appear in real-world situations. *See* Richard H. Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 88 DENV. U. L. REV. 889, 902–04, n.51 (2011) (citing Cullen et al., *supra* note 19). The suggestions in this article are flawed, as explained by Steele's response to the article. Claude M. Steele & Paul G. Davies, *Stereotype Threat and Employment Testing: A Commentary*, 16 HUM. PERFORMANCE 311 (2003).

(3) *Affirmative action increases stereotype threat*.   Third, Sander asks rhetorically, "If one believes stereotype threat is a serious issue, isn't it obvious that large-scale preferences are likely to exacerbate the threat?"[109] But, it probably is more important to point out that Sander, like others, focuses on admissions as the solution to this perceived problem rather than effective academic support.

(4) *Performance gaps in legal writing betray the absence of stereotype threat*.   Finally, Sander argues that "the black-white performance gap is the same or larger in legal writing classes as in timed exam classes, even though the former should not evoke the stereotype threat effect."[110]

Whether or not one agrees with Sander or his critics, what is clear is that neither of them has treated stereotype threat deeply.[111]   In all, very few pages of text in all law review articles discussing Sander's mismatch theory are devoted to a discussion of stereotype threat.

B. Stereotype Threat in Affirmative Action Jurisprudence

Litigants and courts in affirmative action cases have paid even less attention to stereotype threat. Only one judicial opinion discusses stereotype threat.   And, even though roughly two dozen briefs raise the issue of stereotype threat, the theory has been raised in only a handful of cases, and no other courts, including the Supreme Court, have responded directly to these arguments. This holds true for *Fisher v. University of Texas at Austin*[112], where several amici lodged briefs raising the issue of stereotype threat. The Court ignored these arguments, even though, as discussed in the next section,

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[109]   Sander, *supra* note 108, at 903–04. The suggestion that blacks will be stigmatized by affirmative action is an old one, and I respond to it in section V.B.

[110]   *Id.* at 904 n.51.

[111]   This omission is understandable, under a 2005 standard, given that the study of stereotype threat still was in its adolescence. Indeed, Steele and Aronson's original article on stereotype threat was written only a decade earlier. By 2011, a limited discussion of stereotype threat is less understandable. *See* Sander, *supra* note 108, at 904 n.51. Since the original 1994 article on stereotype threat, more than 100 studies have replicated and validated Steele and Aronson's original findings. Indeed, the 1994 article is nearly regarded as canonical in the cognitive psychology academe.

[112]   133 S. Ct. 2411 (2013).

stereotype threat is directly relevant to these issues.

In all of American jurisprudence, stereotype threat is mentioned only once, in the trial court's opinion in *Grutter v. Bollinger*.[113]   In that case, the defendants and intervening parties raised the issue of stereotype threat as a justification to discriminate on the basis of race. The argument was supported by a report on stereotype threat written by Professor Steele.[114] It is clear from the opinion that the court did not attribute meaningful value to a report written by Professor Steele that was filed by the intervening parties.

First, the court apparently did not consider Steele's report or the arguments made about stereotype threat to be meaningful as *evidence*. At the beginning of its discussion of stereotype threat, the court pointed out, "No witnesses testified directly on this subject."[115] Moreover, the court lamented "the sparseness of the evidence on this issue," concluding that it was "unable to determine whether stereotype threat explains any part of the gap between Caucasian and underrepresented minority LSAT scores."[116] Finally, the court concluded, "If there is evidence showing that stereotype threat accounts for some of the LSAT gap, it was not produced in this case."[117]

Setting aside whether or not it was a tactical error on the part of the litigants to miss the opportunity to introduce more meaningful evidence of stereotype threat, it is clear that the court devalued Steele's report. The court characterized the report:

> Professor Steele's report describes his research only in the most general terms. He reports the results of only one experiment he performed using the GRE, and he does not indicate when the experiment was done, how many students participated, whether the results were tested for statistical significance, or whether the results were published and subjected to peer review. Nor has Professor Steele provided any evidence, by way of survey data for example, to show that the members of any particular racial group perceive themselves as being the object of a stereotype that expects underachievement. Professor Steele does not quantify the effect of stereotype threat; nor, at least according to this

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[113]   *See* Grutter v. Bollinger, 137 F. Supp. 2d 821, 866–68 (E.D. Mich. 2001).

[114]   *See* Expert Report, *supra* note 101.

[115]   *Grutter*, 137 F. Supp. 2d at 867.

[116]   *Id.*

[117]   *Id.* at 867–68.

report, has he performed any research on the LSAT.[118]

Unfortunately, this is the only judicial opinion that discusses Steele's stereotype threat work.[119] It appears that this court rejected the theory, in no small part, because there was not enough evidence submitted. It is challenging to try to extrapolate how other courts might respond to a strong, evidence-based litigation strategy that presents stereotype threat as a primary point of emphasis.

Several amicus briefs, and a few parties, have done a better job of raising stereotype threat in their legal argument in opposition to affirmative action challenges.[120] Other than the trial court in *Grutter*, no court has responded to the stereotype threat argument. This may be a reflection of the same dynamic that plays a role in the deficient treatment in the law reviews: the failure of proponents of the theory to articulate it prominently.

On the other hand, it is clear that one Supreme Court Justice has wholly adopted Sander's theory.[121] Justice Thomas's concurrence in *Fisher* explicitly accepts all of Sander's findings:

> The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched. But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these overmatched

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[118]   *Id.* at 867.

[119]   *See* Winkler v. School Bldg. Auth., 434 S.E.2d 420, 447 (W. Va. 1993) (discussing Steele's work on teacher expectations).

[120]   *See, e.g.*, Brief of Psychology Professors as Amici Curiae in Support of Petitioners, Harjo v. Pro-Football, Inc., on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, 558 U.S. 1025 (2009) (No. 09-326), 2009 WL 3359185; Application for Leave to File Brief of Amici Curiae in Support of Respondents Challenging the Marriage Exclusion and (proposed) Amicus Brief, *In re* Marriage Cases, 43 Cal. 4th 757 (2008) (No. S147999), 2007 WL 4632423; Brief of Amici Curiae, International Association of Black Professional Fire Fighters et al., in Support of Respondents, Ricci v. Destefano, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328), 2009 WL 815205; Appellee's Brief, Mems v. City of St. Paul, 327 F.3d 771 (8th Cir. 2003) (No. 02-1834), 2002 WL 32390453.

[121]   *See* Fisher v. U. of Texas at Austin, 133 S. Ct. 2411, 2431-32 (2013) (Thomas concurring).

students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.[122]

Similarly, in *Grutter v. Bollinger*,[123] Justice Thomas critiqued University of Michigan Law School affirmative action policies, saying:

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions. [124]

Notwithstanding Justice Thomas's acceptance of mismatch theory, it does not appear that mismatch theory has great traction among the courts.[125]

III.   Implications of Stereotype Threat for Minority Law Students

Given that stereotype threat has been shown so often to have a dramatic impact on the performance in a standardized testing environment, it should be obvious that we would see diminished performance of minorities on the two standardized tests—the Law School Admissions Test (LSAT) and the bar exam—that bookend the law school experience. But it may be less obvious that the three or four years during law school are riddled with opportunities for stereotype threat to take hold and flourish. In this section, I will discuss the impact that stereotype threat has on both ends and the middle.

A. *The Effects of Stereotype Threat on the Law School Applicant Pool*

If stereotype threat is as profound and pervasive as studies by Steele and a host of others have shown, then it necessarily has an effect on admissions.

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[122]   *Id.*

[123]   Grutter v. Bollinger, 539 U.S. 306, 372-74 (2003) (Thomas, J., concurring).

[124]   Id.

[125]   One other federal court discusses mismatch theory briefly, without expressly adopting it. See *Coalition to Defend Affirmative Action v. Regents of U. of Mich.*, 539 F. Supp. 2d 924, 938-39 (E.D. Mich. 2008) (acknowledging defendants use of Sander's "mismatch effect").

This is due to the fundamental fallout of stereotype threat: stereotype-threatened applicants' credentials are lower than they should be, and applications from stereotype-threatened applicants likely do not reflect their true academic capacity.[126]

In law school admissions, high levels of applications have led schools to find manageable ways to choose, from among the many applicants who are qualified to be admitted, which applicants should be admitted.[127] In most cases, there is no practical way, for example, to interview every applicant or compare rigorously the nuances of the qualities of all applicants. So, schools gravitate towards the easiest modes of comparison—they rely on formulas that cause the bulk of admissions decisions to hinge on applicants' prior grade point averages (GPAs) and standardized test scores.[128]

The reliance on credentials has grown with the emergence of law school rankings. Setting aside perennial elite schools like Harvard, Princeton, Yale,

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[126] Christine R. Logel et al., *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 EDUC. PSYCHOL. 42 (2012): "If conventional measures used to make admissions decisions in selective schools systematically underestimate the ability and potential of negatively stereotyped students relative to other students, it would be inappropriate to interpret such measures at face value in evaluating candidates for admission. To do so would be to discriminate against stereotyped students—to evaluate more highly and potentially to admit more nonstereotyped students over stereotyped students, even when the latter are more qualified and more likely to perform well." *Id.* at 46.

[127] It may not be true that this dynamic plays out at the same in all law school tiers. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (2000): "One of the most common misunderstandings concerns the number of institutions that actually take account of race in making admissions decisions. Many people are unaware of how few colleges and universities have enough applicants to be able to pick and choose among them. There is no single, unambiguous way of identifying the number of schools, but we estimate that only about 20 to 30 percent of all four-year colleges and universities are in this category. Nationally, the vast majority of undergraduate institutions accept all qualified candidates . . . ." *Id.* at 15.

[128] "The most fundamental objective is to be sure that the qualifications of all admitted students are above a high academic threshold. Admissions officers seek to offer places in the class only to those applicants whom they deem intellectually (and otherwise) capable of completing the academic program successfully and benefiting significantly from the experience. The nature of the courses applicants have taken, their secondary school grades, and their standardized test scores are particularly helpful in making these judgments." *Id.* at 23.

Stanford, and a few others, schools fight tooth and nail to be ranked higher and higher on national law school ranking lists.[129] The fight for higher rankings does not exist in its own right. Indeed, a market for rankings has grown and now helps define, to a large extent, how schools conduct their affairs. Students rely heavily on school rankings in making decisions about where to apply and, if selected, where to enroll. Schools, in turn, are ranked higher if students with higher credentials enroll. Given that the formulas for calculating rankings depend so heavily on incoming student credentials, schools game ranking systems by attempting, on every level possible, to ensure that their students' incoming credentials are as high as possible.

In the early 1980s, U.S. News and World Report began ranking universities and educational programs. Schools are ranked according to many factors, including:

    (1) Academic reputation;
    (2) Retention and graduation of students;
    (3) Faculty to student ratios;
    (4) Faculty pay;
    (5) Incoming student prior GPAs;
    (6) Incoming student standardized test scores;
    (7) Financial stability; and
    (8) Alumni giving.[130]

Of all of the factors on this list, schools can most easily manipulate student credentials. Most, if not all, of the other factors depend on things outside of the schools' control.[131] So schools scramble to admit and enroll the

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[129] That is not to say that even the elite schools do not consider their rankings to be important. Indeed, even the elite schools manage their selectivity rates and incoming student credentials.

[130] Robert Morse, *Best Colleges Ranking Criteria and Weights*, U.S. NEWS & WORLD REPORT (Sept. 8, 2014), http://www.usnews.com/education/best-colleges/articles/2014/09/08/best-colleges-ranking-criteria-and-weights.

[131] Of course, incoming student credentials also depend on outside factors, including (i) which students apply to a given school, and (ii) which students choose to enroll at the school. But once the applicant cohort is established, schools are free to regulate which students are admitted. Within that pool, schools also have the ability to affect student choices by offering enrollment incentives like scholarships or tuition discounts.

highest credentialed students possible. Schools offer scholarships to admitted applicants to encourage them to enroll, and they spend a great deal of their effort trying to recruit these students.

But if the test scores from these students are not accurate because of stereotype threat, then this entire admissions paradigm is untrustworthy. We can expect that students subject to stereotype threat will have lower credentials than their equally capable counterparts. For example, a stereotype threat-affected student with a 155 LSAT score may actually have the same academic capacity as a non-threatened student with a score of 160.[132] Or a 3.5 undergraduate grade point average from a stereotype threat-affected student may reflect academic capacity equal to that of a non-threatened student with a 3.8 GPA.

As Professor Logel put it:
> Suppose that Jennifer and Angie . . . both earn a 3.75 [GPA] in high school and a 1200 on their SAT Math and Reading tests . . . . Their grades and tests scores are the same, but do they reflect the same level of ability? If Jennifer, as a Black student, had to contend with stereotype threat in high school, her grades and test scores might underestimate her academic ability—she earned those scores despite having performed with the burden of stereotype threat.[133]

So, law schools that are relying strictly on academic credentials for admissions may be eliminating qualified students who have unreliable incoming credentials. Put another way, law schools that eliminate stereotype threat-affected applicants from the applicant pool are eliminating qualified applicants from the applicant pool. If a law school's LSAT admissions cutoff is 150 and the law school rejects a stereotype threat-affected applicant with a 149, then it actually may have rejected an applicant who fits within its pool of qualified candidates.

But there is a problem: There is no DNA test for stereotype threat. While the effects of stereotype threat have been verified and measured as a group phenomenon, there is no means of demonstrating that a particular individual suffered from the threat in a particular test setting. This does not mean that stereotype threat is not an individual phenomenon, but it is difficult

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[132] This is just an example. There are no studies measuring the difference that stereotype threat has on the LSAT.

[133] *See* Logel et al., *supra* note 136, at 44.

to prove on an individual basis.

If there were a test, that would make my proposal easy to implement. In theory, it would of course make sense that if we could establish that Student X's LSAT score was three points lower than it should have been, as the result of stereotype threat, then Student X could receive a three-point bump in her score and then have her file considered equally along with the rest of the applicant pool. If Student Y's LSAT score was not affected by stereotype threat, then Student Y would receive no score adjustment.

Student	"Raw" LSAT	"ST Adjusted" LSAT
X	155	158
Y	157	157

In this scenario, all other things being equal, Student X actually would move from being a less "qualified" candidate to a more qualified candidate, not because of a change in Student X's academic capacity, but because of a more accurate measure of that capacity.[134] Indeed, I have shown a three-point adjustment as the result of stereotype threat for Student X, but imagine how much more profound this picture would look if the stereotype threat adjustment were greater.

In the same way, if we could recalibrate Student X's undergraduate grade point average, then Student X becomes even more competitive:

Student	"Raw" UGPA	"ST Adjusted" UGPA
X	3.5	3.8
Y	3.5	3.5

Currently, there is no way to tell, on an individual basis, whether a particular applicant's credentials should be adjusted. But even though we are not able to make these fine adjustments, it still remains clear that incoming student metrics cannot be trusted. This is even more evident if we consider

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[134]   I do not mean to argue, and I will not take on in this paper, whether the LSAT is intended to be, or actually is, an effective measure of academic capacity or intelligence.

the impact of stereotype *lift*, which can boost the score of the non-stereotype-threatened individual.[135] This should cause law schools to stop their outright reliance on incoming student credentials as a basis for admissions.[136] Excluding students with lower credentials works to the disadvantage of those students, who may be equally capable as higher-credentialed students. Indeed, there is an argument to be made that reliance on credentials affirmatively discriminates against stereotype threatened applicants.

B. The Effects of Stereotype Threat and Implicit Bias in Law School

The effects of stereotype threat do not end at the front door of the law school. There is every reason to believe that stereotype threat thrives after students are admitted. If one were to design an academic environment to foster the growth of stereotype threat for minorities, one might choose to do the following:

(1) Enroll minority students who identify highly with scholarly achievement and who have a strong personal investment in succeeding in a particular academic endeavor;
(2) Provide a type of material that is difficult to comprehend and challenging to master, even for high-achieving students;
(3) Provide a volume of material that pushes to the limit every student's capacity to maintain focus;
(4) Place minority students in classes every day where their intelligence is evaluated, actually or apparently, by their professors and classmates;
(5) Provide minority students with as few role models as possible, i.e., keep low a school's percentage of minority professors;
(6) Isolate minority students, keeping them from participating in integrated study groups and other voluntary activities; and
(7) Provide little to no feedback to students during the semester.

Without stretching the imagination even a little, it is easy to see how stereotype threat can impede law school learning. If frustration is the spark

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[135] *See* Walton & Cohen, note 40, *supra.*

[136] This is easier said than done, of course, in light of most law schools' market dependence on U.S. News and World Report rankings.

that ignites the chain reaction of fear of stereotype confirmation, self-doubt, and confirming failure, then law school is the perfect proving ground for stereotype threat.

Frustration is a natural part of the law school experience for every law student. From the first day of law school through the end of exams, students are confronted with extremely challenging readings, thrust into completely foreign and intimidating classroom learning environments, isolated from their peers, and they receive little feedback until the end of the semester. Students may spend several months submerged in frustration.

Of course, this normal frustration may affect some groups differently than others. African-Americans and other students of color who experience frustration are also likely to experience the fear of confirming a negative group stereotype that they are not as bright as their peers.[137] Compare the experiences of two hypothetical law students, both of whom confront normal law school frustrations. The white student has trouble understanding antediluvian syntax in cases from the Queen's Court. She thinks, "This is really challenging. I will have to read this again until I get it." The black law student reads the same passage and experiences the same, normal frustration, but she thinks, "This is really challenging. I need to understand this before class. I don't want people to see me as the dumb black student who doesn't get it." The African-American student may further be plagued by increased anxiety and reduced ability to focus, limiting the student's ability to complete the task effectively. The inability to prepare effectively likely affects the student's learning in the classroom. Even though both students experience the same task and the same initial frustration, their internalized responses— and, hence, their performance results—may be dramatically different.

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[137] Stereotype threat also may affect other groups in law school. For example, the typical law school teaching method has long been criticized as it relates to women. See Banu Ramachandran, *Re-Reading Difference: Feminist Critiques of the Law School Classroom and the Problem With Speaking From Experience*, 98 COLUM. L. REV. 1757 (1998); Tanisha Bailey, *The Master's Tools: Deconstructing the Socratic Method and its Disparate Impact on Women Through the Prism of the Equal Protection Doctrine*, 3 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 125 (2003); Edward Adams and Smuel Engel, *Gender Diversity and Disparity in the Legal Profession: An Empirical Analysis of the Gender Profile in National Law Firms and Law Schools*, 63 BUFF. L. REV. 1211 (2015). And, as discussed earlier, persons from lower socio-economic groups or from underrepresented undergraduate institutions may be subject to the threat. *See* discussion, *supra* section I.B.1.

Law school is filled with students who identify with the law domain. Many, if not most, law students have enrolled in law school with a desire to succeed in law—to graduate, pass the bar, and join the legal profession. Thus, it is important to them to do well, to avoid appearing as though they do not have what it takes. And the stakes are high. Failure at law school or on the bar exam means no admission to practice.

Worse, implicit bias (and, of course, conscious bias) can exacerbate this problem, compounding the negative implications of stereotype threat. The implicit adoption, by members of the law school community, of a belief that minority students are less capable of achievement can substantially interfere with the learning process. How might this happen in and out of the classroom? A professor subject to the implicitly biased judgment that minority students are less intelligent or less capable might inadvertently make decisions not to cold-call on minority students, or might not hold them to the same standards in the classroom. Or the professor might be less willing to work through a difficult issue with a student in class or in office hours because of the implicitly biased judgment that minority students are not as capable as whites of success in law school.[138] Low expectations (conscious and subconscious) can have a dramatic impact on students' performance.

Likewise, biases of white students can have a negative impact. Implicit (or even conscious) biases of white students keep minority students out of study groups. This culture of exclusion occurs either consciously (i.e., white students deliberately exclude minorities from study groups out of a fear that they will drag study groups down) or tacitly (i.e., because of an implicit judgment that minorities are less qualified, whites exclude minorities from these groups). All of this triggers, for the minority student, a key thought related to stereotype threat: "I do not belong here."

In addition, the law school environment further reinforces the stereotype threat. Once these students arrive at law school, they usually find that minorities are underrepresented on the faculty.[139] The same

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[138]   Of course, this bias also can be explicit, either as a result of actual prejudice or the conscious belief that lower credentials—which, overall, happen to be proportionally correlated with students of color—translate to lesser capacity.

[139]   *See* Marx & Goff, *supra* note 27 (discussing how the experimenter race has been shown to trigger race salience and, thus, stereotype threat). It follows that if stereotype threat can exist in the learning environment then the same triggers would exist in classes with non-minority

underrepresentation exists in the student body, and those minority students who are in the student body may trend towards the bottom of the class. So minority students have few successful role models to follow. So, when these students encounter the extremely challenging material assigned in the law school curriculum, they already are primed to be subject to the threat. Indeed, they are hyper-primed.

These influences can compound over time, repeating themselves daily throughout the semester, creating a feedback loop of stereotype threat-low performance-confirmation-amplified stereotype threat-lower performance-confirmation-etc. This stress about confirming the negative stereotypes, especially when compounded throughout a law school semester, actually may lead to the result feared and cause students to perform worse than they would if these negative influences were neutralized.

C. Stereotype Threat and Law School Graduates

Stereotype threat extends beyond the law school classroom. Of course, the bar exam—perhaps the highest stakes of all exams for a would-be lawyer—is an obvious culprit. Law graduates who want to become lawyers are highly invested in the outcome of the bar exam, of course, and this tends to exacerbate the scope of the threat. Hence, we could expect to see lower-than-able performance on the bar exam for those who are subject to the threat.

But the threat may extend well beyond the bar exam. Once admitted to the bar, minority attorneys may suffer the effects of stereotype threat in practice. Depending on the environment, minority lawyers may find themselves having to prove their intelligence to associates, partners, judges, and others in the legal community. This may offer some explanation for the failure of minority lawyers to thrive in law firms.[140]

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professors.

[140]   *See* David Wilkins, et al., *Urban Law School Graduates in Large Law Firms*, 36 Sw. U. L. Rev. 433 (2007).

IV.   Recommendations for Law Schools

Given the various ways that law students may encounter stereotype threat, there are many opportunities for law schools to intervene in order to help mitigate or eliminate the threat. In this section, I will propose, generally, ways for law schools to account for the existence of and address the effects of stereotype threat.

A. Admissions Recommendations

Law schools can account for stereotype threat in their admissions policies by doing the following:

(1) *Treat credentials of applicants from particular stereotype threat-affected groups as deflated.* When making admissions decisions, admissions committees should review files for indications that students belong to groups whose application credentials are likely deflated due to stereotype threat. This would include African-American, Latino, and Native American applicants and applicants from lower socioeconomic backgrounds. Law schools should consider that students who are reliably identified as belonging to these groups may have greater academic capacity than their test scores and grade point averages reflect. If the effects of stereotype threat are factored into admissions decision-making, students who normally would be excluded from consideration would be included in the applicant pool, increasing the likelihood of diversity.

(2) *Allow applicants to self-identify as subjects of stereotype threat.* As part of the diversity statements that are a part of many law school applications, law schools should include an application prompt for applicants to articulate why their applicant credentials may be deflated as a result of stereotype threat. And when students demonstrate that they have been affected by stereotype threat, admissions committees should judge their credentials differently than those who are not affected by stereotype threat.

(3) *Create pipeline programs designed to increase applications from stereotype threat-affected applicants.* Law schools should work to develop applicant pools by addressing stereotype threat at an undergraduate level. By immersing high school and/or undergraduate students in a well-designed pre-law program, law schools can provide students with preparation and a sense of belonging,

as well as providing them with tools to recognize and militate against the threat. Pipeline programs should meet the goals of preparing prospective minority students[141] for the transition to law school by:

 a. Providing a sense of belonging to and familiarity with law school. If students feel as though they belong in the law school environment, stereotype threat should be reduced, even when students encounter normal challenges.

 b. Mastering certain law school skills. Teaching pre-law minority students the basics of reading a judicial opinion, note-taking, outlining, and memo and exam writing will help students feel capable in the law school setting because they will recognize that much of the success in law school is tied to mastery of skills (leading to mastery of substance), not to innate intelligence.

 c. Promoting logical and critical thinking. Like teaching skills, teaching students to challenge themselves intellectually will help them experience growth and recognize that critical thinking, like more tangible skills, can be developed over time with effort.

B. Academic Support Recommendations

The effects of stereotype threat do not end at the front door of the law school. There is every reason to believe that stereotype threat thrives after students are admitted. Given that numerous interventions have been shown to counter the effects of stereotype threat, law schools should do what they can in order to deal with the threat.

When it comes to combatting stereotype threat, interventions can be broken into two categories. On the one hand, several studies focus on removing the "primer" that triggers the threat in the first instance. An example of this would be changing the race of a test administrator, withholding a statement that a test is a measure of intelligence, or not having students identify their race on an information sheet prior to the test. On the other hand, other studies show affirmative interventions that place attention not on the triggers but on other means to address the threat, such as reflective writing or mindfulness meditation. Overall, interventions should have the

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[141]   Stereotype threat is not limited to minority students, so these programs also should be open to other students who are likely to be subject to the threat, including women and students from lower socioeconomic backgrounds.

result of providing students with a sense of belonging, capability, and motivation.

If a law school decided to implement affirmative interventions in order to address stereotype threat, two questions should arise. First, which of several interventions should a law school implement? Second, what resources are required in order to successfully address the threat?

As shown above, the interventions that can mitigate stereotype threat are many and varied. Without recounting them all here, it probably is useful to see what they accomplish and how. The interventions work by adjusting the students' self-concept and their experience of the threat. But the studies do not compare interventions or suggest that one is more effective than any other. This should lead law schools to experiment and to discover the best practices for dealing with stereotype threat. As different law schools implement different methods of dealing with the threat, they can report their findings to the rest of us.

Many law school academic support programs ("ASPs") already have the infrastructure to implement one or more interventions. Law school ASPs often take a lead role in orientation programs, first-year academic "acclimation" programs, and other programs designed to help students reach their full potential in law school. Indeed, if the charge to an ASP is to provide the support necessary to see that every student reaches her full potential, then it seems that helping students overcome the effects of stereotype threat fits squarely within the ASP's bailiwick.

Here are my specific recommendations for ASPs:

(1) *ASPs should actively target students of color.* To state the obvious, an ASP that is designed to minimize stereotype threat should target students of color and other groups subject to the threat.[142] More specifically, ASPs should target all students of color rather than targeting merely low-performing students of color. If stereotype threat is pervasive and has a tendency to affect all students of color, then students across the performance spectrum,

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[142] Surely, an ASP director's ability to target racial and ethnic minorities officially could be limited by political pressure from dissenting faculty members or staff, a lack of faculty status and hence the ability to effectively make meaningful program changes (the case for many ASP professionals), and limited human resources. ASP directors also can develop official or unofficial relationships with student groups or with individual students in order to achieve this objective.

including those in the middle and higher tiers of the class, can benefit from its amelioration.

(2) *ASPs should provide meaningful early intervention.*   Many ASPs are designed to address academic problems only when indicated by poor grades. In other words, after the first semester of law school, those students performing at the bottom of the class are targeted for voluntary or mandatory participation in the ASP. This kind of intervention is important, of course, but, as it relates to stereotype threat, it comes too late. If stereotype threat occurs in light of academic frustration, then there is a high likelihood that students affected by this threat in law school will experience its effects most frequently and profoundly throughout the first semester of law school. Intervention during the second semester, then, likely comes after students already have experienced repeated cycles of stereotype threat, fear, and failure. Intervention must occur before those "confirming" failures have occurred. This may take the form of pre-law, orientation, or early semester programs designed to prepare students for the academic challenges of law school, but any such program must focus on more than just skills. Skills-only programs are not as likely to counter the effects of stereotype threat.[143] To wit, the positive affirmations and role-model interactions discussed above all took place before or in the early parts of an academic term and were found to be effective, not just for the terms before or during which they took place, but also in later semesters and years.[144]

(3) *ASPs should operate on the fundamental premise that their constituents have the capacity to succeed and should not be "remedial".* It is critical that students both trust and are encouraged by ASP professionals. As discussed above, trust comes from, among other things, holding students to a rigorous academic standard.[145] Encouragement comes from the ASP professional's expression to the student of the professional's belief that the student has the ability to meet the teacher's high expectations. This belief in students' ability to succeed is reinforced by keeping ASP offerings from being "remedial". Of course, taken in a positive sense, ASPs exist in no small part to help remedy problems like unpreparedness for law school or stereotype threat. When I say that ASPs should not be "remedial" I mean that ASPs should not be

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[143]   *But see* Stout & Dasgupta, *supra* note 99.

[144]   *See* discussion, *supra* section I.B.4.

[145]   Cohen et al., *supra* note 76.

"dumbed down" or taught to the lowest common denominator. This goes to the substance of the ASP and also to certain aspects of their design and administration. Pedestrian, skills-only courses or courses containing only as much substance as is necessary to teach a skill, standing alone, run the risk of leading the student participants to think that we believe they are capable only of pedestrian tasks. On the other hand, focusing students on skill mastery has been shown to ameliorate stereotype threat.[146] These kinds of skills courses should be coupled with challenging course material to be the most effective. ASPs should not "dumb down" course material.[147]

(4) *Other support.* In addition to the normal academic support workshops and events during the first-year, academic support professionals should coordinate with minority student groups throughout the year to conduct workshops relating to stereotype threat. This should include sessions that explicitly discuss the threat and assist students in reframing the threat as a challenge. Incorporating stereotype threat remediation into one-on-one work also could be useful. The benefit is that students will be less likely to respond negatively to difficulty, but instead will be more able to understand that the frustration of law school is normal and temporary—as opposed to its being reflective of innate intelligence.

Most of the study of stereotype threat has explored and documented the substantial effect of the threat on performance on standardized tests. ASPs should address stereotype threat for their students and graduates who are about to take the standardized test, using the methods described above.

In addition, law schools should train faculty to recognize implicit bias and stereotype threat and to deal with those dynamics effectively in the classroom. This includes training faculty in (i) coupling high expectations with communicating a belief in students' ability to meet those expectations can interfere with stereotype threat and raise expectations,[148] and (ii) teaching

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[146]   Stout & Dasgupta, *supra* note 99.

[147]   This also can be a challenge for some ASP professionals. Many ASP professionals do not have faculty status and/or are not permitted to teach substantive courses. This limits the ability of the professional to assign more challenging work or to integrate skills and substance. For those who cannot do so independently, an alternative would be to partner with a supportive faculty member who would be willing to assist with the integration of skills with challenging substance.

[148]   *See* Cohen et al., *supra* note 81.

methods to minimize stereotype threat triggers and to increase amelioration of stereotype threat in the classroom.

V.   Responding to Criticism

My recommendations do not come without their challenges. In this section, I deal with concerns I anticipate my proposals will raise. Other than the first criticism discussed below, most of the criticism I anticipate would be based on arguments already made by Professor Sander, so I will deal with his arguments directly.

A. *Stereotype Threat-Conscious Admissions and Academic Support Uses Improper Racial Preferences*

One argument that I anticipate will be raised is that race is elevated as a factor to the exclusion of whites. It is increasingly more challenging to craft an admissions policy that overtly affects diversity while remaining consistent with the United States Supreme Court's affirmative action jurisprudence. If admissions programs consider stereotype threat, then one would expect a readjustment of the merit evaluations of applicants subject to the threat. Put another way, if some of the members of the law school applicant pool are subject to stereotype threat, then they are not receiving a benefit, but law schools are erasing an untrustworthy detriment.

In *Fisher*,[149] the United States Supreme Court announced that if the "substantial interest" in diversity is to be addressed in educational admissions, then universities must use means that, while having an impact on race, are race-neutral. In requiring narrow tailoring, the Court explained that, to be constitutional, an admissions policy designed to address issues of diversity must satisfy the Court's standard that "no workable race-neutral alternatives would produce the [same] educational benefits of diversity."[150] The Court would not approve of a race-based approach, where "'a nonracial approach . . . could promote the substantial interest about as well and at tolerable

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[149]   Fisher v. Univ. of Texas, 133 S. Ct. 2411 (2013).

[150]   *Id.* at 2420 (citations omitted).

administrative expense.'"[151]

The most common suggestions for race-neutral alternatives to accomplish affirmative action objectives include using proxies for race. These proxies tend to map onto race in significant ways, but choices based on these overlays generally are not considered to be race-based. Examples of these proxies include socioeconomic status, underrepresented zip codes, or other similar identifying characteristics that tend to be tied more closely to one or more races than others.[152] Usually, these proxies map onto less affluent minorities, rather than mapping onto minorities as a whole.

Stereotype threat is an equally viable, if not better, race-neutral proxy. Like socioeconomic status, stereotype threat maps onto race rather effectively without its being exclusively connected to minorities. As discussed above, the effects of stereotype threat are not limited to a particular racial or ethnic group. Indeed, studies have shown that stereotype threat affects African-Americans, Latinos, women, persons of lower socioeconomic status, and, in the right context, even white men. Thus, considering stereotype threat in admissions is not de facto racial discrimination. But not all stereotype threat is the same. Some groups are affected by a threat to intelligence. This is true for African-Americans, Latinos, and persons from lower socioeconomic backgrounds. In a related but not identical threat, women's intelligence is questioned in the area of mathematics. White men, though, generally do not suffer from intelligence-related threats, though they may experience other threats (like a threat regarding athletic ability).[153] So, in higher education admissions, groups other than white males might be more affected. If the effects of stereotype threat could be precisely measured, then admissions committees could adjust the credentials of individual applicants.

But stereotype threat as a proxy is a double-edged sword. There is no litmus test for stereotype threat. And stereotype threat operates as a group phenomenon, meaning it is difficult to measure stereotype threat on an

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[151]   *Id.* (citations omitted).

[152]   Not all non-racial approaches are proxies for race. For example, the well-known prior Texas admissions model was to grant automatic admissions to the top ten performers in each high school in the state. This had the benefit of automatic admission for students from lower socioeconomic neighborhood high schools.

[153]   *See* Jeff Stone et al., *"White Men Can't Jump": Evidence for the Perceptual Confirmation of Racial Stereotypes Following a Basketball Game*, 19 BASIC & APPLIED SOC. PSYCHOL. 291 (1997).

individual basis.   So in order to account for stereotype threat, admissions committees would have to use race, socio-economic status, gender, or other characteristics, as a proxy for stereotype threat.   So the non-race-based proxy, in turn and in part, becomes race-based.

As discussed above, there are several solutions for this.   Allowing admissions committees to be conscious of stereotype threat will enable them to include in their qualified candidate pool students whose credentials may not accurately reflect ability.   This would foster a more diverse pool.   Specifically, students at the margins who may have weaker credentials can be included in the candidate pool where they otherwise might not.   This can happen in the context of race-conscious consideration of applications, and/or it can happen when students self-identify as being subject to the threat.

In the law school admissions context, the negative stereotype that is most relevant is that related to intelligence.   Law schools are looking for the brightest students possible.   At the law school's threshold, the Law School Admissions Test purports to evaluate the intelligence of law school applicants. Admissions committees do their best to evaluate whether applicants have the intellectual capacity to succeed within the law school environment.   Thus, in the law school context, African-Americans, Latinos, Native Americans, and persons from lower socioeconomic groups are likely to suffer from the relevant stereotype threat in a law school admissions context.[154]   And a law school admissions policy designed to account for stereotype threat would have the benefit of increasing diversity for these groups.[155]

This raises two questions.   First, if we could recalibrate the credentials of applicants to account for stereotype threat and more accurately reflect their academic capacity, then should we do so?   I think the obvious answer to this

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[154]   As discussed above, women also suffer from an intelligence-related stereotype threat.   But this stereotype threat may not be related to intelligence generally.   Rather, this threat appears to be to the *applied* intelligence of women in a mathematics context.

[155]   I suppose that a counterargument would be that admitting students under a stereotype threat-conscious admissions policy is unfair because a disproportionately large number of minority applicants would benefit from such a policy, to the exclusion of Whites.   But no Whites who can establish a basis for stereotype threat would be excluded under this approach. The white applicants, who would be subject to this threat, and therefore likely to benefit from a stereotype threat-conscious admissions policy, would be those from lower socioeconomic groups.

question is yes. If we had the ability to precisely measure true academic capacity, then we could use those recalibrated credentials, along with all other relevant criteria, to determine who should be admitted.

Second, if we cannot establish individual, precise measures of the effects of stereotype threat, then should we ignore stereotype threat altogether in admissions? I think the obvious answer to this question is no. On the whole, the applicant credentials are not reliable. Blindly relying on them makes little sense. Instead, it makes more sense to account for stereotype threat as a group dynamic, accounting for the fact that students from stereotype threat-affected groups are much more likely to be subject to the threat and, therefore, have unreliably low credentials. Even without giving these students a direct boost, admissions committees still can consider these students to be more qualified than their credentials reflect, which should have the net effect of giving them a boost in admissions,[156] resulting in greater admissions diversity.

B. *Efforts to Mitigate Stereotype Threat Will Limit, Rather Than Trigger or Reinforce, Stigma for Affected Groups*

Another potential criticism of my proposals is that targeting students of color will reinforce stigma rather than reducing stereotype threat. For example, Sander asks rhetorically, "If one believes stereotype threat is a serious issue, isn't it obvious that large-scale preferences are likely to exacerbate the threat?"[157] The suggestion that Blacks will be stigmatized by affirmative action is an old one.[158] But it should be clear that I am not

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[156]   It has been argued that a failure to consider stereotype threat in admissions actually results in discrimination against stereotype threat-affected groups. *See* Logel et al., *supra* note 136: "If conventional measures used to make admissions decisions in selective schools systematically underestimate the ability and potential of negatively stereotyped students relative to other students, it would be inappropriate to interpret such measures at face value in evaluating candidates for admission. To do so would be to discriminate against stereotyped students—to evaluate more highly and potentially to admit more nonstereotyped students over stereotyped students, even when the latter are more qualified and more likely to perform well." *Id.* at 46.

[157]   Sander, *supra* note 108, at 902–04.

[158]   *See*, *generally*, Angela Onwuachi-Willig, Emily Houh, and Mary Campbell, *Cracking the Egg: Which Came First – Stigma or Affirmative Action?*, 96 CAL. L. REV. 101 (2008).

proposing affirmative action in the traditional sense; I am proposing an adjustment that more accurately accounts for applicant capability. In other words, Sander's rhetorical question contains a flaw. If adjustments in admissions are made to account for the threat, these adjustments would not be "preferences"—i.e., they are not ways of choosing from among equally qualified candidates. To the contrary, these adjustments would be ways of evaluating applicant pools to determine more effectively which candidates are qualified for admission.

It probably is more important to point out that Sander, like others, focuses on admissions as the solution to this perceived problem. In other words, his argument concludes that restricting admission of stereotype threat-affected students is better than letting them in. Admissions is an easy target, of course. But a better answer would be to admit these students and provide them with effective academic support in order to address the concerns, like stigma and stereotype threat, that prevent them from performing up to their potential. This is, of course, a much more complex thing to do than, say, eradicating affirmative action policies—which is easy to implement.

In any event, law schools should not let the fear of failure interfere with efforts to reduce the threat. Much of the research shows that confronting the threat likely works to reduce the threat. In other words, it seems likely that performance will increase if stereotype threat is deliberately addressed. Better performance translates into stereotype refutation, which should lessen stigma.

C. Stereotype Threat Theory Is Mostly Untested in the Real World

As discussed above, Sander criticizes stereotype threat research as having been "almost entirely confined to laboratories."[159] The essence of this argument is that stereotype threat may not have any real world application.

This argument suffers from several flaws. First, it fails to appreciate that studies of this effect require manipulation of the environment—in other words, without a control group and a study group, one cannot compare effects of different stimuli (or their absence).[160] So, any meaningful study of stereotype threat must have a laboratory component, or it would not be valid. Moreover, this response to stereotype threat-based criticism does not account

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[159]   Sander, *supra* note 104.

[160]   *See generally* Steele & Davies, *supra* note 108.

for the vast array of research that has been performed on stereotype threat. And the argument is not factually correct any longer. Indeed, many studies have measured the effects of stereotype threat in real-world contexts. Finally, that stereotype threat has been thoroughly studied and methodically validated over the last two decades is reason to give it *more* credence, not less.

In any event, it surely is true that stereotype threat should be studied more in real-world contexts. This really is a call for law schools to conduct their own programmatic experiments. As the recommendations identified above are implemented in different ways, law schools should study and publish the results. This should enable schools to learn from each other and, over time, generate data that will help determine the best practices for mitigating the threat.

D. *Stereotype Threat Does Not Explain the Law School Performance Gap*

Another argument against stereotype threat is that the study of stereotype threat does not explain the law school performance gap. For example, Professor Sander argues:

> Black underperformance in law school grades, when controlling for entering credentials, explains less than a tenth of the black-white gap in law school grades. Blacks graduate at the same rate as whites—when one controls for law school grades—and they pass the bar at the same rate as whites with the same grades and background characteristics. So exactly what is there for stereotype threat to explain?[161]

Put another way, Sander suggests that, if stereotype threat were a meaningful explanation for lower LSAT scores, those suffering from its effects would perform as well in law school, once a correction is made for the deficiency in LSAT scores—in other words, black students who score 155 on the LSAT—even though that score should have been a 160 but for stereotype threat—should perform as well as their white counterparts who scored 155 on the LSAT. The absence of this equalization, he argues, is evidence that

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[161]   Sander, *supra* note 105, at 1996. In support of this argument, in 2011, Sander cites one psychological study that proposes that stereotype threat may not appear in real-world situations. *See* Sander, *supra* note 108, at 902–04 n.51 (citing Cullen et al., *supra* note 19). The suggestions in this article are flawed, as explained by Steele's response to the article. Steele & Davies, *supra* note 160.

stereotype threat is not the explanation for performance differences.

This argument likewise fails to appreciate the nature of stereotype threat. Stereotype threat does not end with the LSAT; it persists through the law school (and bar exam) experience. In other words, when looking at stereotype threat-affected students, we do not see what we see. It is true that the entering student with a 155 LSAT score might actually have performed at a 160 or higher level without stereotype threat. But it is also true that the same student, once entering law school, still may underperform due to the level at which stereotype threatening situations are infused into the law school environment.[162]

Continuing their discussion of two hypothetical high school students, one of whom is affected by stereotype threat,[163] Professor Logel et al., explain that the threat does not end at the entrance exam:

> If the college [Jennifer, the stereotype threat-affected student] and Angie [the unaffected student] attend has an even greater degree of stereotype threat than [Jennifer] faced in high school—this may be common, as stereotype threat increases as the difficulty of academic work increases and as students become more anonymous in larger school settings, exacerbating worries about belonging—Jennifer might receive worse grades in college than Angie, even though they started college with the same high school grades and test scores.[164]

If this is true for students moving from high school to college, it is all the more likely for students moving, next, to law school. At a minimum, ignoring the possibility that stereotype threat continues to hinder the performance of affected students in law school leaves a gaping hole in the analysis purporting to compare the performance of affected and unaffected students.

But even if stereotype threat does not explain the entire performance gap, it surely explains some of the gap. If so, it seems incumbent upon schools to do what they can to address the threat.

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[162]   *See* Logel et al., *supra* note 136.

[163]   *See* discussion *infra*, p. 25.

[164]   *See* Logel et al., *supra* note 136, at 44.

E. *Performance Gaps in Legal Writing Betray the Absence of Stereotype Threat*

Professor Sander has made the argument that gaps in performance in legal writing courses, as opposed to exam courses, betrays the absence of stereotype threat: "[T]he black-white performance gap is the same or larger in legal writing classes as in timed exam classes, even though the former should not evoke the stereotype threat effect."[165] Sander's premise is based on his apparent belief that stereotype threat is an issue only on timed exams.[166] Nothing could be further from the truth, and, indeed, there is every reason to believe that stereotype threat affects long-term effort as much as it affects short-term effort.

Considered in the light of stereotype threat, legal writing should be no different from other law school work, insofar as intelligence is at a premium and frustration and workload can be high. Students are called on, and they face difficult work. Students are just as likely to feel the fear of confirming a negative group stereotype on legal writing assignments and in legal writing classes as they are in more traditional doctrinal classes and on law school exams. So we would expect to see the same effects of stereotype threat on those assignments as we would in other parts of the law school experience.

Conclusion

Stereotype threat is a real, measurable, psychological phenomenon that explains some of the performance gap between many students of color and Whites. Fear of confirming negative group stereotypes can increase the cognitive burden borne by those subject to the threat and, consequently, impede their academic performance. In law school, this plays a role in admissions, on the bar exam, and nearly everywhere in between, depressing the performance of many students of color before, during, and after law school. Law schools should do what they can to address this effect on performance.

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[165]   Sander, *supra* note 108, at 904 n.51.

[166]   *See, e.g.*, Sander, *supra* note 105, at 424 n.64.