DECLINE TO STATE: DIVERSITY TALK AND THE AMERICAN LAW STUDENT

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Today's law school admissions officer often is confronted by an impenetrable cipher: the law school applicant who "declines to state" his race.[1] Although merely a trickle in the larger stream of law school applicants in the 1990s, by the early 21st century the number of applicants that declined to state race precipitously increased.[2] Some reports indicate that

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[1] A brief explanation of the "decline to state" option may prove useful for those unfamiliar with this designation and the other racial designation choices that are available to law school applicants. Applicants are required to racially identify themselves in their admissions materials, in part to assist institutions in complying with federal law. Specifically, the Office of Civil Rights in the Department of Education ("DOE"), since 1980, has required each post-secondary institution to generate statistics regarding the racial composition of its student body and provide yearly data reports to the DOE. *See* 20 U.S.C. §1094 (a)(17) (discussing reporting requirements); *see also* Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59, 266, 59, 277 (Oct. 19, 2007) (discussing same). The DOE then uses this data to monitor whether schools have complied with their federal antidiscrimination obligations. Schools also use the racial composition data to assist them in determining whether the composition of the incoming class meets their racial diversity goals. Data collection efforts have been stymied over the years by some students' refusal to answer any questions that require one to identify by race. Although schools vary widely in the racial identification choices they offer to students, many have resorted to using the "decline to state" option to keep track of students who refuse to select a racial designation. Here the term is used to refer to students whom actually use the "decline to state" option when it is given as a choice, or simply refuse to provide any answer when asked to self identify by race.

[2] The Law School Admissions Council ("LSAC"), relying on race designation choices made by students taking the LSAT exam, reports that the number of "decline to state" students reached an all time high in 2002, when they comprised a little over 3% of all applicants to American law schools. *See* Law School Admissions Counsel, *Volume Summary Applicants By Ethnic and Gender Group* (2008), http://lsacnet.lsac.org/data/EthGenApps.pdf.

the "decline to state" option's popularity has waned;[3] other data suggests it retains strong appeal in certain communities.[4] To wit: by some estimates, approximately 10% of the applicant pool at highly selective law schools elects to "decline to state" race in any given year.[5] The inconsistencies in the currently available empirical data only highlight the presence of looming unresolved questions about the impact of the "decline to state" phenomenon on law school admissions;[6] yet these unresolved issues should not distract us from the larger concern. For we have not yet asked the most important question: "how does the 'decline to state' applicant, once enrolled, affect American law schools?" More specifically, what impact do

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[3] According to LSAC, "decline to state" candidates presently account for approximately 1.3% of law school applicants. *See id.* LSAC's data, however, appears to underreport the frequency with which the "decline to state" option is used by applicants to highly selective institutions. *See infra* note 5 and accompanying text.

[4] LSAC's reports regarding the falling number of "decline to state" law school applicants are inconsistent with other data showing a rise in popularity of the "decline to state" option. For example, the American Council on Education's *2007 Minorities In Higher Education Report,* shows that the number of graduating college students that decline to state race has increased more than 100% over the past ten years. The report also indicates that 5.2% of the students in professional school graduating classes are "decline to state" students—double the number that existed fifteen years ago. COOK & CÓRDOVA, AMERICAN COUNCIL ON EDUCATION, MINORITIES IN HIGHER EDUCATION: TWENTY-SECOND ANNUAL STATUS REPORT 20 (2007). *See id.* at 18 tbl.15. Arguably, the low number of "decline to state" students LSAC has reported is attributable to LSAC's racial identification options. Studies show that law students sometimes change how they racially self identify over the course of the admissions process, sometimes in response to the ways questions about racial identity are formulated. *See generally*, A.T. Panter et al., *It Matters When and How You Ask: The Self Reported Race/Ethnicity of Incoming Law Students,* 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL 51 (2009) (describing study in which a sample of mixed race LSAT takers changed their individual racial identity selections by the time they enrolled in law school). Indeed, during the period in which this Essay was written, one of my research assistants informed me that LSAC had notified her that it had discontinued use of the racial designation she had chosen the previous year, ("Other") and informed her that she was required to choose another option. She indicated to the author that she was unsure which of the remaining racial identity options to choose, as none accurately reflected how she understood her own racial ancestry.

[5] For the past four years, approximately 10% of the applicant pool to USC law school has "decline[d] to state" race. *See* July 1, 2009 email, Admissions Office, University of Southern California Gould School of Law (Statistical data, on file with author). This admissions office estimate was generated using applicant self reports, as recorded by the LSAC Credential Data Assembly Service. It is unclear to what degree we can more broadly generalize from this estimate and make determinations about the applicant pool at other institutions. However, because there tends to be substantial overlap in the applicant pool between schools of similar academic quality (and many schools rely on LSAC data in making race determinations), the data is suggestive of broader trends regarding the use of the "decline to state" option at elite law schools.

[6] Several questions are raised by the inconsistencies in the data about "decline to state" students, including the following: Should we should focus on data regarding the use of the "decline to state" option by applicants at highly selective schools instead of looking at aggregate data from students at both non-selective and highly selective schools? Does the "decline to state" option take on different significance for students applying to highly selective schools as opposed to schools with more liberal admissions policies? Does education level, class or regional background play a role in an applicant's decision to decline to state race? How do students' evolving personal views about their own racial identities affect their decisions regarding the "decline to state" option over time?

"decline to state" *students* have on law school conversations about diversity?"

Interestingly, the legal literature is virtually silent about "decline to state" students. However, the prevalence of this phenomenon raises important questions for legal educators. For, students whom reject claims about the significance of race for the law school admissions process also are at high risk for absenting themselves from law school conversations about diversity. Educators must decide, should we honor these students' choices, allowing those who opt out to cut themselves off from conversations about diversity initiatives? Or conversely, do we have a continuing obligation to engage these students, given their seemingly conflicted, or even hostile views about diversity programs? Educators must decide, what if any obligation do "decline to state" students have to join in law school dialogues about racial diversity?

The "decline to state" student also presents law students with critical questions: if they are members of this group; if they have considered using the option; or if they merely know someone who has declined to state his race in the admissions process. Students must determine whether the "decline to state" student merely is a benign social actor who has engaged in a strategic gambit intended to increase his competitiveness during the law school admissions process. Or, conversely, is the "decline to state" student an actor that has made an ethically troubling choice—one that demonstrates his refusal to bear personal costs to assist an institution in achieving its diversity goals? These two sets of questions triggered by the "decline to state" student suggest a new way forward in conducting law school conversations about diversity. By stressing the role of the individual, the role personal responsibility plays in achieving the promise of diversity initiatives, the "decline to state" student presents us with a unique opportunity to reframe current conversations about diversity issues.

In order to help legal educators make use of the discussion opportunities created by "decline to state" students, Part I of this Essay shows that outreach efforts crafted to reach "decline to state" students will improve law school conversations about race, as these efforts will force us to give more detailed consideration to the key, elementary principles necessary for conducting meaningful conversations about diversity. Part II focuses on building the understandings necessary to reach more "decline to state" students. This section debunks the assumption that "decline to state" students' share a single unified perspective, identifying the multiple constituencies that may decline to state race, as well as the unique pedagogical challenges each group presents for legal educators. Part III continues by offering some preliminary suggestions regarding how educators can meet the spe-

cial challenges posed by the different subgroups within the "decline to state" community. Part IV shows how conversations about the motivations of "decline to state" students can provide benefits to students other than those who actually exercise the "decline to state" option. It explains that, by helping all students develop a more nuanced understanding of dissenters' concerns, we help them cultivate skills that allow them to dialogue past current points of impasse in debates about diversity.

I. DIAGNOSING STALEMATE: IS THERE A CONNECTION BETWEEN "DECLINE TO STATE" STUDENTS AND STALLED LAW SCHOOL CONVERSATIONS ABOUT DIVERSITY?

A. FRAMING THE PROBLEM

Law schools, as practical matter, largely have retreated to sterile conversations about race and social justice. While most schools ensure students talk about diversity in some fashion during their first year, in many cases it is covered solely as part of the constitutional law curriculum, in discussions of equal protection challenges to state schools' affirmative action programs. However, some educators have noted that, even when there are opportunities for broader discussion about diversity issues, fewer and fewer students are interested in having these conversations.[7] The student editors of this journal faced the same disinterest problem when they announced their intention to hold the event that gave rise to this Essay, the inaugural *Diversity in the Legal Profession Symposium* at the University of Southern California Gould School of Law. Many of their fellow students asked them whether the symposium was really necessary, arguing that there was not much left to discuss, as society already had grappled sufficiently with diversity issues.

The dynamic the student editors encountered seemed related to an intellectual puzzle I was working through at the time—identifying the sociopolitical reasons for the large numbers of "decline to state" applicants I saw during my tenure on USC Admissions Committee. My committee experiences made me question whether the student disinterest I noticed in classroom conversations about diversity was somehow related to the apparent rise of the "decline to state" student population. Intuitively, one senses that

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[7] *See, e.g.*, Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness, Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 659-661 (2008) (discussing reluctance among white and black students for various reasons to engage in conversations about race and diversity); *see also*, Judith Scully, *Seeing Color, Seeing Whiteness, Making Change: One Woman's Journey in Teaching Race and American Law*, 39 U. TOL. L. REV. 59, 65 (2007) (acknowledging the emotional impact of discussions of race on students of all races).

there is some connection here. Unfortunately, however, there is little empirical data exploring "decline to state" students' political views. However, while we wait on the empirical data necessary to fine tune pedagogical initiatives, we should not allow our desire for empirical certainty to blind us to other opportunities. For the "decline to state" student can function as an important conceptual figure in conversations exploring the stakes of diversity initiatives. More specifically, the decline to state student's behavior forces us to consider whether opting out of diversity programs is merely a self-regarding act that imposes no harm on others or, if the secondary consequences of that action (on diversity programs and other law students) counsel against the use of the "decline to state" option. Indeed, in my experience, by exploring the motivational drives and moral quandaries associated with the "decline to state" student, I caused my students to think more critically about their individual personal relationships to diversity initiatives as well as the legal profession's diversity goals.[8]

In the simplest of terms, this Essay calls on educators to highlight the moral and ethical choices faced by students whom "decline to state" race, as a way to spur more rigorous conversations about diversity. In more intellectually precise terms, this Essay offers educators a new set of discursive strategies for exploring student resistance to affirmative action, as well as other diversity initiatives. Antidiscrimination scholar Christopher Bracey suggests that the time is right for us to investigate new discursive approaches, as contemporary conversations about diversity and race-based social justice initiatives have become so well rehearsed that they have lost much of their productive value.[9] As he explains, previously powerful arguments now tend to generate stock answers that substantively do not advance discussions about these issues. Many antidiscrimination scholars,

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[8] Critics may question the novelty of this approach, as discussions of affirmative action programs typically cover the redistributive consequences of these programs. *See, e.g.*, Robert Post, *Affirmative Action and Higher Education: The View from Somewhere*, 23 YALE L. & POL'Y REV. 25, 29–30 (2005) (discussing redistributional consequences); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 121 (2003) (discussing critics' reservations about redistributional consequences). However, discussions that focus on the "decline to state student" frame these redistribution questions differently. Specifically, these discussions allow us to make use of students' tendency to personalize and individuate the burdens associated with achieving the goal of diversity (What are you personally prepared to do to achieve this goal?), while simultaneously urging students to adopt a communitarian orientation that highlights the cost of "opt outs" on others who do value these initiatives (How should we regard the costs "opt outs" impose on those who do participate in diversity programs?).

[9] Christopher A. Bracey, *The Cul De Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1313 (2006) (concluding that "the continued reliance upon pedigreed rhetorical themes has and continues to poison racial legal discourse"). Legal scholars, to the extent they have argued within and about these tropes, have been subject to a kind of cognitive capture, failing to expand the debate about affirmative action and other civil rights and equality issues.

including Lani Guinier and Gerald Torres,[10] Kim Crenshaw[11] and Richard Ford Thompson,[12] have explored this problem, each suggesting ways to avoid current discursive limitations that derail our efforts to achieve racial inequality. This Essay joins in the effort to craft new solutions by framing the issues facing "decline to state" students in ways that will spur greater understanding of and interest in diversity initiatives. By examining the intended and unintended consequences of "decline to state" students' withdrawal from diversity efforts, we can gain insight into some of the impending social problems that must be overcome before we can return to a meaningful assessment of contemporary diversity initiatives.

B. DISCUSSION OPPORTUNITIES AND THE "DECLINE TO STATE" STUDENT

Focusing on the "decline to state" student promises to reinvigorate classroom discussions about diversity in multiple ways; however, the primary advantage of this approach is that it allows us to revisit some of the basic, first principles necessary to structure effective conversations about diversity. For example, because our focus on the "decline to state" student requires us to consider the effect "hold outs" have on law school diversity initiatives, these conversations remind students that diversity programs' success rests on securing *mutual agreement* of involved parties to a given program's meaning and its value. Too often professors rush past the definitional stage in discussions about diversity, and therefore fail to engage students in a truly participatory dialogue about what the term "diversity" means.[13] In my view, students participating in dialogues about diversity must understand and respect their fellow students' definitions of diversity, and the reasons for various students' choices regarding whether to support (or not support) diversity initiatives. This definitional stage in student con-

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[10] *See generally*, LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002) (describing limitations in current conversations about race and recommending new perspective that would analyze particular manifestations of racial injustice for evidence of larger social structural dynamics that cause the subordination of socially disempowered groups).

[11] *See* Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336–41 (1988) (describing how the rhetoric of colorblindness, formally associated with progressive anti-racism movements, has been remobilized by conservatives in ways that tend to compromise the struggle for racial equality).

[12] *See generally*, RICHARD THOMPSON FORD, THE RACE CARD (2008) (arguing that charges of "racism" are imprecise and inappropriate to describe the problems caused by whites' unreflective use of social structural opportunities enjoyed as a consequence of earlier discriminatory legal regimes and social arrangements).

[13] This Essay focuses on programs designed to improve the racial diversity of law schools and other institutions. However, diversity initiatives may encompass a broad range of identity variables. *See* Guinier, *supra* note 8, at 116–20 (noting that an institution's diversity goals may include considerations of race, class, gender and sexual orientation).

versations is critically important, as Americans have very different beliefs about the proper scope and substance of diversity programming.

Specifically, two kinds of conceptual disagreements derail conversations about diversity initiatives like affirmative action. The first definition-based disagreement stems from students' questions about the identity variables that are properly considered as part of the diversity equation.[14] While this fact is well known, its implications have not been fully appreciated. For American law students, like other Americans, exhibit different levels of support for affirmative action programs, depending on which communities are targeted for assistance. For example, American law students, like many other Americans, often fully support gender-based or disability-based affirmative action, even while they reject race-based affirmative action initiatives.[15] Yet few students find themselves in conversations that permit them to fully explore the tension between their support of gender or disability-based affirmative action, but rejection of race-based programs. Professors, however, should encourage students to explore the reasons they more strongly support affirmative action targeted to certain communities rather than others, an inquiry that is likely to lead students to confront the second common point of disagreement in diversity debates: disputes about the goals diversity programs are trying to achieve.

Indeed, the second source of disagreement between parties attempting to discuss diversity initiatives comes from the varied viewpoints people hold about diversity programs' primary purpose. For example, some believe affirmative action programs are required for social justice reasons—to ensure opportunity is made available to all marginalized groups in society. Others believe these programs serve primarily representativeness purposes; therefore, affirmative action programs need only provide opportunities in sufficient number for members of disempowered groups to reasonably *believe* that they also can also be granted participation rights in a given institution. Still others believe affirmative action programs are in place primarily to ensure that universities and businesses have access to students and

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[14] *See* Faye J. Crosby et. al., *Understanding Affirmative Action*, 57 ANN. REV. PSYCHOL. 585, 596 (2006). Specifically, Crosby indicates that Americans tend to be more comfortable with programs that consider gender or disability and less comfortable with programs that consider race. *Id.*

[15] *See id.*; *see also,* David A. Kravitz & Judith Plantania, *Attitudes and Beliefs About Affirmative Action: Effects of Target and of Respondent Sex and Ethnicity*, 78(6) J. APPLIED PSYCHOL. 928, 929, 934–35 (1993) (discussing Americans' preference for programs to benefit disabled over programs assisting women and minorities); David C. Wilson et al., *Affirmative Action Programs for Women and Minorities: Expressed Support Affected By Question Order,* 72(3) PUB. OPINION Q. 514–22 (2008) (noting higher levels of support for gender-based affirmative action than race-based). Researchers also found that white support for race-based affirmative action increased when they were asked first about whether they supported affirmative action for women. *Id.*

workers with a broad range of cultural and social perspectives, as a diverse membership ensures a body engages in better decision-making. To have a truly meaningful conversation about diversity, professors should be comfortable engaging with students about the propriety and relative importance of these different affirmative action program goals, and how programs might be shaped differently in light of these understandings.[16]

The conversation topics described above require a certain kind of "strong democratic talk,"[17] an approach antidiscrimination scholar John Calmore has long urged law schools to adopt in student dialogues about race and social justice. Yet Calmore's call has largely gone unheeded. As a result, many students are simply disinterested in conversations about diversity. These students find that they cannot proceed to an intelligent discussion about the thorny issues at the heart of diversity debates in the absence of a full opportunity to explore their foundational beliefs. And while it would be naïve to believe that students can come to *full* agreement about all of the issues I have outlined above, a discussion that *aims* for consensus about the scope and substance of diversity programs, one that allows students to examine the full gamut of options available for crafting these initiatives, will be a far cry from the anemic conversations that occur in the absence of these fundamental inquiries.

A second insight gained by focusing on the "decline to state" student in conversations about diversity is that we can ask students to more carefully consider the material consequences of "opting out" of regimes of racial naming. For, I would argue that "opting out" increases the representational burdens on those who are willing to identify by race in the admissions process, just as disengaged students increase the participatory burdens of more engaged students when diversity is discussed in law school classes. In my view, one is certainly entitled to reject the specific affirmative action program in place at one's law school; however, there is something more deeply troubling about using the "decline to state" option to express opposition, as it allows one to wholly avoid or even disavow one's obligation to carefully consider one's responsibility to assist in the

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[16] The mechanics of the affirmative action program also matter a great deal, as studies show that individuals generally tend to favor "soft" affirmative action programs—ones that focus on recruitment—but disfavor those that appear to more decisively change existing distribution patterns for professional benefits. *See*, *e.g.*, Crosby, *supra* note 14.

[17] For further discussion of the benefits of "strong democratic talk" about diversity issues, see John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 906 (1997). In my view, a discussion organized to encourage strong democratic talk will urge students to confront their concerns about the costs (real or imagined) of achieving diversity as part of the dialogue about diversity's value. Traditional diversity education efforts all too often attempt to solely focus students' attention on the social benefits of diversity, without engaging in honest conversations about students' views regarding potential costs.

struggle for a racially inclusive society. Even those that would dispute my characterization of "decline to state" students' actions still recognize that there are moral considerations that attach to the decision to "opt out" of diversity programs. For students who "decline to state" still go on to enjoy many benefits these diversity initiatives bring to the law school community (and society) more generally. In the classroom, "decline to state" students often function as spectators, as passive recipients of any insight gained as a result of other students' hard work attempting to meaningfully dialogue about race and diversity issues.

To be clear, my concerns about "decline to state" students should not be read as a simple indictment of these students because of their increased risk for "opting out" of classroom discussions about diversity. Rather, I believe that we would do well to consider some of the atmospherics that encourage student withdrawal from conversations about race and diversity. Many students avoid conversations about programs like affirmative action because they believe that they are required to regurgitate stock answers celebrating diversity, without being given space and opportunity for critical reflection. Educators who are tempted to ignore these students should consider the costs of this kind of student disengagement, as students who opt out of these conversations often graduate with a thinly veiled hostility for or skepticism about diversity programs. Soon enough these disaffected students will take on leadership roles in firms or corporations and are more likely to scale back their employers' diversity programs without fully considering the implications of their actions. Admittedly, inviting these disaffected students back into conversations may be difficult, both because of their sometimes unpopular views and because they may be resistant to truthfully expressing their opinions. With an eye towards addressing these challenges, Part III offers some pedagogical options to encourage alienated students to participate in conversations about diversity.

The third benefit that comes from conversations about "decline to state" students is that these discussions encourage all students to see themselves as essential components of a diverse student body. Too many diversity conversations encourage students to see diversity as a consumable item possessed by persons of color. In these conversations, white students conclude that they have nothing to contribute to conversations about diversity (and not surprisingly opt out of these discussions), and students of color start to see themselves in a commodified fashion, a perspective that has clear educational consequences.[18] Indeed, over the past several years, I

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[18] Kimberlé Williams Crenshaw, *Forward: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33, 40–43 (1994) (raising concerns about classroom discussions of race that make students of color feel obligated to "represent" a given racial group).

have grown increasingly disturbed by the number of students of color I encounter who claim to "have diversity," and white students who claim to "lack diversity."[19] These students fail to realize that diversity can only be produced by or defined in relation to a community, no single individual can provide this value independently. The tendency to discuss diversity in this manner is so counterproductive and troubling that it is one of the key corrective interventions educators should make when discussing diversity with students.

Last, by focusing on the "decline to state" student, we have the opportunity to tease out the multiple anxieties that cause students to withdraw from conversations about race and examine each concern separately. For, as Part II shows, the "decline to state" community is a mixed group, and by mapping out its various constituencies we can identify many of the social issues that are depressing students' willingness to discuss diversity in the classroom. Indeed, I suspect that, because we have paid little attention to the range of perspectives in this community, our efforts to encourage resistant students to participate in diversity conversations may be too narrow or one note, and we fail to cover motivational issues that are key to large segments of the student body. And I believe that the concerns that affect "decline to state" students do, in modified form, affect large numbers of students, reaching beyond those that would be regarded as part of the "decline to state" community.

II. UNDERSTANDING THE "DECLINE TO STATE" STUDENT

A. STEPPING BACK FROM "COMMON SENSE" CONCLUSIONS

Most legal educators believe they know what kind of student declines to state race in the admissions process. The paradigmatic student they have in mind typically is drawn from years of teaching experience and repeated encounters with students resistant to talking about race and diversity. Professors tend to use this paradigmatic student going forward as a guide for determining how to engage reluctant students in conversations about racial inequality. However, the tendency to focus on their own experiences makes professors fall prey to the "blind men and the elephant" problem: each professor is likely to focus on only one segment of the "decline to

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[19] This problem stretches beyond the law school community, as law firms routinely state that they are looking for "diverse candidates," a construction that grammatically makes no sense and creates an atmosphere in which minority candidates tend to feel commodified. *See, e.g.,* Howrey Law Firm Commitment to Diveristy, http://www.howrey.com/firm/diversity/recruitment/ (noting that the firm holds receptions to introduce *diverse* law school candidates to the firm and to encourage them to apply to the firm's summer program).

state" community, overlooking the existence of other distinct constituencies.[20] Indeed, when I surveyed a group of professors about which students are most likely to decline to state race, there appeared to be substantial disagreement about the characteristics and motivations of students in this group.

For example, some professors argue that there is no mystery here: "decline to state" students are what I call "affirmative action casualties," ("AACs") white students who bear the scars of the hard fought battles in the 1980s and 1990s over race-based affirmative action programs.[21] These students, professors argue, do not intend to take any larger position with regard to questions about race or diversity. They merely object to admissions officers' use of race as a basis for assessment in law school admissions decisions.[22] Other professors disagree, arguing that the lion's share of "decline to state" students are members of the millennial, post-race generation—a group that ostensibly does not identify by race.[23] Post-race millennials are students who have never seen themselves in racial terms, and therefore resist an admissions process that threatens to make race a primary part of their identities.[24]

Still other professors suggest that both of these accounts are wrong, arguing that the "decline to state" category is really filled with multiracial students who are dissatisfied with the racial designation options offered to them in the admissions process. They note that it is only recently, within the past several years, that some law schools have allowed mixed race applicants to choose multiple race categories instead of being forced to

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[20] John Godfrey Saxe, *The Blind Men and the Elephant*, *in* THE POETICAL WORKS OF JOHN GODFREY SAXE 111, 112 (1882).

[21] For a summary of these arguments, see Crosby, *supra* note 14, at 585, 593. Specifically, affirmative action proponents generally have argued that race-based affirmative action is essential to "achieve genuine equal opportunity." On the other side of the debate, opponents "maintain that affirmative action undermines its intended beneficiaries by promoting the stereotype that those who benefit from the policy could not succeed on their own." Critics also argue that affirmative action functions as a form of reverse discrimination that increases intergroup tension. *Id.*

[22] *See* Posting of Robert Speirs to Scott Jaschik, *None of the Above*, INSIDE HIGHER ED, Feb. 15, 2005, http://www.insidehighered.com/news/2005/02/15/race2_15#Comments (Feb. 16, 2005 at 19:05 EST).

[23] For an example of this perspective see Posting of Marlowe to Scott Jaschik, *None of the Above*, INSIDE HIGHER ED, Feb. 15, 2005, http://www.insidehighered.com/news/2005/02/15/race2_15#Comments (Feb. 16, 2005 at 13:38 EST).

[24] *See* Crosby, *supra* note 14, at 596 (noting that as early as the mid nineties psychological studies began to show that the identity variable college students were most resistant to being identified by was race); *see also*, Amanda E. Lewis, *"What Group?" Studying Whites and Whiteness in the Era of "Color-Blindness,"* 22 SOC. THEORY 623, 640–41 (2004) (discussing certain white students' resistance to identifying by race).

choose "Other" or just one racial category.[25] A multiracial student may still be dissatisfied with the options presented to him on a given form, and decline to state race, rather than choose a racial designation he finds offensive.[26]

The explanations offered above, I believe, account for the majority of "decline to state" students. However, undoubtedly there are other smaller subgroups in the "decline to state" community. To be clear, this discussion does not purport to identify all of the potential "decline to state" constituencies.[27] However, among the remaining smaller subgroups, a fourth constituency in the "decline to state" population merits discussion here—the "racially fatigued."[28] The racially fatigued are persons who, although they identify by race and believe that they are committed to ending racial inequality, paradoxically also are disinterested, uncomfortable and resistant to talking about race.[29] The racially fatigued law student resents having to racially identify in his admissions materials because he feels this identification comes with an additional burden. In order to be an attractive candi-

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[25] *See* Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 UCLA ASIAN PAC. AM. L.J 1, 6–7 (2006–07) (explaining that schools vary widely in the racial designation choices they offer to students and some fail to create options that are attractive to multiracial students); *see also*, Charmaine L. Wijeyesinghe & Bailey W. Jackson III, *New Perspectives on Racial Identity Development* 141–42 (2001) (noting that "[multiracial] people born during the 1980s and 1990s now have greater options for claiming various racial identities, including a [multiracial] identity").

[26] Indeed, multiracials may change racial designation when they are uncomfortable with the options available to them, or they may refuse to respond to racial identification questions entirely. *See* David R. Harris & Jeremiah Joseph Sim, *Who is Multiracial? Assessing the Complexity of Lived Race*, 67 AM. SOC. REV. 614, 622 (2002) (citing study results showing that 8.5% of white/black adolescent test subjects "respond[ed] to the best single-race question by saying either that they d[id] not know which single race best describe[d] them or by simply refusing to give one"); *see also*, Panter et al., *supra* note 4, at 61–62 (describing study in which mixed race law students changed their racial designation once enrolled in law school, switching from the one that they designated on the LSAT).

[27] My discussions with professors revealed at least one other group: "stigma avoidance" students. These students are students of color that decline to state race to avoid the stigma they believe they will feel if they are admitted to a school under admissions standards that are part of an affirmative action program. Importantly, a student concerned about "stigma avoidance" may never actually disclose to others that he "decline[d] to state" during the admissions process; however, he may still enjoy a private psychological benefit, and take comfort in his decision. Discussion of these students' actions also is very important for assessing the success of affirmative action programs as, in the long term, the stigma avoidance problem may lead admissions officials to develop erroneous conclusions about the pool of minority applicants available to them. Specifically, if high performing minorities systematically refuse to identify by race, it may lead officials to be overly pessimistic about the standardized test performance of minority students or about other merit assessment measures used to assess the potential of law school applicants.

[28] Although racially fatigued students are likely to be a smaller constituency in the "decline to state" community, I suspect that there are large numbers of racially fatigued students in the law school community more generally.

[29] BARBARA TREPAGNIER, SILENT RACISM: HOW WELL MEANING WHITE PEOPLE PERPETUATE THE RACIAL DIVIDE 47–48 (2006). For further discussion of this phenomenon see Camille Gear Rich, *Marginal Whiteness*, 2010 CAL. L. REV. (forthcoming June 2010).

date, he will have to submit an application that demonstrates that he is a "racial progressive," a task that is tainted with risk, given the chance of making an inappropriate statement.[30] By exercising his right to "decline to state," the racially fatigued student can passively shift conversations about his candidacy away from race-related issues.[31]

Students that have used the "decline to state" option may feel compelled to register their protest at this juncture, as they may conclude that the four distinct communities I have identified in the "decline to state" population parse out the motivational interests of students too finely. Some will contend that they identify with two or more of the groups described in the preceding section, and therefore none of the perspectives identified, standing alone, fully reflects their views. Yet these students' complaints only demonstrate the urgent need for more rigorous conversations about the understandings of "decline to state" students, for a student could not possibly be a member of more than one of these subgroups without holding logically inconsistent views.

For example, the AAC resents affirmative action because of its racially distorted results (it affords too many opportunities to less qualified minorities); consequently, he is not a member of the "post-race generation."[32] Also, the post-race applicant should be deeply troubled by the

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[30] *See*, *e.g.*, Jennifer L. Pierce, *"Racing for Innocence": Whiteness, Corporate Culture, and the Backlash Against Affirmative Action*, 26 QUALITATIVE SOC. 54, 60 (2003) (discussing interview with white attorney who described feeling like he was "walking on eggshells" when speaking about race-related issues).

[31] Evan P. Apfelbaum et al., *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interactions*, 95 J. OF PERSONALITY & SOC. PSYCHOL. 918, 918–19 (2008) (noting that many whites appear to hold the view that avoiding discussions of race in social situations is a way to seem non-prejudiced). Sociologists, including Barbara Trepagnier and Eduardo Bonilla-Silva, have discussed this phenomenon in detail. *See, e.g.*, TREPAGNIER, *supra* note 29, at 47–48; EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 43–47 (2d ed. 2006) [hereinafter BONILLA-SILVA, RACISM WITHOUT RACISTS].

[32] Importantly, AACs may claim that they would be members of the post-race generation but for the existence of affirmative action. They may claim that they would not think about race if they did not have to be concerned that someone else's race could be used to grant him or her an advantage in the law school admissions process. Certainly, psychologists have found that, for some whites, racial identity increases in salience when they are primed to think they are in competition for social resources with persons from other racial groups. Charles Jaret & Donald C. Reitzes, *The Importance of Racial-Ethnic Identity and Social Setting for Blacks, Whites and Multiracials*, 42 SOC. PERSP. 711, 714 (1999). However, assuming this claim of connection true, it still establishes that AACs and post race students belong to separate communities and must be treated differently, given their reactions to affirmative action. Truly post race whites oppose affirmative action programs not because they threaten whites' interests, but because of the dignitary impact racial naming has on them. Regardless of priming regarding the competitive threat posed by other racial groups, post race students will not take up the invitation to think about resource allocation through the lens of race.

multiracial students' claim: if race has no meaning, one should not support the quest to further instantiate rules of racial recognition by making them more accommodating of complexity. Additionally, the multiracial "decline to state" student has a political project wholly at odds with the racially fatigued. It would be illogical to insist that regimes of racial naming must allow for greater racial specificity, but then claim one wants to avoid conversations about race entirely. In order to take a principled position, to make a coherent argument about diversity, a student whom declines to state race cannot be a member of more than one of these groups.

Nevertheless, the fact is that many students do hold logically inconsistent views about diversity, racial justice and the propriety of racial naming. Since they have not had time to reflect on the inherent contradictions in their views, they have confused and underdeveloped ideas about the roles racial identification and diversity play or should play in society.

By parsing out the typical reasons for disavowing racial naming and exploring each one separately, we can encourage students to more fully understand each of these positions, and to make more reasoned determinations about their views. Also, by parsing through these justifications with students, educators have an opportunity to engage the multiple (and often logically inconsistent) anxieties of students and their potentially destructive synergies. Finally, by separately examining each of these justifications, educators can better assess how current diversity education efforts are being received by students and develop pedagogical options for getting students to engage more deeply in conversations about diversity. This definitional exercise is a critical step in reopening diversity conversations with otherwise alienated segments of the student population. The insights offered in the next section are designed to paint a more detailed picture of each of these constituencies in the "decline to state" community.

B. THE ADVANTAGES OF TAKING A SECOND LOOK: IDENTIFYING THE CONSTITUENCIES IN THE "DECLINE TO STATE" COMMUNITY

Before proceeding to a review of the attitudes of "decline to state" students, some background information about their demographic characteristics is helpful. Anecdotal accounts from admissions officers and informal surveys indicate that, historically "decline to state" students have been overwhelmingly white and predominately male.[33] Law school admissions

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[33] *See* William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L. J. 29 (2000) [hereinafter Kidder, *Rhetorical Acts*]; Interview with Edward G. Tom, Director of Admission for the Boalt Hall School of Law, in Berkeley, California on Feb. 3, 2000 (reporting on results of Boalt Hall's 1997 in-

data confirms the gender breakdown of this group as, until recently, men made up more than 50% of students who declined to state race for the purposes of the LSAT.[34] To better chart the racial breakdown of the "decline to state" community, sociologists and psychologists joined together to conduct a survey comparing the racial self-designation choices of students who declined to state on their LSAT registration forms, as compared to the racial designation choices they made on a survey requesting disclosure after they entered law school. For the purposes of the survey, 85.9% of the "decline to state" students identified as white, 8.2% as multiracial white, 3.5% as Hispanic and 1.2% as Black or Asian.[35] Some may dispute these findings, as some schools have found that as much as 20% of their "decline to state" pool is Asian.[36] I do not attempt to resolve this discrepancy here, but instead assume that Asians do make up a substantial part of the "decline to state" pool at some institutions.

Consistent with the data provided above, my analysis presumes that in most instances "decline to state" students are white students. and attempts to explain why particular political claims associated with "decline to state" students may resonate more with white students. This is not to say that black and Hispanic students do not use the "decline to state" option, but they appear to be a very small part of the "decline to state" community. Also, when it appears that the "decline to state" subgroup in question is also composed of Asian students or is primarily composed of multiracial students, the discussion makes note of this as well. However, where race is not explicitly mentioned in the discussion, one may presume that the student group being discussed is primarily made up of white students.

1. Affirmative Action Casualties

> "Whites get discriminated against. All the time! Yeah, I mean that that just amazes me now. If you're a White male, you really have a disadvantage. If you're a minority female, you really have an advantage. White males have a problem today . . . Unfortunately, there's always going to be some sort of discrimination. But people, you know, people should just choose people based on their merits."[37]

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quiry into the racial/ethnic composition of "decline to state" applicants that year, which revealed the sample to be "overwhelmingly White"); email from University of Southern California Gould School of Law Admissions Office (Jan. 2009) (on file with author)

[34] Until recently, male decline to state students outnumbered women 2:1. The gender disparity ended by 2005, when decline to state students were roughly evenly divided among the sexes. *See* Cook & Córdova, *supra* note 4.

[35] *See* Panter et al., *supra* note 4, at 58.

[36] *See* Kidder, *Rhetorical Acts, supra* note 33.

[37] Laura Smith et al., *The Territory Ahead for Multiracial Competence: The Spinning of Racism,* 39 PROF. PSYCHOL. RES. & PRAC. 337, 343 (2008) (quoting study participant).

The first answer interposed to account for "decline to state" students is based on the continuing public outcry over the affirmative action programs at elite educational institutions.[38] Now, twenty years into this debate, Supreme Court cases like *Grutter*[39] and *Gratz*[40] stand as clear reminders that the 21st Century foes of affirmative action are still staunchly pressing for diversity programs of this kind to end.[41] Although affirmative action's foes arguably have made some headway, as evidenced by California's Proposition 209[42] and similar measures in other states, little has changed for the AAC—the law school applicant who feels his application is being given short shrift because of a particular law school's diversity efforts. From his vantage point, the broader successes in rolling back affirmative action measures in a few states have done little to improve his actual chances of admission at most institutions.[43] The "decline to state" option, conse-

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[38] For an example of this rhetoric, see FREDERICK LYNCH, INVISIBLE VICTIMS: WHITE MALES AND THE CRISIS OF AFFIRMATIVE ACTION (1989).

[39] Grutter v. Bollinger, 539 U.S. 306 (2003). In *Grutter*, the Supreme Court held that the University of Michigan Law School's affirmative action program was constitutional because it was intended to achieve diversity, a compelling state interest, and the "plus" system the program relied on was sufficiently narrowly tailored to achieve the law school's diversity goals. Foes of affirmative action also claimed victory after the *Grutter* decision, as some language in *Grutter* indicates that affirmative action likely no longer will be needed in twenty five years. The Court also indicated that admissions programs that create quotas for minority students are unconstitutional.

[40] Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that the University of Michigan's undergraduate affirmative action program failed strict scrutiny, and therefore was unconstitutional). The Court recognized that the university had a sufficiently compelling interest to merit the creation of an affirmative action program, but determined that the current system in use was not sufficiently narrowly tailored.

[41] *See, e.g.*, Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139 (2008) (noting that affirmative action foes like Ward Connerly are currently challenging whether UCLA Law School's admissions process has improperly taken race into consideration in violation of California law). Also, there was a great deal of controversy last year about the ABA's *Statement 211, Equal Opportunity and Diversity*, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, REPORT TO THE HOUSE OF DELEGATES 4, *available at* http://www.abanet.org/media/legaled/hod210_212.pdf. The standard merely requires each member law school to make concrete efforts to ensure that each institution has a diverse student body. Affirmative action critics charged that *Standard 211* forced schools to violate anti-affirmative action laws in certain states or risk a non-compliance judgment. *See also* Gail S. Stephenson, *Student Body Diversity: A View from the Trenches*, 38 CUMB. L. REV. 71 (2007–2008) (discussing arguments of foes of affirmative action programs).

[42] Proposition 209 is a ballot initiative which passed in 1996. The initiative amended the California Constitution to prohibit state agencies and educational institutions from using race or gender-based affirmative action programs. For further discussion of Proposition 209, see Girardeau A. Spann, *Proposition 209*, 47 DUKE L. J. 187 (1997).

[43] *See* Joel Olson, *The Participation-Inclusion Dilemma*, 30 POL. THEORY 384, 392 (2002). Olson explains that whites tend to devalue the benefits they enjoy as a consequence of white privilege because these benefits are no longer clearly confirmable, obvious and guaranteed. Instead, the benefits of whiteness appear to be mere statistical probabilities that their life chances are better in some socially, economically or professionally relevant way. For example, white students tend to score higher on the

quently, is the only option this student has to confound an admissions process he deems fundamentally unfair.[44] He may conclude that a racially indeterminate applicant is likely to fare far better in the admissions process than a white applicant.[45] Alternatively, he may conclude that a "decline to state" applicant will effectively be treated like a white applicant, but feel the decision to "decline to state" is an important personal symbolic gesture to express his belief that admissions programs should be colorblind.[46]

If we assume that AACs (consistent with the demographic composition of the larger "decline to state" community) primarily are white, and a large minority may be Asian, it makes sense that these kind of arguments would gain sway with this constituency. Right-wing affirmative action critics have long courted working class whites and more recently Asians as allies in campaigns against affirmative action, charging that both whites and Asians are substantively disadvantaged by the use of race in admissions.[47] Notably, critics have made substantial headway with these groups, despite the absence of empirical proof showing whites suffer any tangible competitive disadvantage because of affirmative action programs.[48] Asian AACs', perhaps, feel even more under siege, as similar to whites, they resent what they see as special treatment for black, Latino and Native American students, but they also recognize that some schools operate under a seeming quota system for whites, ensuring whites receive the lion's share

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SAT than students from some minority groups, but no individual white student is guaranteed to score better on the SAT than a given minority student.

[44] BONILLA-SILVA, RACISM WITHOUT RACISTS, *supra* note 31, at 25–47 (discussing frustration of white students about affirmative action). Conscious of some whites' tendency to "decline to state," to avoid being subject to affirmative action standards, researchers in one study categorized these candidates as "covert white" students. Panter et. al., *supra* note 4, at 61–62.

[45] Posting of M. Danielle to Scott Jaschik, *None of the Above*, INSIDE HIGHER ED, Feb. 15, 2005, http://www.insidehighered.com/news/2005/02/15/race2_15#Comments (Feb. 17, 2005 at 10:40 EST). The author could find no empirical data to support this view.

[46] Posting of Brant Hadaway to Scott Jaschik, *None of the Above*, INSIDE HIGHER ED, Feb. 15, 2005, http://www.insidehighered.com/news/2005/02/15/race2_15#Comments (Feb. 16, 2005 at 13:38 EST).

[47] *See* Kidder, *Rhetorical Acts supra* note 33, at 61 (citation omitted).

[48] *See, e.g.*, Goodwin Liu, *The Causation Fallacy:* Bakke *and The Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1075–78 (2002). Liu persuasively demonstrates that affirmative action's foes have overstated their case. He shows that if a school's admissions process was governed chiefly by a person's standardized test score, most of the "qualified" white students complaining about affirmative action would still not be admitted as, once seats affected by affirmative action are added back to the available pool, the sheer number of qualified applicants gives those whom previously were shut out a very slim, almost negligible increased chance of admission. Furthermore, those whites that have scores slightly lower than the qualifying standard (complaining that minorities with the same lower scores were unfairly admitted) should have no basis for complaint. Under an admissions regime that faithfully admits only students with qualifying scores, these lower performing students would not have any chance at all of being admitted.

of seats each year.[49] Asian AACs resentment likely increased most sharply during the period immediately after the 1980s and 1990s, when several schools admitted that they had seen a flood of highly qualified Asian applicants during this period, and unfairly burdened Asian applicants because of concerns about admitting white students.[50] Indeed, during this period, Asian students hoping to concentrate in the humanities were hit particularly hard, as schools appeared to favor Asians interested in science and technology in the admissions process, because they had more difficulty finding qualified white students interested in these topics.[51]

If "decline to state" students primarily are AACs, some pedagogically useful observations can be generated, as there is a wealth of scholarship examining the views of foes of affirmative action programs. This research generally shows that white affirmative action critics' claims, although framed in race-neutral rhetoric, are actually quite race-based, as these students are intensely preoccupied with their racial group's perceived shrinking allocative share of educational and professional opportunities. For example, sociologist Thomas Bobo explains that, by using Herbert Blumer's group status model to interpret disputes about race-based affirmative action, one discovers that these disputes are primarily conflicts between racially defined groups over status and resources.[52] Blumer's framework suggests that, rather than being *unconcerned* about race, AACs are concerned about any rule change that could decrease their expected allocative share of professional opportunities, as these opportunities historically have

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[49] Karen Kurotsuchi Inkelas, *Caught in the Middle: Understanding Asian Pacific American Perspectives on Affirmative Action Through Blumer's Group Position Theory*, 44 J. C. STUDENT DEV. 625, 626 (2003) (discussing disclosures made by Berkeley College and Brown University admitting that during part of the 1980s their admissions standards were biased against Asians as a consequence of their efforts to maintain the share of seats given to white students at historically established levels).

[50] *Id.*

[51] *See id*. at 626 (discussing Berkeley and Brown's submissions to Office of Civil Rights indicating that their admissions standards during a specific period were biased against Asian applicants); *see also Kidder*, *Rhetorical Acts*, *supra* note 33.

[52] Crosby, *supra* note 14, at 598. The "group position" model is based on the proposition that "prejudice . . . involves most centrally a commitment to a relative status positioning of groups in a racialized social order." Lawrence D. Bobo, *Prejudice as Group Position: Microfoundations of a Sociological Approach to Racism and Race Relations*, 55 J. SOC. ISSUES 445, 447 (1999). I have previously explored the implications of Blumer's insights about group status and race relations, noting the advantages it confers in understanding social conflicts. *See* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1187–90 (2004). Other scholars, without explicitly mentioning the group status model, have implicitly recognized this approach as the proper way to understand white resentment about affirmative action. Miguel M. Unzueta, Brian S. Lowery & Eric D. Knowles, *How Believing in Affirmative Action Quotas Protects White Men's Self Esteem,* 105 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 12 (2008) (noting whites' anxieties about losing professional opportunities to minorities because of affirmative action).

accrued to their particular racial group.[53] Asian AACs circumstances are slightly different, as they seek to increase their allocative share using existing merit systems, but they resent rule changes that threaten to take away the gains they have made by learning how to master merit systems that previously benefitted primarily white students. Therefore, because white and Asian AACs are motivated by group status concerns, we can depend on an AAC to complain about any diversity initiative, even if does not explicitly refer to race, if the initiative will give his racial group fewer opportunities than the AAC believes that it historically has received—and/or it erases contemporary gains his racial group has made.[54]

The observations described above are born out by sociologists' work polling AACs. Admittedly, most of the research in this area has focused on whites; however, sociologists have found that foes of affirmative action are often highly racially identified,[55] much more so than individuals who support affirmative action programs.[56] Additionally, psychologists, again working with a white sample of students, have found evidence that white critics of affirmative action also exhibit high levels of modern or covert racism, reflecting their relatively low esteem for historically low status racial groups.[57] Asian students have not been studied in as much detail; however, researchers working with this group also have concluded that Asian affirmative action critics can become highly racially preoccupied and develop stereotypical assumptions about other minority groups, namely that af-

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[53] *See* Bobo, *supra* note 52, at 447–48; *see also*, Olson, *supra* note 43, at 391 (noting that some whites, acting based on rational self interest calculations, try to hold on to any competitive system governed by rules that appear to advantage their group).

[54] Crosby, *supra* note 14, at 599–601 (describing an experiment in which researchers staged a competition and used arbitrary rules to assign "merit" to particular participants). The competition participants then reported feeling "sorely cheated" when the competition's rules were changed in a subsequent game to another arbitrary system, when the new rules disadvantaged those who previously enjoyed an advantage. These research findings help explain the position of appellants in the recent Supreme Court case *Ricci v. DeStefano*, No. 07–1428 (U.S. decided June 28, 2009). Appellants were white male promotion candidates who brought Title VII claims alleging "reverse discrimination" when their employer, the New Haven Police Department, threw out the results of a promotion exam they had scored well on. The Department's position was that the exam results should be rejected, because the exam inexplicably appeared to disadvantage minority candidates, and therefore could result in a Title VII "disparate impact" suit brought by minorities.

[55] *See* Jennifer L. Eichstedt, *Problematic White Identities and a Search for Racial Justice*, 16 SOC. FORUM 445, 452 (2001) (discussing claim that affirmative action programs actually trigger stronger racial identification in some whites, as these whites believe that their racial group is currently "under siege" and is competitively disadvantaged by these programs).

[56] Janet K. Swim & Deborah L. Miller, *White Guilt: Its Antecedents and Consequences for Attitudes Toward Affirmative Action*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 500, 503 (1999).

[57] *Id. See also*, Nyla R. Branscombe et,.al., *Racial Attitudes in Response to Thoughts of White Privilege*, 37 EUR. J. SOC. PSYCHOL. 203, 204 (2007) (noting that discussions of whites' privileged status or unfair advantages triggered feelings of identity threat that caused some whites to question the deservingness or competence of less favored groups).

firmative action grants unfair advantages to members of racial groups with comparatively weak skills.[58] These Asian students, like whites, also tended to be preoccupied with questions of merit, although their views about merit were sometimes conflicting and underdeveloped.[59]

Despite their tendency to resort to stereotyped notions about certain minority students' capabilities, it would be a mistake to read AACs' reactions to affirmative action as simply expression of racist antipathy. Rather, the psychological literature also shows that individuals who have achieved success under existing merit assessment systems (i.e. have earned high GPAs or high LSAT scores) have a great investment in believing these merit regimes are fair,[60] because believing otherwise would invalidate their successes. Instead of concluding that existing merit regimes are unjust, they tend to blame individuals who do not fare well under these systems.[61] Racism simply becomes the way in which an individual can maintain his view that his accomplishments under existing merit systems have been properly earned. Stated simply, when white or Asian students blame culture or lack of initiative for underrepresented minorities' failures, sociologists quite rightly characterize this behavior as modern racism.[62] However, the animus against these groups does not come from a deep seated hatred or distrust of other races, and instead stems from a desire to maintain a positive view of one's own attributes and one's own racial group.

Indeed, the more important insight to take from these studies is that AACs are, in large part, attempting to preserve their self image as "deserving" persons. Yet this desire for positive self regard can quickly result in even more self serving and disturbing perceptual distortions. For example, social psychologist Miguel Unzueta and his colleagues have found that some whites now use affirmative action as a psychological crutch, citing it as the cause of a variety of bad outcomes in their lives, many of which have extremely tenuous connections to any affirmative action program.[63]

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58 Inkelas, *supra* note 49, at 651–52.

59 *Id.*

60 Crosby, *supra* note 14, at 599–600.

61 *Id.* at 599.

62 *Id.*; *see also* sources cited *supra* notes 56–57.

63 Unzueta et. al., *supra* note 52, at 1–13 (finding that some whites used affirmative action as a tool to produce positive self regard). Unzueta discovered that invoking the belief that affirmative action is a quota-based policy allowed some white men to retrospectively attribute their failures to reverse discrimination, instead of taking responsibility for instances of sub-par performance; *see also*, BONILLA-SILVA, RACISM WITHOUT RACISTS, *supra* note 31, at 83 (explaining that affirmative action programs confer significant self esteem benefits on some whites as these programs "allow[] whites [to avoid] consider[ing] the possibility that they are not qualified for a job, promotion or college"). Bonilla-Silva also explains that some whites use affirmative action stories as morality tales, to illustrate how life is capable of subjecting one to capricious unfair treatment. *Id.*

Unzueta explains that when whites believe minorities have taken more than their rightful allocative share of professional opportunities, they then see whatever success they have gained as an even more powerful demonstration of their talent. This observation seems to be equally likely for Asian Americans, who may feel under siege because they cannot benefit from *de facto* "quotas" for whites or other admission advantages this group enjoys (such as legacy admissions), but they also have not benefitted from the assistance affirmative action provides to currently underrepresented minorities.[64]

My observations about the race-focused orientation of whites and Asians who are resentful about affirmative action programs seems relatively obvious; however, these observations prove more powerful when framed in the context of a specific pedagogical challenge. The central issue to confront regarding "decline to state" students who are AACs is that they are masking group-pride based claims (based on race) in more palatable race-neutral language.[65] The legal literature has explored how affirmative action foes reject this proposition, by arguing that their sole interest is in protecting the integrity of existing merit based systems.[66] However, given the ample literature discussing the disparate distributional consequences of different merit assessment measures,[67] the role capture and practice plays in giving particular groups a competitive advantage,[68] and the failure of

[64] Inkelas, *supra* note 49, at 652.

[65] BONILLA-SILVA, RACISM WITHOUT RACISTS *supra* note 31, at 78–79 (describing a series of claims from interviewees illustrating this view). Specifically, the interviewees' comments indicate that many whites believe that they are innocent of the crimes their ancestors committed and should not be held accountable for past injustices. However, these claims also provide evidence of this group of whites' continued focus on racial identity and the status of their racial group. These individuals also use colorblindness rhetoric to make their claims; however, their claims regarding the hope for a colorblind process are inconsistent with their intense concerns about creating new systems that reduce their racial group's share of opportunities.

[66] Lani Guinier, *Admissions Rituals as Political Acts: The Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 121 (2003).

[67] David M. White, *The Requirement of Race-Conscious Evaluation of LSAT Scores for Equitable Law School Admissions*, 12 LA RAZA L.J. 399 (2000).

[68] Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41, 45 (2006); William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055, 1084 (2001) [hereinafter Kidder, *"Elite" College Students*]; William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter.*—A History of African American, Latino, and American Indian Law School Admissions, 1950–2000*, 19 HARV. BLACKLETTER L.J. 1, 26–27 (2003); LAW SCHOOL ADMISSIONS COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES 18 (2005), *available at* http://www.lsacnet.org/publications/cautionarypolicies.pdf; *see also*, Joseph Gannon, *College Grades and LSAT Scores: An Opportunity to Examine the "Real Differences" in Minority-Nonminority Performance*, *in* TOWARDS A DIVERSIFIED LEGAL PROFESSION 273, 282 (David M. White ed. 1981).

traditional measures to accurately gauge future performance of persons in minority groups,[69] their reification of existing measures seems foolhardy. The defensive attitude white AACs have about traditional merit assessment measures could be viewed as an insistent claim that we not disestablish the historic quota whites have enjoyed at elite educational institutions, an argument that grows in salience as Asians increase their share of seats at these schools. The challenge educators face is getting AACs to truthfully acknowledge that their concerns are about the relationship of racial groups' allocative share of opportunities and, more specifically, how we balance our justice concerns against certain groups' expectancy-based claims to these opportunities.

2. Living Post Race: Understanding Millenials

> I run into these sort [sic] of race questions all the time. At one point, I decided to start responding "Human," but later decided that was to [sic] anthropocentric. I now put in "Earthling." No one has ever said anything. (I believe they are not allowed to comment or challenge any classification.) The point is that I don't want it to matter. I want it to be a non-issue. Maybe more people are feeling that way, and maybe that means we are making progress.[70]

While the AACs get the lion's share of attention when discussing law school admissions,[71] another often cited reason for the emergence of the "decline to state" applicant is the millenial's post-race orientation. "Post-race" millenials simply refuse to cooperate with an admissions process that requires them to make race a primary part of their identities.[72] For these students, the reasons for declining to state race stem from their desire to maintain a sense of personal dignity. They strongly believe that racial identity is not an important component of one's self image, and they believe that the racial identification requirements of the admissions process

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[69] Richard O. Lempert, David L. Chambers and Terry K. Adams; *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 473 (Spring 2000) (explaining that, even when LSAT scores and GPAs are viewed in combination, they are not good predictors of success after law school).

[70] Marlowe, *supra* note 23.

[71] Although AACs get a great deal of attention, in my view the "decline to state" community must be composed of some students that are not AACs. For, a substantial number of "decline to state" students are applicants that have applied to relatively non-selective universities (defined as places where seventy-five percent or more of the applicant pool is granted admission), and therefore need not worry about affirmative action meaningfully reducing their chances of admission. Consequently, some other factor must motivate them to "decline to state" race.

[72] *See generally* Lisa Spanierman et al., *Psychosocial Costs of Racism to Whites: Exploring Patterns Through Cluster Analysis*, 51 J. COUNSELING PSYCHOL. 249 (2004) (noting that some whites reject the notion that race is a significant aspect of an individual's personal identity). *See* Lewis, *supra* note 24, at 626.

demand a personal compromise not worth making.[73] Consequently, their refusal to identify themselves by race in their admissions materials is not intended to function primarily as a critique of the allocation of professional opportunities; rather, they are making a larger claim that race simply should not play a role in shaping one's being.[74]

Post-race whites often are very frustrating to those interested in diversity efforts because their dignitary claims seem extremely libertarian and ahistorical; their choices do not seem to take into account the need for remediation efforts to combat racial inequality.[75] They are even more frustrating when they use colorblindness rhetoric, in part because this language makes them appear to be aligned with the New Right, a group which only relies on this language as a way of preserving whites "proper" allocative share of professional opportunities. Post-race students, however, are different; they tend to take the rhetoric of colorblindness much more seriously. Therefore, although educators are concerned that post race students' use of colorblindness as an interpretive framework makes it too easy for them to overlook the causes and current effects of racial caste,"[76] the essential challenge educators face when engaging with post race students is to remain mindful that their colorblindness rhetoric functions *differently* than the rhetoric used by AACs.

In summary, educators that hope to re-engage post race students must find ways of respecting these students' dignitary concerns, yet simultaneously get these students to question whether their colorblind behavior really will allow us to address the issue of racial stratification in American society. For the post-race student's desire for a "post racial future"—or at least one in which race is reduced to a mere social descriptor (as opposed to a rough proxy for an individual's relative social standing) seems laudable. The question is, are post-race students using strategies that will assist us in achieving this possibility? Assuming that these students' beliefs about not identifying by race are, in fact, honestly held,[77] the challenge is convincing them to critique their own "colorblind" behavior and its relationship to current conditions of racial inequality.

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[73] When asked about their identity characteristics, instead of mentioning racial identity, many whites will cite an identity variable stemming from one of their voluntary association or affinities. Jaret & Reitzes, *supra* note 32. Other whites tend not to identify based on race unless the issue is made salient, for example, if they are placed in a social setting where whites are the minority. Eric D. Knowles & Kaiping Peng, *White Selves: Conceptualizing and Measuring a Dominant-Group Identity*, 89 J. OF PERSONALITY & SOC. PSYCHOL. 223, 226 (2005).

[74] Marlowe, *supra* note 23.

[75] Lewis, *supra* note 24, at 640–42.

[76] *Id.*

[77] *Id.* at 640–42.

3. Mixed Race Persons

> [On] most [of the application forms for school] even when I was growing up, there was not another. . . . And so during those times, even when I was younger, I felt confused. You know, because I thought. "Man, why do I have to check one." And so a lot of times, I would check two [categories] or not check any.[78]

A smaller contingent of "decline to state" students are mixed race persons who, rather than claiming race has no meaning, believe that they belong to two or more racial groups, or that mixed race people deserve their own racial category. When these students "decline to state" in the admissions process it typically is because they resent being asked to identify based on only one parent's racial heritage,[79] and are unsure about the long term consequences that may flow from this kind of act of racial identification.[80] Multiracial students may be accustomed in their daily lives to taking a more complex, dynamic approach to questions of race, sometimes identifying as multiracial,[81] at other points refusing altogether to identify by race[82] or by making context specific selections about racial identity, shuttling back and forth between different racial designations over time.[83] When invited into conversations about race, multiracials may retreat, not because they are disinterested in race, but because they fear that their peers will fail to treat them in a manner that gives full recognition to their backgrounds' racial complexity.[84] Alternatively, multiracial students may avoid discussions of diversity and race because they find that the language currently being used is overly rigid and reductionist, and they feel that they do not have the skills necessary to ensure these conversations are conducted in a more nuanced manner. Given these challenges, many multiracial students find that it is simply easier if they avoid conversations about race altogether.

Certainly, no one should discount the complex identity negotiations multiracial students must go through. However, the pedagogical challenge educators face in discussions with multiracials is to convince them to move

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[78] Marie L. Miville et al., *Chameleon Changes: An Exploration of Racial Identity Themes of Multiracial People*, 52 J, COUNSELING PSYCHOL. 507, 511 (2005) (quoting interview subject).

[79] Jaret & Reitzes, *supra* note 32, at 712. Tanya Kateri Hernandez, *Multiracial Discourse: Racial Classifications in an Era of Colorblind Jurisprudence,* 57 MD. L. REV. 97, 106–07 (1998) (noting that advocates of a biracial or multiracial option in racial classification systems often argue that being forced to choose from a menu of single race designations diminishes the humanity of mixed race individuals).

[80] *See* Miville et al., *supra* note 78, at 511–17.

[81] Leong, *supra* note 25, at 13.

[82] *See id*. at 19–20

[83] *Id*. at 10. Miville et al., *supra* note 78, at 511–12 (describing multiracials ability to shift between identities as the "chameleon experience").

[84] Jaret & Reitzes, *supra* note 32, at 715. *See also* Miville et al., *supra* note 78, at 512.

beyond concerns about personal expression to a consideration of broader social issues. For example, anti-discrimination scholars like Tanya Hernandez have worried that multiracial students' focus on personal expression issues when thinking about racial identity may distract them from larger questions of structural inequality and the racially disparate impact of allegedly race neutral institutional procedures.[85] I agree that students need to move beyond the issues that arise from voluntary acts of racial identification and consider the consequences that flow from involuntary or unavoidable assignment to a given racial category. Indeed, multiracials have a wealth of experience with both forced racial identification and voluntary or self selected racial identification, yet we have not yet fully capitalized on their ability to talk about issues stemming from *de facto* or forced assignment to a racial category. Helping students make connections between experiences of forced assignment to a racial category and the socially stratifying effects of this forced assignment, may help them to engage with some of the larger social justice issues associated with racial identity. In my view, educators can get multiracials to re-engage by encouraging them to see their complex racial heritage as a source of insight, rather than a basis for alienation.[86]

4. The Racially Fatigued

> "Certain things, you know, you just don't say certain things, you can't make, um . . . .certain comments or jokes, things that used to be, you know, okay. It makes me feel. . . it makes me feel like I am walking around on eggshells all the time, like I might say the wrong thing."[87]

The last group of "decline to state" students is composed of the "racially fatigued"—students who are fundamentally uncomfortable talking about race.[88] Composed almost exclusively of white students, the racially fatigued feel badly about race discrimination, but also feel it has little to do with their lives. These students would prefer that discussions about racism focus on the problems caused by explicit racists—the select few "bad apples" that cause larger social problems. However, racially fatigued students know that this is no longer the focus on anti-discrimination scholar-

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[85] Tanya Hernandez has argued that the emergence of the category of multiracials can in part be attributed to biracial children's reluctance to relinquish their claim to whiteness. Hernandez, *supra* note 79, at 118–19.

[86] There is evidence that multiracials have particularly unique insights about discrimination because of their mixed heritage. *See, e.g.*, Margaret Shih et. al., *The Social Construction of Race: Biracial Identity and Vulnerability to Stereotypes*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 125 (2007) (noting Black-White and Black-Asian multiracials in her study were less likely to fall prey to stereotypical assumptions about other races than persons with a single race background).

[87] *See* Pierce, *supra* note 30.

[88] *Id.*

ship, and instead contemporary discussions of racism focus on subtle, expression of prejudice. These kind of discussions of racism cause racially fatigued students to suffer anxiety, as they tend to reveal that seemingly colorblind arrangements and social practices have racially discriminatory implications.[89] In order to avoid having to perpetually police and re-evaluate their own conduct, racially fatigued students simply avoid people of color and discussion of racial issues. Perhaps most ironic, racially fatigued students engage in these avoidance strategies precisely because they identify as socially progressive, anti-racist persons. Some racially fatigued students are simply afraid of participating in conversations, because they believe that one insensitive or impolitic comment could result in them being branded as racist. Others simply want to avoid self reflection. These feelings result in what I refer to as "racial reticence"—racially fatigued persons' attempts to avoid racial conversations for fear of making a bad turn.[90]

Some will argue that a racially fatigued student is not likely to decline to state, as students are not required to discuss race in their admissions applications. However, a white applicant may be concerned that he cannot mention his whiteness in his admissions materials without showing that he acknowledges his racial privilege and has done his small part to facilitate racial equality.[91] Put differently, the racially fatigued applicant fears that he will have to perform "progressive whiteness," a maneuver that requires him to sprint across a rhetorical minefield without triggering someone's concern that he is naïve, privileged or racist. Rather than take this trip, the racially fatigued student finds that it is easier to remain mute and stand passive. Rather than make this attempt, the racially fatigued student finds it easier to sit quietly during classroom discussions about race, waiting for them to end. Indeed, in my view, racial reticence extends beyond just the

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[89] *See generally*, Amanda Brodish et al., *More Eyes on the Prize: Variability in White Americans Predictions of Progress Toward Racial Equality*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 513 (2008) (discussing white Americans' discomfort with conversations that reveal racially discriminatory dynamics in seemingly innocent social practices).

[90] *See*, *e.g.*, BONILLA-SILVA, RACISM WITHOUT RACISTS*, supra* note 31, at 29–30, 43–47 (discussing some whites' reluctance to talk about race); Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1560 (1991) (describing an anti-discrimination study in which white students in a law school class expressed anxiety about speaking about race because they feared offending their black peers). Ansley also indicated that "racial reticence," as defined here, affects students of color as well as white students. *See also* Smith et al., *supra* note 37 (discussing tendency for some whites to be uncomfortable talking about racial issues).

[91] Indeed, white progressives do tend to believe that America has a great deal of work to do in order to end racial inequality. *See* Brodish et al., *supra* note 89, at 518. When Brodish and his colleagues conducted a study measuring white students' perceptions of racial progress, they found that whites with lower race prejudice scores (or lower levels of individual prejudice) actually believed that America had made relatively less progress towards racial equality than white subjects with higher levels of individual prejudice.

"decline to state" community; it is one of the main challenges educators face when trying to initiate discussions about diversity in the classroom.

The biggest pedagogical challenge educators face when talking with racially fatigued students is teaching them that passivity itself is a choice with social and material consequences. Fortunately, there is a wealth of evidence available to educators that demonstrates the connection between whites' passivity and continuing racial stratification. Specifically, social psychologists have discovered that students who claim that racism occurs outside of their social circle, often interact with people who tell racially insensitive jokes, make racially discriminatory comments and otherwise act in ways that effectively marginalizes minorities.[92] The racially fatigued either try to ignore this improper conduct or dismiss it as a "matter of opinion," a mistake, a minor indiscretion or assume the person must not "really mean" what he or she has just said.[93] The racially fatigued student also acts as though ignoring problematic conduct is another inconsequential action, when, taken together, these kinds of "inconsequential" acts play a key role in continuing racial segregation.[94] Therefore, educators working with racially fatigued students should focus on three goals: re-energizing fatigued students, finding ways to decrease their anxiety about inquiries regarding their own conduct and convincing them that their passivity actually compromises the effort to deal with racism.

My hope is that, armed with this roadmap for identifying the different groups in the "decline to state" community, legal scholars will find more innovative ways to pull these groups back into conversations about race and diversity. For, I believe that students should engage in more discussion about diversity issues, even if they oppose affirmative action programs, because the case for diversity will grow weak if supporters of these initiatives have no insight into the basic concerns of persons who do not support diversity initiatives. Indeed, I am disturbed by the number of students I encounter who ostensibly support diversity initiatives, but have no principled views about how to formulate these programs, measure their progress, recruit new supporters or think critically about tailoring diversity programs' goals. Also, I am concerned because supporters of diversity initiatives seem to have no specific critiques or ways of evaluating existing programs or (most important) no ideas about what institutional practices would have to change to alleviate the need for formal structural interventions. Affirmative action foes, equally, seem short sighted, as they oppose current struc-

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[92] *See* TREPAGNIER, *supra* note 29, at 47–48; Spanierman, *supra* note 72.

[93] *See* TREPAGNIER, *supra* note 29, at 47–48.

[94] *See infra* notes 130–141.

tural initiatives, but offer no insight about ways to disrupt contemporary discriminatory social dynamics with material implications. In light of these concerns, Part III offers some tentative suggestions about how to re-engage diversity program critics and enrich law school dialogues about diversity. My suggestions, however, are merely preliminary ideas, offered in the hope of inspiring others to create even more innovative, effective pedagogical initiatives.

III. LEGAL EDUCATION AND THE "DECLINE TO STATE" STUDENT: PEDAGOGICAL SOLUTIONS

A. PEDAGOGICAL CHALLENGES:

Although legal scholars have generated a wealth of scholarship exploring the diversity challenges facing the legal profession and documenting students' declining willingness to discuss issues of race, insufficient emphasis has been placed on understanding the range of anxieties and concerns that cause students to withdraw from conversations about diversity. In Part III, I draw on social psychologists' research to help explain why the current legal scholarship most likely to reach disengaged "decline to state" students has had only limited success. Using these insights, I then offer new methods for reaching out to the various "decline to state" groups that have opted out of conversations about diversity and race.

1. Affirmative Action Casualties

Part I indicated that the primary challenge educators face when dealing with AACs is that these students are preoccupied with questions about whites' (or Asians') allocative share of educational and professional opportunities, but they are accustomed to articulating their concerns in more palatable race-neutral rhetoric about merit. Although this community has received a great deal attention, it is unclear how effective current strategies to engage their interests are working.

For example, to address AACs' concerns about affirmative action programs, some scholars have worked to unravel the factual basis for their claims, showing that academically high performing students are not meaningfully harmed by affirmative action programs. Constitutional scholar Goodwin Liu, for example, has argued that affirmative action has relatively slight impact on the career opportunities available to "highly qualified" whites, given the vast constellation of factors weighed in law school admis-

sion programs and the overabundance of qualified applicants.[95] Antidiscrimination scholar Lani Guinier uses another approach, urging disaffected students to sets aside questions of merit and see their fears regarding lost opportunities as providing a critical opportunity for reflection. Instead of blaming affirmative action for their scant career choices, she argues, they should problematize and challenge the social arrangements that ensure that there are relatively few high quality educational and professional opportunities available to qualified students.[96]

Other scholars have attempted to direct AACs away from their zero sum concerns about lost opportunities and refocus their attention on the benefits they stand to enjoy by being a member of a diverse student body.[97] These scholars have taken a cue from *Bakke*, the decision in which the Supreme Court recognized diversity as a compelling state interest and explained that it provides value to all members of an educational community. Building on this understanding, other scholars have attempted to show that diversity improves students' ability to engage in critical thinking, empathize with others, socialize across racial groups and reject irrational fears about members of other races.[98] Another group of scholars' attending to AACs' woes have rebutted claims made about the stigmatic harms suffered by affirmative action beneficiaries,[99] as well as rebutted the claim that students admitted to law schools under affirmative action programs do not perform well once they become lawyers.[100]

One critical group of scholars has challenged AACs more directly, launching a critique of the very notion of "merit" as a way of distributing

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[95] *See* Liu, *supra* note 48, at 1075–78.

[96] Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 113 (2003). For example, Guinier suggests that prestige rankings may be raising the stakes for getting into a small number of schools and tend to diminish the accomplishments of individuals educated at less selective institutions. As a result, these regimes tend to reinforce certain unfair status hierarchies. More generally, Guinier calls upon us to "read race in conjunction with institutional and democratic structures" to identify socially stratifying arrangements. *Id.* at 120. This approach is a further development of Guinier's proposal to treat minority groups as a "miner's canary" to attune us to dynamics that tend to disempower socially disadvantaged groups. *Id.* at 119.

[97] France Winddance Twine & Charles Gallagher, *The Future of Whiteness: A Map of the Third Wave*, 31 ETHNIC AND RACIAL STUDIES 4, 7 (2008).

[98] *See* Crosby, *supra* note 14, at 596–97 (collecting scholarship expounding on diversity's benefits).

[99] *See Grutter*, 539 U.S. at 353–356 (2003) (Thomas. J., concurring in part and dissenting in part) (discussing stigma arguments. *Compare* Angela Onwuachi-Willig et al, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299, 1304–07, 1313–14 (2008) (suggesting more complex relationship between stigma and affirmative action and raising questions about claims of correlation).

[100] David Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005) (rejecting claims that students of color admitted to elite law schools under affirmative action programs perform less well than other students).

social resources. Specifically, Critical Race theorists such as Richard Delgado,[101] Patricia Williams,[102] and Daria Roithmayr[103] have drawn attention to the culturally constructed, contingent nature of ostensibly objective and race neutral merit assessment measures. Because this work seeks to shake the very foundational premises of AACs' claims, one would expect it to have had a big impact on this particular group of students concerns. And while this work has received significant attention, it has been has been rejected by numerous AACs and their supporters. However, the reasons for this result are clear. As explained in Part I, stakeholders whom have done comparatively well in a competitive process are loath to question the rules of that process. Consequently, AACs who have done well are not eager to dismantle contemporary merit systems. Indeed, stakeholders tend to use affirmative action as a kind of pressure release valve in a competitive environment, as it can explain away one's losses when one does not actually perform well under the rules of the merit system in which one is personally invested.[104]

In light of AAC's strong beliefs about merit, one novel way to engage their interest is to move away from calls to deconstruct merit, and instead encourage them to deconstruct whiteness, or Asianness, as the case may be. For the AAC's primary allegation is that affirmative action shortchanges his racial group, because it winnows away at his group's rightful share of professional opportunities as conferred by existing merit systems. Yet this claim of injustice rests on a highly reductive, oversimplified notion of racial identity. Statistically one's racial group may, on average, tend to do better under a particular "merit" system than other racial groups. However, these benefits do not flow evenly to all members of a racial category; instead they tend to benefit certain segments of a racial group more than others. Students therefore should be encouraged to think about cleavages in racial groups based on class, immigration status, ethnicity and region. Indeed, more specifically, a white or Asian AAC should be encouraged to think about whether the merit systems he currently supports actually do benefit the precise subgroup that more accurately describes his identity.[105]

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101 Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995).

102 PATRICIA A. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 99 (1991).

103 Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 10 LA RAZA L.J. 363 (1998)

104 *See* Unzueta, *supra* note 63.

105 For example, are they as comfortable with the disadvantages working class whites suffer when their LSAT scores are compared against those of more affluent whites able to take test preparation courses? Are they prepared to defend them in light of the depressed scores ethnic or newly immigrated whites might earn in comparison to more assimilated whites? Would they defend these exams as

For example, at present, many white AACs believe that standardized tests benefit whites as, on average, whites perform better on these exams than members of certain minority groups. However, the discussion of whiteness in these debates tends to distract white AACs from asking whether it is wealthy and upper-class whites or working class whites who perform well on these tests; or whether there are regional biases, with Northern whites scoring better on standardized tests than Appalachians.[106] The focus on whiteness in these discussions prevents white AACs from thinking about whether white Anglo-Saxon Protestants do well on the test as opposed to Russian immigrants.

When students think more critically about the diverse array of groups currently captured by the term white (or Asian), as well as the individual needs of sub-communities covered by the current race categories, their first inclination may be to claim that these differences in the privilege conferred within racial groups means that we should never consider race in admissions. However, critics fail to make the next logical move, to recognize that the standardized testing regimes that they have long embraced, because they believe it is in their self interest, actually *do not* benefit them. They fail to take the next logic step, to recognize that the plus system admissions officials use at most institutions, which gives all students (regardless of race) credit for economic disadvantage, immigration status and other measures, is actually attempting to filter within racial categories to identify those most in need of assistance. This plus system actually works in their favor *more* than mere reliance on standardized testing, yet it has been the subject of much criticism. Indeed, many students may realize for the first time that the plus system they have described as an invalid deviation from "merit" based measures is actually critical to their own interests.

Some may still view calls for whites to deconstruct race with some concern, remembering how foes of race-based affirmative action encouraged a similar move: asking working class whites to challenge affirmative action programs on the ground that class was a more effective proxy for social disadvantage than race in contemporary society. However calls to deconstruct whiteness need not result in a renewed call to replace race-based

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allowing for "fair" distribution of opportunities even when it is revealed that assessments based purely on standardized tests will result in gender imbalances?

[106] For a more thorough discussion of how the experience of whiteness is affected by issues of class, sexuality, and gender, thereby qualifying individuals' relative claim to white privilege. *See* Rich, *Marginal Whiteness*, *supra* note 29. As Sociologists Monica McDermott and Frank L. Sampson explain few scholars have attempted to "specify[] concrete ways in which . . . experiences of whiteness differ" in ways that materially affect whites' life chances and social standing. *See* Monica McDermott & Frank L. Samson, *White Racial and Ethnic Identity in the United States*, 31 ANN. REV. SOC. 245, 256 (2005).

affirmative action programs with ones focused on relative economic standing. Rather, the dialogue about diversity should explore the unique social barriers created by class as well as the distinct ones caused by race, with the recognition that class bias cannot be equated with racial bias. Also, diversity programs may still focus on race for representativeness reasons, for cultural diversity reasons, or simply to ensure greater social inclusion for marginalized groups. Simply shifting from race to class based affirmative action would serve none of these purposes. Here again we see the importance of building clear, shared foundational understandings with our students, in order to have sensible conversations about diversity.

To be clear, conversations about the deconstruction of race can still make space for people to defend the importance of affirmative action based on the existence of racial bias in society, as some privileges of whiteness extend more easily across all members of subgroups within the category of whiteness. Importantly, however, while we recognize that some of the benefits of whiteness extend across a wide swath of subgroups in a racial category, we also can take note of the ways in which other identity characteristics may cause certain subgroups of whites to experience relatively less privilege and more instances of bias and marginality.[107]

B. POST-RACE STUDENTS

Post-race students have garnered much less scholarly attention in discussions about increasing student engagement in diversity conversations. The tendency to overlook this group is due in part to the fact that this constituency, because of its use of colorblindness rhetoric, tends to get conflated with AACs whom use similar language to defend existing merit assessment systems. However, as explained above, true post-race students are not invested in preserving institutional arrangements that replicate the status quo. They are more concerned about the dignitary injury they suffer when they submit to regimes that require racial identification. They do not socially identify as white (or any other race) and resist having conversations about diversity because they believe these conversations unfairly reduce the individual to a representative of a given racial group instead, of encouraging us to focus on more socially relevant facets of personal identity.

In my view, the primary pedagogical challenge presented by this group is finding ways to engage them in a constructive conversation about a colorblind society. Some would suggest that Critical White Studies scholars' work might be useful in explaining to post race students that, de-

[107] For further discussion of this issue, see Rich, *Marginal Whiteness*, *supra* note 29.

spite their claims of racelessness, as they still enjoy substantial benefits as a consequence of being socially recognized as white.[108] Increasingly, however, this scholarship has less traction, as white students are apt to minimize the significance of cultural and social benefits that tend to be granted to white persons.[109] Others might point to work done showing the material advantages afforded whites as a consequence of prior patterns of racial exclusion;[110] however, this work still likely would not convince the post-race student of the importance of race-based diversity programs, as not all whites enjoy the economic head start produced by historical patterns of segregation, making the post-race student believe we should focus on class inequality rather than making generalizations based on racial status.

In my experience, one of the most effective ways for educators to bring post-race students back into discussions about racial diversity is to take their desire for colorblindness far more seriously. For even if we did want a colorblind world, research suggests that we do not currently posses the skills to make this a reality. Post-race students should be given an opportunity respond to psychiatrists' and social scientists' work showing that even the most well meaning individuals cannot actually conform their conduct to the colorblindness standard. Specifically, the implicit bias literature has revealed that most Americans engage in a kind of involuntary automatic process of racial categorization, often mobilizing stereotypes or negative feelings about minorities even before they are consciously aware that they are relying on them.[111] Other scholars have noted that when people consciously try not to think about race, they end up triggering more racial references and stereotype associations than persons who allow them-

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[108] *See, e.g.*, Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work In Women's Studies in* CRITICAL WHITENESS STUDIES, LOOKING BEHIND THE MIRROR 293, 293–294 (Richard Delgado & Jean Stefancic eds., 1997) (listing forty-six ways in which white privilege benefits all whites regardless of class and gender position); JOE R. FEAGIN ET AL., WHITE RACISM 8 (2d ed. 2001); *see also* Janet K. Swim & Deborah L. Miller, *White Guilt: Its Antecedents and Consequences for Attitudes Toward Affirmative Action*, 25 PERS. SOC. PSYCHOL. BULL. 500, 500 (1999) (noting that White Americans can be confident that they will be represented in the media, that they will not be followed or harassed when they enter a store, and in general do not need to "spend as much psychological effort or economic resources recovering from others' prejudice and protecting themselves from possible encounters with prejudice").

[109] Olson, *supra* note 43, at 392.

[110] For examples, *see generally*, THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN (Oxford 2004) (describing the role whites' accumulated wealth plays in maintaining racial inequality); Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y. & LAW 197 (2004) (describing cumulative effects of racist homeowner associations on present day patterns of residential segregation).

[111] *See, e.g.*, Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOC. PSYCHOL. Q 23 (1983) (noting that participants in a study were faster at recognizing a positive word if they had been primed with the word "white" instead of "black").

selves to remain more vigilant about race and think critically about diversity issues.[112] Given the clear evidence showing that most, if not all of us, cannot alter our behavior to comport with the colorblindness ideal, and that attempts to do so may aggravate discrimination problems, post-race students should be asked to consider how we address the continuing problem of racial inequality given the psychological intractability of racial bias.[113]

Additionally, post-race students should be exposed to scholarship showing that whites often fail to recognize that the subtle behavior they engage in can be viewed by minorities as discriminatory.[114] Consequently, failure to attend to this unintentional, subtle behavior can prevent post-race students from forming honest and meaningful relationships with persons in minority groups.[115]

One way of understanding post-race students' views is to recognize that they have dutifully internalized the colorblindness lessons that they were told were essential to achieve racial equality, but somewhere along the way the deployment of colorblindness rhetoric changed in ways that has made them less critical of current social arrangements than they otherwise might be. Educators' challenge with this group is to make post-race students understand that their consciously held beliefs may not match with their actual behavior in social settings, and that their refusal to acknowledge race may in fact work in precisely the opposite way that they intend. The question we must pose to post-race students is: if the decision to ignore race is not effective in practice and results in continuing structural inequality, can one ethically refuse to acknowledge race and still be committed to

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[112] BONILLA-SILVA, RACISM WITHOUT RACISTS, *supra* note 31, at 57–63.

[113] Because they do not acknowledge the significance of race, but often act based on unconscious racism, post-race students are at high risk for engaging in what the anti-discrimination literature refers to as microaggressions and microinvalidations. As Mitu Gulati and David Wilkins point out, microaggressions and microinvalidations are a common complaint of minority attorneys at large firms. *See* David Wilkins & Mitu Gulati, *Why Are There So Few Black Lawyers at Corporate Law Firms: An Institutional Analysis*, 84 CAL. L. REV. 493 (1996). These kinds of unintentional slights can substantially chill relationships between minority and white attorneys, as persons of color, reacting to these kinds of microassaults often appear standoffish and unfriendly. *See* Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM.PSYCHOL. 271 (2007) (discussing seemingly neutral or ambiguous social interactions that are interpreted by minorities as involving discriminatory animus but are read as neutral by white viewers).

[114] Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV 1498, 1506–14 (2005);. *See also* Boris Elgoff & Stefan C. Schmukle, *Predictive Validity of an Implicit Association Test for Assessing Anxiety*, 83 PERSONALITY & SOC. PSYCHOL. 1441, 1442 (2002) (reviewing potential problems associated with implicit bias measures while recognizing their general predictive value for assessing individuals' behavior); Gaertner & McLaughlin, *supra* note 111, at 23.

[115] *See generally*, Derald Wing Sue et al., *Racial Microaggressions in Everyday Life*, 62 AM. PSYCHOLOGIST 271, 271–86 (2007) (discussing harms committed by whites who engage in colorblindness strategies when interacting with persons of color). *See also* Panter et al., *supra* note 4, at 67–79 (discussing microagressions, microinsults and microinvalidations).

social justice?[116] The moral quandary set before these students is: will they accept the laissez faire distributional consequences of a "colorblind" world,[117] even if these consequences are tied to subtle racism, or are the costs associated with a color-conscious approach still too high to adopt this approach to addressing racial inequality?[118]

C. PEDAGOGICAL CHALLENGES: MULTIRACIAL STUDENTS

As Part II explains, the primary challenge educators face with multiracial students is getting them to think more deeply about the political repercussions of voluntary identification by race *and involuntary racial designation*. Additionally, Part II explains that we must remain sensitive to the unique challenges multiracial students face in conversations about diversity, as when discussions of race are not sufficiently nuanced they can trigger anxiety in multiracial students.[119] Yet multiracial students should be reassured that the best way to for them to develop their own skills in talking about diversity issues and to ensure that conversations are sufficiently nuanced, is to commit to full participation. Additionally, these students should be encouraged to recognize their mixed heritage as a special source of insight, as they often have had the experience of feeling discrimination from all of the various racial groups to which they have a connection, making them particularly attuned to the working of different stereotypes.[120] Additionally, multiracial white students may have special insight into the social privileges conferred by whiteness. This is particularly true if they have had experiences in which they were regarded as white and, in other similar circumstances, been subject to discrimination because they were identified as being a member of a minority group.

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[116] Lewis, *supra* note 24, at 636 (noting that color-blindness understandings naturalize racialized interactions that privilege whites).

[117] FORD, *supra* note 12, at 305–07.

[118] BONILLA-SILVA, RACISM WITHOUT RACISTS, *supra* note 31, at 25–47; *see also* STEVEN A. TUCH & JACK K. MARTIN, RACIAL ATTITUDES IN THE 1990S CONTINUITY AND CHANGE 16 (1997).

[119] Multiracial students may also face challenges in these discussions that may be neither intuitive to educators nor easily noticed. Most often a multiracial student's problems will stem from concern that the class discussions do not allow him to represent himself in a manner that gives full weight to the complexity of his racial background. However, other problems include, feelings of dysmorphia when he makes claims about his racial heritage, if he believes that his physical body does not match well with the racial group or groups he claims. Alternatively, he may have fears associated with abandoning a kind of "honorary whiteness" if he primarily socializes with white students who do not otherwise discuss race.

[120] *See* Shih, *supra* note 86; *see also*, Miville et al., *supra* note 78, at 511–13 (noting heightened sensitivity to issues of marginalization because of discrimination experiences and rejection experienced at the hands of more than one racial group).

In addition to addressing students' special sensitivities, educators should help these students explore the relationship between their interest in maintaining the freedom to self-designate, with competing social concerns regarding the material consequences of voluntary *and* involuntary racial designation. Educators might begin by covering issues close to home with multiracial students, namely: law schools' ability to assign students to specific racial categories, and the effects this discretion has on their ability to reach internal diversity targets for student enrollment.[121] For school officials can redesignate a student that has indicated membership in multiple racial categories to a particular racial category for their own internal diversity assessments., and often are required to do so when reporting on their diversity efforts to the federal government.[122] No guidance is offered to schools developing internal statistics for those multiracial students that refuse to answer race questions altogether. In the absence of other guidance, the concern is schools may resort to observer assignment, the applicant's prior racial designation reports, or other features to assign a student to a particular category.

Beyond the dignitary concerns a multiracial student may have as a result of this forced assignment, one can see that treating multiracials in this matter also has larger social and material implications. For example, if a school designates a multiracial student as a member of a particular race or ethnic group in order to improve a school's internal numbers for a given racial or ethnic category, and this practice effectively masks the school's failure to recruit persons who do actively claim minority identities, what implications does this have long term for minority communities?[123] This practice, over the long term, could result in a law school graduating fewer students that claim a given minority identity or intend to maintain strong ties with a given ethnic or racial group. The involuntary assignment of students to particular racial categories also has more immediate implications. If schools compensate for their inability to attract candidates from a particular group by reclassifying multiracial students, how does this affect law school conversations about race and diversity? One can see that there

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[121] Here I am differentiating between the numbers a school reports to the DOE and diversity estimates for internal use or publicity. Even if the school uses the DOE rules, students may find these rules generate distorted results for students that have identified themselves as members of multiple racial or ethnic groups.

122 See 72 Fed. Reg. 59622 (noting that the DOE requires multiracial students identifying as Latino and Asian to be reported just as Latino instead of in the "two or more races" category). Schools have much more discretion when choosing methods for their own internally generated numbers, and the emphasis has been on devising rules that can be consistently applied to students.

[123] For example, a school may create a default rule establishing that multiracial students that are white and claim another minority identity, will always be counted based on their minority identity in the school's internal diversity estimates.

might be fewer students with a strong connection to a given racial group who feel qualified and motivated to speak about issues relevant to a given racial or ethnic community. In light of these concerns, does a school's use of this reassignment strategy impose a burden on multiracial students to be more vocal in conversations about race? Should the school's redesignation seem less controversial because multiracial law students themselves sometimes change their designation for a similar reason—to position themselves well in light of a school's diversity goals?[124]

These questions outlined above are not often explored, but they may help multiracial students place the issue of involuntary assignment in a new context. For the discussion shows the "decline to state" student that, his decision to opt out (because he is incapacitated by personal identity questions, frustrated about his options, or simply opposed to designating) does not change the fact that these designations are being made, and that they have a range of material consequences. Additionally, the discussion provides multiracials an opportunity to discuss how their voluntary individual choices, in the aggregate, do have effects on minority communities, both in terms of the material opportunities offered to members of a given minority group, as well as the ability of these groups to make their concerns known in conversations about social justice issues.

Also, discussions about involuntary racial assignment and its material consequences most likely will resurface during a multiracial student's professional career. For example, a multiracial lawyer who identifies as white may find himself suddenly counted as a minority in his firm's diversity statistics if the firm concludes it would be helpful for recruitment or advertising purposes. A mixed race lawyer might oppose this involuntary designation for a number of valid reasons. He may oppose the redesignation because he believes that his firm's diversity efforts are lacking, and he wants to resist having his success used as an excuse for his firm to claim it has achieved success and scale back on diversity initiatives. He may oppose redesignation because he fears stigma, as people may believe he was promoted solely because of a diversity initiative. Finally, he may oppose the redesignation because, although he is mixed race, he has not made any attempt to reach out to minority communities and does not feel well qualified to speak about minority attorneys' concerns. Importantly, if the multiracial attorney has not previously had an opportunity to think about the relationship between personal identification, involuntary designation and the political repercussions of his choices, he will have difficulty negotiating the

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[124] Indeed, some multiracial students may temporarily identify with a racial group for the purposes of the admissions process, but privately express disdain for that group. For a discussion of this phenomenon, see Leong, *supra* note 25, at 19. *See also* Guinier, *supra* note 8, at 155.

dignitary and the social repercussions of whatever decision he makes at his firm.

Once multiracial students begin to see the political repercussions of their voluntary choices, both on their own lives and on minority communities, a wide array of topics are open for discussion.[125] To facilitate this discussion, educators should point to studies in social psychology exploring the various reasons multiracials shift between racial identities,[126] noting that some research shows a disturbing tendency for individuals to claim whatever racial identity gives them an advantage in a given social context.[127] In contrast, other research shows that multiracials tend to identify more stably with the part of their racial identity that carries the highest social status,[128] asserting membership in the most socially dominant group to which they have a claim.[129] Critics might characterize this research regarding trends in multiracials' behavior as evidence of opportunistic behavior. Yet, it might be more helpful to see these behaviors as evidence of mixed raced minorities' continuing anxieties about discrimination, anxieties that have encouraged them to flee that discrimination by identifying with either the highest status racial group to which they have a claim or the group that can provide the greatest support in a given circumstance. Alternatively, it might be more helpful to see this research as providing evidence of continuing social pressure encouraging mixed race students to conform to a single race category or face discrimination.

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[125] Multiracial students can be invited to grapple with a variety of questions related to diversity efforts: questions regarding the effect multiracials have had on discrimination measurement protocols relied on by the federal government, as well relatively low rate of interracial marriage between certain race groups and the social significance and political consequences of these developments.

[126] *See* Panter et al., *supra* note 4, at 57. *See generally* Jaret & Reitzes, *supra* note 32.

[127] *See generally*, Charmaine L. Wijeyesinghe, *Racial Identity in Multiracial People: An Alternative Paradigm in* NEW PERSPECTIVES ON RACIAL IDENTITY DEVELOPMENT 129 (Charmaine L. Wijeyesinghe & Bailey W. Jackson III eds., 2001). In a survey of 4,472 law students, researchers discovered that the majority of students who self identified as "other" or "decline to state" during the LSAT registration process later self identified as white in a voluntary racial identification procedure conducted during the first week of law school.

[128] Panter and Daye determined that students, who later voluntarily identified as multiracial during their first week of law school, actually registered as racial minorities during the LSAT with nearly 13% identifying as black, 21% as Latino or Hispanic, and 17% identifying as Asian Pacific Islander. Only 48% had identified as "other." They concluded that, to the extent schools rely on LSAT racial designations for their diversity assessments, this approach "redistributed students," especially multiracial students, into categories that do not mirror how these students would have self identified under unconstrained settings." Panter et al., *supra* note 4, at 65–66.

[129] *See, e.g.*, Panter et. al, *supra* note 4, at 58 (noting that majority of multi-racial students identifying as "other" or "decline to state" on the LSAT were multi-racial white students who subsequently identified as white after the law school admissions process ended). *But see* Miville et al., *supra* note 78, at 513 (noting that in a sample of ten multiracial students, the subjects tended to associate with their minority identity, suggesting that these individuals' choices appeared to be affected by the race of the parent by whom they were raised).

Importantly, regardless of one's personal views about the significance of these trends, one can see how a discussion examining a multiracial person's individual concerns regarding self identification can quickly move to the political backdrop that informs the multiracial student's choices. In discussions organized around these political concerns, multiracials are encouraged to think about racial identity selection choices as something more than an expression of idiosyncratic personal preference. Instead, they are encouraged to consider the ways in which concerns about race discrimination as well as the realities of phenotypic appearance either limit or shape multiracials' choices regarding how to identify by race. These discussions about multiracial identity promise to reinvigorate conversations about diversity with all students, and push us to ask smarter questions about the balance between respecting individual choice and addressing the problems with racial stratification and marginalization in American society.

D. PEDAGOGICAL CHALLENGES: THE RACIALLY FATIGUED

Although it seems counterintuitive, the racially fatigued student is perhaps the hardest to motivate in the "decline to state" community. These students refute a central assumption of most diversity programming, namely, that educating students about racism and social inequality will cause them to develop an interest in diversity initiatives. Indeed, racially fatigued students already possess a relatively complex understanding of contemporary race discrimination dynamics, including the problem of implicit bias, aversive racism and even laissez faire racism. Although these students fully recognize America still struggles with race, they have no desire to make this struggle part of their own lives. Rather, because they clearly understand how complicated conversations about race have become, they have retreated into inaction and silence, a strategy they believe has no negative consequences.

Part II indicated that the primary challenge in working with racially fatigued students is findings ways to overcome their feelings of exhaustion. However, the crucial insight for educators working with racially fatigued students is that their passivity is not simply due to the fact that they are tired of talking about racial issues. Rather, these students' exhaustion is a direct result of their anxiety about discussing and confronting discrimination..[130] Simply put, it is fear, rather than fatigue, that makes them avoid conversations about race. For example, racially fatigued students may say that they are tired of discussions regarding implicit bias and microaggres-

[130] TREPAGNIER, *supra* note 29, at 50–58 (discussing whites' anxieties about being branded racist).

sions. However, further discussion often reveals that they are actually anxious about what they may find if they police their own daily behavior and subconscious preferences in the effort to uncover discriminatory patterns.[131] Intense personal critique may force them to become aware of other sources of "white privilege," in their lives, benefits they would prefer to avoid noticing or discussing. One of the easiest way for the racially fatigued to avoid triggering this anxiety is to avoid conversations and social engagements that require them to engage in these discussions.[132]

Interestingly, the racially fatigued have not garnered much attention in the legal literature, most likely because they are not apt to strongly advocate in favor of diversity programs nor criticize their operation. However this largely passive group presents more issues than it might initially seem. For law students who are uncomfortable thinking about issues regarding diversity and racial stratification become lawyers who are uncomfortable discussing diversity and racial stratification. When large numbers of attorneys in an organization are passive and attempt to avoid discussions of race, there is little interest in critically assessing diversity programming to discover whether it is actually working.[133] Indeed, the modern trend at law firms is for diversity questions to be handled by coordinators, consultants, or members of the diversity committee, which is a source of relief for the racially fatigued attorney.[134] However, as scholars like Lani Guinier and Martha Minow have observed, when a small group is tasked with the job of evaluating and identifying solutions to a firm's diversity problems, it often lacks the necessary institutional power to effect change.[135] Consequently, educators are mistaken if they conclude that the students who passively opt out of diversity conversations have little effect on diversity initiatives in

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131 Derald Wing Sue et al., *Racial Microaggressions in Everyday Life*, 62 AM. PSYCHOLOGIST 271, 271–86 (2007); *see also* Panter, *supra* note 4, at 67–79 (discussing experiences of students of color with microaggressions during law school).

132 *See generally* Smith et. al., *supra* note 37, at 339–43 (2008) (discussing a study in which participants, despite agreeing that racism exists, consistently discounted and explained away any potential role racism played their own lives).

133 *See generally*, Pierce, *supra* note 30 (remarking on the widespread ignorance within the company she studied about the reasons African American attorneys had left the company). Instead, white employees generally tended to assume that the African American associates all left for "better opportunities."

134 See Altman Weil, Inc., Results 2008 "Flash" Survey on Diversity Director Position in Large Law Firms (2008), *available* at http://www.altmanweil.com/dir_docs/resource/7b47da34-0b11-4e3b-9df3-6eeda35c6195_document.pdf (noting that 100% of corporate firms surveyed had a diversity program and 58% had a dedicated Diversity Manager or Coordinator).

135 *See* Martha L. Minow & Lani Guinier, *Dynamism, Not Just Diversity*, 30 HARV. J.L. & GENDER 269 (2007). For further discussion of ways in which firms might avoid these problems *see* Verna Myers, *On Diversity and Inclusion: What Stage is Your Firm In*?, 46 BOSTON BAR J. 16 (May/June 2002).

place at other institutions.[136] Instead, these students' very passivity may facilitate the marginalization of diversity issues in the legal community.[137]

Fortunately, recent work by social psychologists gives legal educators the materials necessary to encourage students to recognize that their passivity actually makes them important players in the maintenance of racial subordination and marginalization. Specifically, social psychologists have shown that whites tend to conform to the race-related behavior of their peers. Consequently, if exposed to peers with racist attitudes they tend to be more muted in their protests about racism; if exposed to peers with anti-racist attitudes they tend to be more vocal about the need for equality.[138] Passive students should be asked to consider how their passivity may have allowed certain discriminatory dynamics to operate in their presence, and they should be encouraged to consider how their decisions to ignore small scale discrimination can make them more insensitive to other racist incidents. Other social psychologists have concluded that when whites react passively to race discrimination, they suffer many negative psychological effects, including guilt, anger and shame.[139] Consequently, racially fatigued students are making a choice in racially disturbing interactions between two problems: suffering the social discomfort that occurs when pointing out racism in one's peer group, as opposed suffering the discom-

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[136] Indeed, because of this lack of institutional power, they may find it harder to call for the kinds of programmatic changes that would have a large impact at firms. Firms tend to prefer "soft" forms of affirmative action, like outreach, instead of "hard" forms, such as programs that use race or gender as a tie-breaking consideration between equally matched candidates. *See* Crosby, *supra* note 14, at 585–611. They also tend to believe that the least disruptive manner to increase diversity at the firm is to increase the pool of minority competitors for partnership, knowing that eventually someone will have the fortitude to make it through the established partnership system, and thereby validate its continued usage. *See also* Ellen Ernst Kossek & Susan C. Zonia, *Assessing Diversity Climate: A Field Study of Reactions to Employer Efforts to Promote Diversity,* 14 J. ORGANIZATIONAL BEHAV. 61 (1993) (discussing employees resistance to "hard" affirmative action programs and preference for "softer" recruitment efforts).

[137] When race talk spills out of these specialized locations, it is still in a properly limited temporal period: at the start of the year training session, the year-end retreat or during recruitment season. As a result, if an attorney raises concerns about discrimination in other circumstances, his or her claims are often viewed with resentment or suspicion. This creates a stifling atmosphere for minority attorneys as well as white attorneys sensitive to diversity concerns.

[138] Fletcher A. Blanchard et al., *Condemning and Condoning Racism: A Social Context Approach to Interracial Settings*, 79 J. APPLIED PSYCHOL. 993 (1994). They further noted that the sentiment of individuals was most malleable when they did not have much direct contact with minorities. *Id*. at 995–96

[139] K.S. Douglas Low, Kimberly T. Schneider et al., *The Experiences of Bystanders of Workplace Ethnic Harassment*, 37 J. APPLIED SOC. PSYCHOL. 2261 (2007) (outlining the harmful psychological costs and other health related costs suffered by bystanders to ethnic discrimination). Importantly, even if the "bystander" did not directly observe discrimination, he or she tended to be psychologically affected when hearing about a complaint second hand and becoming aware of discriminatory dynamics in the workplace.

fort associated with "ignoring" what one's knows to be wrongful behavior. Yet, this second, less-discussed form of discomfort, associated with ignoring racism, has serious and damaging psychological consequences. In my view, if educators make the costs of racial reticence and avoidance strategies more clear, racially fatigued students will have more reason to think about whether their passive stance really can be squared with their need to maintain a vision of themselves as socially progressive and, indeed, their own psychological welfare.

Relatedly, educators should also introduce students to social psychologists work showing that whites' desire for a positive self image, and their desire to see themselves as socially progressive, can cause them to distort their perception of reality. Eduardo Bonilla-Silva, for example, has produced several studies exploring whites' distorted claims about interracial friendships.[140] Bonilla-Silva polled a group of white students requesting information on how many of the students currently had close black friends. Nearly 50% of students reported that they had black friends or "hung around" with black students. Bonilla-Silva then made more specific inquiries about these students' close friends, and included clearer terms for what counted as voluntary friendship, namely interaction with an individual by choice outside of a work or school setting. After these more specific inquiries, the percentage of whites in the group that indicated that they had black friends dropped to 7%.[141] Bonilla-Silva explains the disparate results by pointing out that many whites mistook being "friendly towards" blacks as actually meaning they had friendships with blacks. Additionally, his other work shows that whites who self segregate tend to develop more discriminatory attitudes, and that they are largely oblivious to their self segre-

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[140] BONILLA-SILVA, RACISM WITHOUT RACISTS, *supra* note 31 at 53–73 (describing various experiments).

[141] *Id.* at 109–10; *see also* Eduardo Bonilla-Silva et al., *When Whites Flock Together: The Social Psychology of White Habitus,* 32 CRITICAL SOC. 229, 231–39 (2006) (noting that whites tended to inflate claims about relationships with blacks under pressure to maintain a view of themselves as socially progressive) [hereinafter Bonilla-Silva et al., *White Habitus*]. Many of the individuals interviewed described work relationships or superficial interactions with blacks as friendships, but would retract or modify their claims about having close relationships with blacks after further questioning revealed that the relationships they referred to were compulsory or weak. Other scholars have reported more optimistic figures regarding the number of white/black cross-racial friendships in certain communities, but they still find that surprisingly small numbers of whites have interracial friendships with blacks. *See, e.g.*, Maureen Hallinan & Richard Williams, *The Stability of Student's Interracial Friendships* 52 AM. SOC. REV. 653 (1987) (presenting research results indicating that only 10% of whites have black friends).

gating behavior, attributing their failure to build interracial friendships to "lack of opportunities."[142]

Also, educators that are interesting in motivating the racially fatigued to rejoin conversations about diversity should encourage them to think about how racial fatigue will affect America's discrimination efforts over the long term. Much of the research discussed above indicates that it plays a role in the continuing social and the economic marginalization that minorities experience. Indeed, some would argue that this fatigue helps lock in existing racially discrimination dynamics and becomes a new driving forces behind minorities' social and economic marginality. If the passivity associated with racial fatigue becomes widespread, it will become a *new* reason for affirmative action programs, separate and apart from attempts to eliminate the effects of past discrimination. Last, some of the studies discussed above indicate that whites are in fact mistaken if they believe passivity will prevent them from engaging in morally troubling behavior.[143] Taken together, these materials should raise concerns for racially fatigued students. They suggest that, even in a single race environment, racially fatigued students should not believe that they are insulated from thinking about racism. For they are even more likely to be exposed to the discriminatory comments of others and instead must be vigilant to ensure that they do not succumb to the racially desensitizing effects of a single race environment. Indeed, after being exposed to these materials, it will be more difficult for a racially fatigued person to maintain his view that he can maintain his identity as a racially progressive person by simply by avoiding conversations about race and diversity and mixed race environments where his actions may be challenged. All of these issues provide a ripe basis for class discussion.

IV SECONDARY BENEFITS: DISCUSSION STRATEGIES EFFECTS ON STUDENTS WHO ARE NOT MEMBERS OF THE DECLINE TO STATE COMMUNITY.

Part III of the Essay focused on discussion strategies for encouraging decline to state students to re-engage in classroom discussions about racial diversity and affirmative action. Part IV shows that these discussion strategies also have secondary benefits that extend to persons who are not "decline to state" students.

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[142] Bonilla-Silva et al., *White Habitus*, *supra* note 141, at 238–41; BONILLA-SILVA, RACISM WITHOUT RACISTS, *supra* note 31, at 111–14.

[143] *See supra* Part III.D.

A. DECLINE TO STATE STUDENTS AND THE LARGER STUDENT BODY

All students suffer when decline to state students withdraw from classroom conversations about diversity. Supporters of diversity initiatives find themselves in abstract discussions about diversity's value, without being challenged to create truly effective programs that properly instrumentalize affirmative action programs' goals: including, broadening the scope of academic debate and ensuring the inclusion of members of marginalized groups. Relatedly, students supportive of affirmative action fail to acquire the language and analytical tools necessary to participate in conversations that require them to explore their commitment to diversity in a more concrete fashion. They fail to explore basic, classic fairness questions central to the affirmative action debate. For example, while they count themselves as affirmative action supporters, many students cannot explain why a school's diversity goals take priority over the expectation-based desert claims of persons who have achieved the highest scores on assessment exams the school *itself* has identified as one of the primary means for measuring intellectual potential.

"Decline to state" students' also suffer by withdrawing from diversity conversations, as their ability to weigh the costs and benefits of diversity programming is compromised when they do not engage with parties who strongly support these programs. For example, too many AACs deride affirmative action programs because they allow admissions officials to deviate from the rank order of student quality suggested by standardized testing. However, these student critics cannot provide any principled explanation for why we should continue to place such stock in standardized test scores given their poor predictive power for forecasting lawyers' professional success and their disparate impact on historically underrepresented minorities.[144] Additionally, post race students rail against affirmative action because of the dignity-based harm it inflicts on those who feel compelled to identify by race, but they have not been asked whether this personal dignitary injury is sufficiently significant to outweigh the more inclusive distributional outcomes that flow from affirmative action pro-

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[144] Numerous scholars have challenged the view that students with high LSAT scores go on to become the most successful, skillful lawyers. Linda M. Perkins, *Meritocracy, Equal Opportunity, and the SAT*, 41 HIST. OF EDUC. Q. 89–95 (2001) (arguing that merit standards disproportionately exclude minorities); *see also* Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 10 LA RAZA L.J. 363 (1998) (noting failure to establish clear correlation between strong LSAT performance and professional success); Kidder, *"Elite" College Students, supra* note 68, at 1055–1124 (noting that differences in LSAT performance did not accurately predict minority students' actual performance after admission and graduation). Instead, he explains, admissions officers' decision to focus on the LSAT seemed to emphasize differences between students whom otherwise were distinguished from one another by only relatively small undergraduate GPA differentials.

grams. Numerous other basic fairness questions are available for debate, but they go unexplored while dissenters stand mute and refuse to engage their opponents. Indeed, as long as students on both sides of the affirmative action debate cannot answer the central classic fairness questions that should be debated in these conversations, one wonders whether they really can add anything meaningful to future conversations about affirmative action or diversity more generally.

B. Reservations: Respecting Decline to State Students' Choices

Some may have reservations about attempts to get "decline to state" students to reconsider their positions, worrying that the effort to increase discussions about diversity is actually a cover for educators' desire to institute a certain orthodoxy about diversity issues. On the one hand, this concern about orthodoxy seems a bit late, as most of the scholars writing in this area are clearly in favor of diversity initiatives.[145] Moreover, the critique misses its mark when applied to this discussion, as this Essay is intended to *raise* questions about the costs associated with students' perception that there is an orthodoxy that requires them to endorse diversity programs without critical reflection. I believe we should encourage our "decline to state" students to speak not because we expect a dramatic change in their views, but rather, because their silence covers a more deeply troubling dynamic under which students that are hostile to diversity initiatives sit in unreflective silence, failing to critically examine their own perspectives. My view is that many students feel there is no real space in classroom discussions for airing concerns about diversity initiatives and, as a consequence, many who would benefit from further discussion about diversity remain silent throughout law school, and enter the legal profession with conflicted, underdeveloped and illogical views about diversity programs.

In short, my goal is to create a context in which both socially progressive and socially conservative students are motivated to participate in rigorous conversations about diversity. I suspect that if all students are encouraged to participate in these kinds of conversations early in their professional careers, they are more likely to dialogue in good faith, and will find it harder to take extreme or rigid positions. Also, I believe that the "decline to state" framework may uniquely resonate with students, in particular social conservatives, because it emphasizes personal responsibility. For conservatives, the framework suggests that their rejection of institutional interventions like affirmative action does not absolve them of the

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[145] *See supra* notes 48–100.

larger social obligation to take an interest in diversity efforts. Instead, because they reject structural interventions, they have *greater personal responsibility* to *name and challenge* discriminatory social dynamics in their own lives. Simply put, by opting out of organized diversity initiatives, AACs, post-race students, multiracials and the racially fatigued, bear an additional burden to critically assess the social dynamics of the workplace and their own lives to ensure they are not contributing to the problem of race-based marginalization.[146] More vigilance is necessary, even if it is only to ensure the accuracy of the claim that structural interventions like affirmative action are no longer required. Social progressives, also, have a responsibility if they support affirmative action to ensure that they develop informed, intellectually defensible views about these initiatives and other diversity programs. The responsibility to participate in diversity debates does not end merely because they support current institutional measures. Rather, they also have an obligation to think beyond the rough versions of diversity initiatives currently in existence to imagine new initiatives, and imagine how society would need to change in order to make structural interventions like affirmative action less necessary.

CONCLUSION

This Essay ends with the question that began our discussion: how do we engage with the student who "decline[s] to state" race? At present, legal scholars have tended to focused on only select groups of students that opt out of diversity initiatives; as a result, they have missed the opportunity to explore the full range of issues that cause students to feel alienated from conversations about diversity. In my view, however, we have an obligation to explore the special challenges created by these different groups of decline to state students in more detail. For we have an affirmative obligation to help both supporters and critics of affirmative action work through their intuitions about diversity initiatives, and assist them in developing nuanced, logical positions on these issues. More specifically, we have an obligation to help students develop the lexicon and analytic skills necessary to critically evaluate diversity initiatives in the law schools in which they are enrolled, as well as in the institutions and businesses they will join in the fu-

[146] Many scholars agree that whites' tendency to unthinkingly self segregate is perhaps the largest barrier to achieving racial equality, as this segregating pattern makes whites more insular in their thinking about race issues, unaware of the challenges posed by discrimination, and locks people of color out of opportunities exchanged in single race networks. *See* Bonilla-Silva et al., *White Habitus*, *supra* note 141, at 230–51(2006) (noting that many whites appear to be unaware of their self segregating behavior and explain their lack of interaction with blacks as stemming from "lack of opportunities").

ture.[147] Importantly, however, if legal educators do not take on the challenge of providing students with these essential skills, we should be little surprised when law firms' and other institutions' diversity programs stall and fail. For young lawyers are far less inclined to explore prickly diversity issues once they enter the practice of law, and have little time to reflect on the consequences of their decisions.

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[147] Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity & Rule of Law*, 73 FORDHAM L. REV. 2081, 2082 (2005) (explaining that "competence in dealing with racial matters" and the ability to speak "openly, frankly and professionally about [race] relations" are both critical skills that law students should gain while in law school).