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# Affirmative Action for Whom?

Paul Brest\* & Miranda Oshige\*\*

*Affirmative action was initially conceived as a remedy to benefit African Americans. Although many affirmative action programs include the members of other racial and ethnic groups, little attention has been paid to the criteria for inclusion. In this article, Paul Brest and Miranda Oshige propose a framework for analyzing which groups to include in a law school's affirmative action program for student admissions and faculty hiring, and consider the inclusion of African Americans, Native Americans, Latinos, Asian Americans, and persons of low socioeconomic status in terms of that framework. The authors conclude that the reasons for including African Americans do not necessarily apply to the members of these other groups. There is no single answer, they argue, to the question, "Affirmative action for whom?" and institutions may come to different conclusions based on the rationales and empirical assumptions underlying their programs.*

Like many other law schools, Stanford seeks a student body that is both highly qualified and diverse in terms of culture, class, background, work and life experience, skills, and interests. In addition to using these amorphous criteria of diversity, the school has an affirmative action program that seeks to include the members of specified minority groups: African Americans, Native Americans, Mexican Americans, and Puerto Ricans. In either case, applicants who add to the school's diversity may be preferred to others with the same test scores and even to those with somewhat higher test scores.<sup>1</sup>

Asian Americans are not included in the Law School's affirmative action program. They account for about 9 percent of the student body, and the number seems on the increase. Recently, the Stanford Asian and Pacific Islander Law Students Association (APILSA) questioned the appropriateness of treating its member groups in aggregate and of including none in the affirmative action program. APILSA wrote:

Asians and Pacific Islanders are a heterogeneous group with diverse experiences. . . . [T]he Law School's admissions policies must be changed to recog-

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1. Some preference is also given to so-called "legacies"—applicants whose relatives have attended the school.

nize the unique experiences of the many ethnic groups that comprise the Asian and Pacific Islander communities . . . . The Law School should consider some Asian and Pacific Islander ethnicities as a positive factor in admissions decisions. The underrepresented groups include Pacific Islanders, Filipinos, and Southeast Asians.<sup>2</sup>

Any diversity or affirmative action policy is likely to reflect the local history of a particular institution and is bound to be somewhat arbitrary with respect to the groups it includes. Nonetheless, APILSA's call for a broader, more inclusive policy provides an occasion to try to formulate some principles for determining what groups should be included in affirmative action programs.

At the outset, we should clarify what we mean by "affirmative action," and what we believe to be the plausible rationales for affirmative action programs. An affirmative action program seeks to remedy the significant underrepresentation of members of certain racial, ethnic, or other groups through measures that take group membership or identity into account.<sup>3</sup> Such measures range from actively searching for and recruiting members of particular groups to counting group identity as a "plus" in the admissions or hiring process. Nothing in the nature of an affirmative action program requires quotas or proportional representation,<sup>4</sup> or the admission or hiring of other than qualified and competent persons. Because the facts relevant to assessing an affirmative action program are quite context-specific, we focus on legal education, considering the admission of students and, to a lesser extent, the appointment of faculty.

There are two broad sets of rationales for an affirmative action program for law school admissions or hiring. First, a racially and ethnically diverse student body and faculty can serve an institution's missions of teaching and scholarship. Second, the visible presence and success of minority professionals can help secure compensatory or distributive justice for other members of their racial and ethnic groups. Under either rationale, the goal of an affirmative program is not to benefit the particular candidate admitted under the program. Rather, that candidate's presence within the school or, subsequently, within the broader professional community is intended to benefit others. The educational rationale focuses on the benefits that the faculty member's or student's presence will bring to the school as a whole. The justice-related rationale depends

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2. Memorandum from the Stanford Asian and Pacific Islander Law Students Association to the Faculty of Stanford Law School (Jan. 29, 1993) (on file with the *Stanford Law Review*).

3. Without implying anything about the inclusion of other groups, we focus on racial and ethnic groups, which lie at the heart of most current affirmative action programs. Other groups that are or have been the beneficiaries of affirmative action in hiring or admissions include women, the disabled, and gay men and lesbians. See *Diversity or Quotas? Northeastern U. Will Accord Gays and Lesbians Preferential Treatment in Hiring*, CHRON. HIGHER EDUC., June 8, 1994, at A-13.

4. While the significant underrepresentation of a group may signal the need for affirmative action to further the goals discussed below, we are not aware of any plausible political or social theory that makes the proportional representation of groups an ultimate objective. Although this article does not focus on the question of "how many," relevant factors include the pool of qualified candidates available to a school and the desirability of the school's having what some have termed a "critical mass" of students from a particular group—enough to provoke insights about the group and to provide moral support in difficult times.

what we call the “multiplier effect”—the external benefits that the preferred candidate transmits to other members of his or her racial or ethnic group.

Throughout the article, we make the following assumptions about the law school admissions process. First, applicants’ undergraduate grade point averages and LSAT scores are reasonably good predictors of academic success for minority and nonminority students alike.<sup>5</sup> Second, students admitted under an affirmative action program are qualified to attend the institution inasmuch as they perform (at least) adequately—that is, receive passing grades and graduate—under the institution’s generally applicable standards. Third, but for affirmative action, there would be significantly fewer students from certain minority groups in many of the nation’s law schools and significantly fewer lawyers from those groups in the profession.<sup>6</sup>

With respect to faculty appointments, we assume the following. First, law schools seek faculty members having all or some of the following characteristics, with different institutions assigning different weights to them: excellence in teaching, excellence in scholarship, expertise in particular subjects, skills and knowledge from other disciplines, and practical experience deemed relevant to legal education. Second, affirmative action in effect adds to this list membership in particular racial or ethnic groups. Third, just as different institutions weigh the other factors differently, they may give different weight to the presence of minority faculty; but no plausible affirmative action strategy would encompass hiring a faculty member not qualified for his or her academic responsibilities.

Although this article does not focus on legal issues, we should say a few words about the rather precarious state of the law of affirmative action. The constitutional and statutory permissibility of using race as an admissions criterion continues to be determined by *Regents of the University of California v. Bakke*<sup>7</sup>—particularly Justice Powell’s opinion.<sup>8</sup> In brief, an institution may treat an applicant’s minority status as a “plus” in the admissions process. It may do this only for the purpose of increasing the diversity of its student body for educational reasons, and not to increase the number of minority graduates in society as a whole or to redress past societal discrimination.<sup>9</sup> The circum-

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5. LINDA F. WIGHTMAN & DAVID G. MULLER, AN ANALYSIS OF DIFFERENTIAL VALIDITY AND DIFFERENTIAL PREDICTION FOR BLACK, MEXICAN-AMERICAN, HISPANIC, AND WHITE LAW STUDENTS (Law School Admission Council Research Report No. 90-03, 1990). We are not aware of any study that seeks to correlate any admissions criteria with professional success.

6. These assumptions are based largely on intuition and casual empiricism. As Professor Farber observes, most law schools do not publicize the relevant data. Daniel Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 913-14 (1994).

7. 438 U.S. 265 (1978).

8. Although no other justice joined Justice Powell’s opinion, it has been treated as the opinion of the Court. See Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 23 (1979) (arguing that since any special admissions program that satisfies Justice Powell’s standard would be approved by a majority of the *Bakke* Court, Justice Powell’s opinion is tantamount to the Court’s).

9. *Bakke*, 438 U.S. at 310 (opinion of Powell, J.). However, a particular institution found to have engaged in discrimination may be permitted or required to redress its own past wrongdoing. *Id.* at 307; see also Hopwood v. University of Tex., 861 F. Supp. 551, 572-73 (W.D. Tex. 1994) (finding a documented history of discrimination against Mexican Americans and African Americans at the University

stances under which race may be taken into account in faculty hiring are no broader.<sup>10</sup>

Notwithstanding the Court's narrow view, we consider affirmative action as a means to social justice as well as for its educational benefits. The educational benefits of a diverse student body cannot be entirely separated from broader issues of justice: For example, a school may believe that it is educationally desirable to assure the presence of groups that have claims to corrective justice. Granting that the nation's current political trends seem unsympathetic to affirmative action,<sup>11</sup> a discussion of a subject of such broad importance ought not be limited to the particular rationales favored at any one time by a particular alliance of justices.

The reader may find it helpful at the outset to know the authors' general views on affirmative action based on race or ethnicity. We firmly believe that the racial and ethnic diversity of a faculty and student body contributes to a law school's educational mission. With respect to justice-related rationales for affirmative action, we are unsure about the extent to which affirmative action actually improves the status of members of preferred groups beyond the particular individuals graduated from law school—especially in comparison to programs that directly benefit the most disadvantaged members of those groups.

More broadly, we find the allocation of benefits based on group membership troubling enough to consider affirmative action an extraordinary remedy that is not to be used lightly. To put the downsides most starkly: Remedies based on race or ethnicity are in tension with the liberal ideals of our society, they may encourage divisive identity politics, and they may stigmatize and foster antagonism toward members of the groups they are intended to benefit. To put the alternative most starkly: Absent a radical redesign of admissions criteria,<sup>12</sup> an end to affirmative action would leave many of the nation's law schools—especially the most selective ones—with a largely white and (increasingly) East Asian<sup>13</sup> student body, and with few African American, Latino, and Native American students. Both for educational and for broader social reasons, such a result strikes us as highly undesirable—catastrophic would not be too strong a word. We write at a time when opposition to affirmative action is strong, even coming from individuals and organizations with abiding com-

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of Texas and holding that remedial race-based classifications could be justified to undo past effects of discrimination).

10. Indeed, in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275-76 (1986), the Court rejected the putative benefits of minority teachers as "role models" for their students.

11. See Farber, *supra* note 6, at 896-99 (detailing unfavorable public opinion toward affirmative action); see also Philip J. Trounstine, *Minority Preference in Trouble*, SAN JOSE MERCURY NEWS, March 7, 1995, at 1A (reporting on a survey in which 60% of Californians favored a ballot initiative to end affirmative action preferences by the state government).

12. We consider the alternative of preferences based on socioeconomic background in Part III.E *infra*.

13. That is, students of Chinese, Japanese, or Korean ancestry.

mitments to racial justice.<sup>14</sup> Nonetheless, affirmative action in higher education is not about to disappear overnight,<sup>15</sup> nor do we believe it should.

Among the possible rationales for affirmative action, we are more persuaded by those concerning its instrumental, future-oriented benefits—the educational value of a diverse faculty and student body and the external benefits that flow from the professional success of an individual to other members of her group—than we are by the correction of past injustices.<sup>16</sup> At the same time, we acknowledge and to some extent share the view that a history of discrimination against a group creates a special claim. Our goal is to engage readers who assign different weights to the underlying rationales for affirmative action and their empirical premises.

Because affirmative action programs are group-oriented, Part I considers the relevance of group membership in American political thought. Part II builds on this discussion to set out the plausible rationales for affirmative action programs. Our aim is not to engage in a fundamental philosophical or legal defense or critique of affirmative action, but rather to identify criteria for determining which groups should be included in law school admissions or hiring programs. Part III applies those criteria to racial and ethnic groups that are candidates for affirmative action. There, we also briefly discuss class as a possible basis for affirmative action.

## I. INDIVIDUALS, GROUPS, AND RIGHTS

While the immediate beneficiary of an affirmative action program is an individual, his or her eligibility generally depends on group “identity” or “membership.” But what do these terms mean, and what makes group identity or membership arguably relevant to employment at, or admission to, an institution of higher education? How can a group-based policy be reconciled with the strong tradition of liberal individualism in American political thought? We begin by describing the relevance of group identity as a sociological phenomenon and then turn to normative questions concerning affirmative action.

### A. *The Sociological Group*

To say that people are “members” of groups sometimes means no more than that they possess certain characteristics, such as brown eyes or type A-

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14. See PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 109 (1993) (“The new race-consciousness has provoked broad outrage and resentment [among whites].”); Farber, *supra* note 6, at 907-09 (pointing to critical race scholars such as Derrick Bell and Richard Delgado who doubt the effectiveness of affirmative action); Mary Ellen Tracy, *The New Face of California*, STAR TRIB. (Minneapolis), Sept. 7, 1994, at 16A (discussing the attempts by some Asian American groups to refocus affirmative action policies on class rather than race and ethnicity).

15. See Farber *supra* note 6, at 915-18. *But see* Proposed Cal. Const. Amend. 10 (introduced Feb. 17, 1995) (forbidding racial preferences by any state entity, except where mandated by federal law, including state institutions of higher education); *Black Regent Planning Proposal to End Affirmative Action at UC*, SAN JOSE MERCURY NEWS, Jan. 13, 1995, at B3 (reporting that Ward Connerly, a University of California Regent who is African American, has argued that affirmative action has “reached a point of diminishing returns” and has called for an end to preferences in hiring, promotions, and admissions decisions at the University of California); Trounstein, *supra* note 11.

16. See text accompanying notes 21-67 *infra*.

positive blood. Although the members of a group defined by possession of the latter trait do in fact share an important characteristic—the ability to receive blood from one another—that characteristic is not particularly salient most of the time either for those who possess it or for those who do not.

Racial and ethnic groups, in contrast, are socially constructed. Even though some physiognomic and other genetic group differences may exist, they are largely inconsequential for everyday life and public policy.<sup>17</sup> Their importance lies, rather, in the salience we choose to attribute to them. That being said, societies often do treat race and ethnicity as important. “To declare that race is a trope,” writes Henry Louis Gates,

is to deny its palpable force in the life of every African American who tries to function every day in a still very racist America. In the face of Anthony Appiah’s and my own critique of what we might think of as “black essentialism,” Houston Baker demands that we remember what we might characterize as the “taxi fallacy.”

Houston, Anthony, and I emerge from the splendid isolation of the Schomberg Library and stand together on the corner of 135th Street and Malcolm X Boulevard attempting to hail a taxi to return to the Yale Club. With the taxis shooting by us as if we did not exist, Anthony and I cry out in perplexity, “But sir, it’s only a trope.”<sup>18</sup>

Membership in ethnic and racial groups is often salient in day to day life for members and nonmembers alike. For better or worse, people often feel affiliations with, differences from, and sometimes repugnance toward others based on their race or ethnicity. For better or worse, racial or ethnic identity tends to affect our self-esteem, the regard that we have for others and others for us, and our overall well-being. We experience pleasure or dismay when others with whom we identify or are identified with do something significantly praiseworthy or blameworthy. On the one hand lies pride for the achievements of members of one’s group and a desire that others be aware of those achievements; on the other lies the shame caused by the disgraceful behavior of a group member and perhaps the fear that it will reinforce negative stereotypes about the group as a whole and about us in particular.

People’s group identities—whether voluntarily assumed or imposed by others—may create more tangible harms and benefits as well. For example, employers’ negative stereotypes of members of a group may result in their disproportionate unemployment or underemployment. Group affiliations also may create networks of support. An individual who identifies strongly with a group tends to give to charities benefiting that group. Moreover, the fact that members of some racial and ethnic groups tend to live in the same neighborhoods, attend the same schools and churches, and patronize the same businesses may give rise to intragroup economic interdependence.

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17. See LUIGI L. CAVALLI-SPORZA & PAOLO M.A. PIAZZA, *THE HISTORY AND GEOGRAPHY OF HUMAN GENES* (1994); David Wheeler, *A Growing Number of Students Reject the Concept of Race*, *CHRON. HIGHER EDUC.*, Feb. 17, 1995, at A9.

18. HENRY LOUIS GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* 147 (1992).

In these ways, the welfare of an individual member of a group can affect the well-being of other members. A member of a group that is negatively stereotyped or economically disadvantaged may suffer from harms done to others in the group. Indeed, the subordinate status of one generation may be reproduced in the next.

### B. *The Normative Relevance of Group Affiliation*

Some political theories treat groups as moral entities that hold rights *as groups*—rights that are different from and even greater than those of their individual members. Nationalism implicitly treats citizens this way, as do the constitutive theories of some religious and cultural groups. By contrast, liberal political theory treats *individuals* as the bearers of rights: Groups have no intrinsic entitlements; the rights of, say, an ethnic or national group are no greater than the aggregate rights of its members.

While recognizing the dangers of trying to reduce the political thought of those who live in a country as diverse as the United States to a unitary theory, we believe that the dominant American constitutional tradition is one of liberal individualism—where “constitutional” refers to political discourse in legislative chambers as well as to explicit interpretations of the Constitution of 1787 and its amendments. For example, our constitutional tradition protects the rights of individuals to worship, associate, and identify with others as they please and, indeed, to change their affiliations as they please.<sup>19</sup> The essential wrong that the Fourteenth Amendment and most antidiscrimination laws seek to prevent is the unequal treatment of individuals based on group membership. Indeed, it is precisely this tradition of liberal individualism that renders affirmative action and other group-based policies constitutionally problematic.<sup>20</sup>

Constitutionally problematic is not the same as unconstitutional, however. In Part II, we outline several rationales for affirmative action that are not inconsistent with the premises of liberalism. These rationales are premised on what we call a *sociologically informed liberal theory*. This theory treats individuals rather than groups as rights holders, yet also acknowledges the ways in which our individual welfare is inextricably linked to the welfare of others with whom we identify and are identified. It recognizes that our membership in groups deeply affects our lives and may indeed affect our ability to exercise the rights we hold as individuals.

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19. See, e.g., *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that compelling public school children to salute the flag violates the 1st Amendment).

20. See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816, 2825 (1993) (finding that a redistricting plan that was “unexplainable on grounds other than race” violated the Equal Protection Clause); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 (1989) (finding no compelling state interest in awarding city construction contracts on the basis of race, since there was no proof of prior discrimination by the City itself in awarding such contracts); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (holding that group classifications based on race or ethnicity are inherently suspect); *Hopwood v. University of Tex.*, 861 F. Supp. 551, 569 (W.D. Tex. 1994) (applying strict scrutiny to race-based admissions criteria to “provide assurance that individual rights are afforded the full protection they merit under the Constitution”).



## II. THE RATIONALES FOR AFFIRMATIVE ACTION

The rationales for affirmative action fall into two broad categories: first, the contributions a diverse student body and faculty make to an institution's educational enterprise, and second, corrective and distributive justice in the broader society.

### A. *The Contributions of Diversity to the Educational Mission*

A law school may believe the presence of students and faculty from diverse backgrounds furthers its own missions of preparing students for the profession and producing and disseminating knowledge.

The importance of a diverse student body and faculty does not depend on the false notion that one's race or ethnicity defines a particular way of thinking about issues of law and policy. It does assume the reality—no less a reality because it is socially constructed—that people of different races and ethnicities often have different life experiences that affect their relations with members of other groups and influence their views on issues of legal doctrine and policy. For example, African Americans regularly encounter discrimination not experienced by whites and often scarcely believable to them.<sup>21</sup> Policies that seem "neutral" to a dominant group may have quite different meaning for the members of other racial or ethnic groups.<sup>22</sup> This has important implications both for the interpersonal and intellectual lives of students and faculty.

On the interpersonal side, the opportunity to encounter people from different backgrounds and cultures allows students to explore the nature of those differences and to learn to communicate across the boundaries they create.<sup>23</sup> In this respect, the educational rationale bears some similarity to a core reason for requiring high school or college students to learn a foreign language—to learn about a culture different from one's own. Something is gained by learning about *any* different culture: for example, understanding that people with different backgrounds can have a different sense of family and other interpersonal relations, and different views of the boundaries between the public and private spheres—and also understanding the considerable commonalities that exist among diverse groups. Even more is gained by learning about particular cul-

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21. We were struck by how eye-opening it was for a group of white students to view a *Prime Time Live* segment that showed the discrimination faced by a well-dressed African American in dealing with a landlord and several retail merchants. *Prime Time Live: True Colors* (ABC television broadcast, Nov. 26, 1992). See generally ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993) (describing the pervasive discrimination encountered by middle-class African Americans); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

22. For critiques of the putative neutrality of practices with a disproportionate impact on members of racial minorities and women, see DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Neil Gotanda, *A Critique of 'Our Constitution is Color-Blind.'* 44 STAN. L. REV. 1 (1991); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

23. Cf. MICHAEL J. PIORE, *BEYOND INDIVIDUALISM* 131-32 (1995) (discussing the difficulties of communication among America's new identity groups); David Dominguez, *Beyond Zero-Sum Games: Multiculturalism as Enriched Law Training for All Students*, 44 J. LEGAL EDUC. 175 (1994).

tures likely to be encountered in one's personal and professional life.<sup>24</sup> The university environment offers special opportunities to explore the nature, boundaries, and permeability of different cultures.<sup>25</sup>

Such understandings are especially important for lawyers, who will wield enormous power and play leadership roles in political, civic, and private organizations. No less than anyone else, law students hold stereotypes, preconceptions, and prejudices based on group membership, and some minority students feel alienated from "white" society and institutions, including law schools. We believe that encounters among students from different backgrounds—especially within an academic institution that seeks to encourage intergroup relations and discourse—tend to reduce prejudice and alienation. But one need not share this optimistic view to believe in the importance of understanding differences and similarities through firsthand experience.<sup>26</sup>

The intellectual case for diversity begins with the observation that virtually every important issue of policy ultimately finds expression in law and the legal system. The dynamics and outcomes of the legal process reflect the interplay—often, the struggle—among diverse interests and cultures. The interaction of these interests and cultural perspectives within the walls of a law school contributes to an understanding of the legal system. Ultimately, what matters to an institution's intellectual mission is not group membership or background as such, but a multiplicity of intellectual perspectives. But it is a fact that people's backgrounds affect the way they perceive and evaluate the world.

These observations apply not only to students, but to the faculty in their mission of producing and disseminating knowledge. Skepticism about the relevance of diverse life experiences to a university's mission sometimes manifests itself in the observation that a work of scholarship must stand or fall on its own merits, without regard to the scholar's group affiliation. While we have no doubt that this observation is true,<sup>27</sup> it fails to negate the equally obvious point that different life experiences affect scholars' agendas, viewpoints, and approaches to their subjects in ways that enhance knowledge.<sup>28</sup> Especially in law, where regulations and judicial decisions affect different groups differently,

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24. Cf. Bill Ong Hing, *Raising Personal Identity Issues of Class, Ethnicity, Gender, Sexual Orientation, Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993).

25. Cf. PIORE, *supra* note 23, at 146-55; RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (2d ed. 1993).

26. Of course, race and ethnicity are by no means the only aspects of difference that law students should encounter. However, the luck of the draw, supplemented by a general policy of seeking students with different backgrounds and life experiences, will achieve diversity in almost every important respect *except* race and ethnicity.

27. Not everyone would agree with our position. Indeed, the discovery of an author's concealed identity or deeds may occasion controversy and a reevaluation of his work. Consider, for example, the minor flap caused by the revelation that Danny Santiago, the author of *Famous All Over Town*, was Anglo. See David Streitfeld, *Book Report*, WASH. POST, Sept. 24, 1989, at E15. Compare the flap resulting from the claim that *The Education of Little Tree*, a charming story by Forrest Carter about growing up as a Cherokee, was in fact written by a white racist, see Steve Brewer, *A Novel Experience: 'Little Tree' Scandal Raised Profile of University Publisher*, DALLAS MORNING NEWS, Dec. 7, 1992, at 21B, and consider also the reevaluation of the work of Paul DeMan and Martin Heidegger occasioned by revelations about their collaboration with the Nazis.

28. For an interesting discussion of this phenomenon in the biological sciences, see SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES* (1991).

it would be amazing if a scholar's experiences did *not* affect her outlook and interests, and hence her work.<sup>29</sup> The presence of women and minority scholars has in fact changed the intellectual landscape of some areas of law,<sup>30</sup> and their influence has permeated fields that many would not have imagined had much connection with gender or race.<sup>31</sup> In any subject where a faculty member's experience brings different perspectives to her scholarship, it will likely enhance her teaching in similar ways.<sup>32</sup>

Faculty also serve important social roles within the school and university. It is largely the faculty who set an institution's tone and agenda. The presence

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29. For example, with respect to the very subject of affirmative action, Richard Delgado has argued that white constitutional scholars (including Paul Brest) prefer utility-based rationales for affirmative action because they avoid the unpleasantness of coming to terms with oppression, guilt, and reparations. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 569-71 (1984).

It is not a coincidence that the most influential foundational works of feminism and feminist legal theory were written by women. See, e.g., SIMONE DE BEAUVOIR, *THE SECOND SEX* (1953); MACKINNON, *supra* note 22; MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990); DEBORAH L. RHODE, *JUSTICE AND GENDER* (1989); ROBIN WEST, *NARRATIVE, AUTHORITY AND LAW* (1993); MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMEN* (Philadelphia, M. Carey 1794). Granting that one of the first major attacks on the liberal tradition of civil rights scholarship was written by a white scholar, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (emphasizing that racial discrimination is often legitimized through legal doctrine resting on the liberal tradition), and that at least one other white scholar has done important work in the genre, Gary Peller, *Frontier of Legal Thought III: Race Consciousness*, 1990 DUKE L.J. 758 (exploring the ideological roots of the race-consciousness rejection of conventional civil rights), the bulk of this work, some of which draws heavily on personal narrative, has been done by scholars of color. The importance of an author's race to scholarship in this area has been the subject of heated debate. E.g., Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (arguing that some critical race scholars fail to support their claims that scholars of color produce a racially distinctive brand of scholarship, and challenging the arguments that white academics are entitled to less "standing" in race-relations discourses and that minority status should serve as a positive credential for evaluating academic work); Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1864-70 (1990) (arguing that Kennedy's denouncement of a minority voice is based upon a "narrow[ ] insistence on an empirically provable, neatly categorized definition of a minority perspective"); Scott Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990) (responding to Kennedy); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991) (arguing that Kennedy implicitly incorporates majoritarian standards in his argument); cf. Hing, *supra* note 24.

30. Perhaps the most dramatic change has occurred in the area of sexual harassment and abuse. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (discussing the legal and social issues raised by sexual harassment in the workplace); see also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987) (discussing men's domination of women); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (focusing on domestic violence in a discussion of the interrelationship of women's lives and culture with the law).

31. See generally Leslie Bender, *Frontier of Legal Thought III: Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (reconstructing torts using a feminist legal method and with feminist goals and values); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (arguing that a preoccupation with questions of power and knowledge has contributed to contract doctrine's inconsistency and indeterminacy); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

32. See, e.g., Susan Bisom-Rapp, *Contextualizing the Debate: How Feminist and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law*, 44 J. LEGAL EDUC. 366 (1994).

of minority faculty—regardless of their areas of teaching and scholarship and, indeed, regardless of their particular beliefs—tends to make minority students feel that they are welcomed at the institution. Faculty who belong to these groups also often provide important counsel, support, and comfort for minority students—especially, but not only, when events occur that seem to threaten their sense of acceptance at the institution.<sup>33</sup> Also, although, by the very choice to attend law school, a law student has already made a significant career decision, the presence of minority faculty members lends reality to the possibility of academic careers for minority students. Finally, as important as the support that minority faculty provide for members of their own groups is the effect of their teaching, mentoring, and academic leadership on white students, many of whom have not regularly encountered members of minority groups in positions of authority.

## B. Justice

### 1. Corrective justice.

Corrective justice seeks to compensate individuals for wrongful injuries. It aims to make victims whole, to place them in the position they would have occupied absent the injustice. Many commentators believe that corrective justice provides the most persuasive moral justification for affirmative action. For example, Gertrude Ezorsky asserts that the history of government involvement in discrimination against African Americans “suffices to demonstrate the moral legitimacy of legally required compensation” to them.<sup>34</sup> Richard Delgado favors “a reparations argument [that] emphasizes that white society has mistreated Blacks, Native Americans, and Hispanics and now must make amends for that mistreatment.”<sup>35</sup>

The paradigm of corrective justice involves an identifiable tortfeasor compensating an identifiable victim for injuries that a court can clearly attribute to that tortfeasor’s illegal behavior. This model sometimes has been relaxed in fashioning remedies in class action cases.<sup>36</sup> The model also was relaxed in the two major reparations programs arising out of World War II: German reparations to Jews and American reparations to Japanese Americans.<sup>37</sup>

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33. This is not to suggest that faculty should, or in fact do, limit their counseling and support to students whose group affiliation is the same as their own. The fact that they do not increases the perception and truth of their full membership in the academic community.

34. GERTRUDE EZORSKY, *RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION* 75 (1991). Ezorsky nonetheless is concerned with the asymmetry of burdening an individual who is not necessarily responsible for, or who may not have benefited from, discrimination, and argues that compensation should be paid to dispreferred candidates, funded by a progressive tax. *Id.* at 84-88.

35. Delgado, *supra* note 29, at 569.

36. See *State v. Levi Strauss & Co.*, 41 Cal. 3d 460, 224 Cal. Rptr. 605 (1986); *Daar v. Yellow Cab Co.*, 433 P.2d 732, 63 Cal. Rptr. 724 (1967); Anna L. Durand, Note, *An Economic Analysis of Fluid Recovery Mechanisms*, 34 STAN. L. REV. 173 (1981).

37. LESLIE T. HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1988* (1993); RONALD W. ZWEIG, *GERMAN REPARATIONS AND THE JEWISH WORLD* 1-13 (1987); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 655-57 (1993) (discussing an educational fund established as reparations and available to Japanese Americans who were interned or their close relatives).

Affirmative action seeks to correct the injuries inflicted on a group by racial discrimination.<sup>38</sup> As such, it is analogous to the World War II reparations programs, though with some significant differences. Those programs were essentially bilateral and benefited the immediate victims of wrongdoing or their heirs.<sup>39</sup> The government assumed the wrongdoer's burden, which it distributed broadly across the society through taxation.

By contrast, affirmative action programs are trilateral, and the lines of causation and responsibility are more diffuse. The institution that adopts the program is not usually a proven or acknowledged wrongdoer, and in any event not a wrongdoer with respect to the individual beneficiaries of its affirmative action program. To benefit from the preference, a candidate need not show any individual injury, but only that she is a member of a racial or ethnic group that has suffered historic societal discrimination. The main burden of compensation is neither borne by the institution adopting the program nor distributed over the society at large. Rather, it is borne by dispreferred candidates—those who, but for the affirmative action policy, would have gotten the position.<sup>40</sup>

This asymmetry among the wrongdoer, those who are compensated, and those who pay the price of compensation explains much of the controversy surrounding affirmative action as a corrective remedy. The asymmetry may be reduced to the extent that, through "multiplier effect," the advantages given a particular applicant redound to the benefit of other members of her group who have suffered from discrimination. The asymmetry may also be reduced to the extent that a dispreferred white applicant has benefited from discrimination in other situations. But even if whites in aggregate have benefited, it would require a heroic cascade of assumptions to justify imposing the burden of reparations on the relatively narrow class of white candidates for a particular position.<sup>41</sup> As Kathleen Sullivan has written,

[V]iewing affirmative action as penance for past discrimination invites claims that the focus on that discrimination should be sharper. . . . [B]ecause corrective justice focuses on victims and retributive justice on wrongdoers, predicat-

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38. It might be argued that reparations are also due groups whose members suffered other wrongs at the hands of the United States government: the descendants of the inhabitants of lands seized or colonized by the United States and immigrants whose lives were affected by the war in Vietnam. We nonetheless limit the corrective justice rationale to domestic discrimination. This has been the implicit rationale for most affirmative action programs. Moreover, the already substantial difficulty of assessing the responsibility of discrimination for a group's current status pales beside the disputed premises and complexities of an inquiry into the effects of colonialism, foreign wars, and the like.

39. For example, West Germany paid Israel for reparations to Jews who suffered under the Nazi regime. Israel then distributed the payments to claimants and their heirs who had left West Germany before a specified date. NANA SAGI, *GERMAN REPARATIONS: A HISTORY OF THE NEGOTIATIONS 172-74* (1980).

40. There is no avoiding the fact that admissions and employment are zero-sum games: At any given time, the number of positions is limited, and admitting or employing one candidate, for whatever reason, necessarily results in another's not being admitted or employed.

41. The asymmetry would, of course, be reduced under a group-based theory of compensatory justice: All beneficiaries of a group-based affirmative action program would serve as proxies for the injured group; and by assigning responsibilities as well as rights to the members of that group, a group-oriented theory more readily justifies imposing the burdens of affirmative action on individual "dispreferred" members of the (white) perpetrator class than does a liberal individualist theory.

ing affirmative action on the past sins of discrimination invites claims that neither nonvictims should benefit, nor nonsinners pay.<sup>42</sup>

Corrective justice focuses on remedying the present effects of past discrimination. Affirmative action also may prevent current or future discrimination against the members of minority groups by placing minority professionals in visible positions of competence and power.<sup>43</sup> Because the mechanisms for achieving this end are essentially the same as those for achieving distributive justice, we discuss them together below.

### 2. *Distributive justice.*

An affirmative action program may be premised on a distributive rationale: A just society should not allow people to be very poor or powerless. A purely distributive rationale is indifferent to how an individual's subordinate status came about—whether it is the result of happenstance, discrimination, or cultural maladaptation to postindustrial American society. Welfare programs such as Aid to Families with Dependent Children and Medicare are paradigmatic (non-group-based) distributive policies. A hiring or admissions program favoring the disabled is an example of an essentially distributive affirmative action policy.<sup>44</sup>

Distributive policies that seek to improve the present condition of individuals seldom aspire to be thoroughly egalitarian. They only prevent individuals from falling below some threshold, leaving a society with considerable variation in individual welfare. The aggregate welfare of groups will likely vary as well because of discrimination, cultural differences, or randomness. Because a liberal theory of distributive justice is concerned with justice for individuals, the fact that some groups are worse off in the aggregate than others has no intrinsic normative importance. Group inequalities may, however, bear on individual distributive justice to the extent that the success of an individual depends on the success of other members of the groups to which she belongs. This phenomenon is described immediately below.

### 3. *The multiplier effect.*

Both the corrective and distributive rationales for affirmative action depend on what we call the “multiplier effect”—the mechanisms by which an improve-

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42. Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 79, 92 (1986); see also Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1782 (1993) (endorsing Sullivan's analysis of the corrective rationale).

43. Affirmative action may serve as a prophylactic against bias by the very institution that adopts the program. An institution may adhere to practices that have an unintended disparate impact on the members of minority groups—for example, placing undue reliance on “old boy” networks for information about applicants or appointments candidates—that a commitment to affirmative action can counteract.

44. Such a program is not compensatory, inasmuch as the applicant's condition typically is not the result of a wrong done by the institution or by “society” more generally. (This is not to deny that many disabled people are the objects of prejudice and discrimination, or that society's willingness to tolerate the disparate impact of various practices on the disabled may be the result of a morally indefensible insensitivity.)

ment of the status of one member of the group may redound to the benefit of others.

Imagine two people, Hermit and Grouper, both of whom are stuck at the bottom of the socioeconomic ladder. Hermit, who is white, feels no affiliation with others, and his interactions with the rest of society consist of arm's length transactions. Others perceive Hermit as lower class, and therefore attribute various stereotypical characteristics to him, but they do not regard or stereotype him in terms of racial or ethnic characteristics. By contrast, Grouper belongs to an ethnic group a disproportionately high proportion of whose members are lower class. The group has strong internal cultural affiliations and support networks, and it is negatively stereotyped by nonmembers.

Because people like Hermit have no strong connections with each other, either in their own eyes or in the eyes of others, an increase in Hermit's status, power, or wealth will not affect others beyond his role as a player in the market. By contrast, Grouper's rise may benefit members of her group and may reduce outsiders' prejudice against group members. Her material success may enable her to support group-related institutions. Her access to power may enable her to promote or protect the interests of other group members. She may serve as an example or inspiration for young members and thus encourage their pursuit of higher education and professional career paths. While a rise in Hermit's status benefits only himself, a rise in Grouper's status may have a *multiplier effect*, creating external benefits for other, less advantaged members of her group.

*Wealth, power, and connections.* The success of a group member may infuse wealth into a minority community, its organizations, and its businesses. For example, many American social, educational, religious, advocacy, and other nonprofit organizations serve particular racial and ethnic groups, and many of these organizations depend heavily on the contributions of group members. In the for-profit sector, group members' success may enable them to start or invest in small business enterprises that tend disproportionately to employ other group members.<sup>45</sup> Because the members of many ethnic groups tend to live and to shop in neighborhoods composed largely of other group members, the success of one member may contribute to the general economy of the neighborhood.

Successful professionals may use their positions of power outside their own communities to further the aims of other members of their group and protect them against discrimination. For example, a minority member of a political body or corporate board may be especially concerned about the impact of the organization's internal or external policies on communities of color. It is striking how the presence of one or more minority group members among an insti-

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45. Some Vietnamese immigrant communities have hui, or "loan clubs." James Leung, *Asian Loan Clubs May Lose Secrecy*, S.F. CHRON., Dec. 24, 1990, at A7. Nathan Glazer and Daniel Patrick Moynihan have pointed to the importance of small businesses and an active entrepreneurial class as an important means of achieving economic success. See NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* 31-33 (2d ed. 1970).

tution's decisionmakers can affect its awareness of the impact of its decisions. These positions of leadership are often occupied by lawyers;<sup>46</sup> and, of course, the practice of law itself affords many opportunities to protect the group's interests.<sup>47</sup>

The mechanisms described in the preceding paragraphs are premised on phenomena of racial and ethnic affiliation that hold true for some members of some racial and ethnic groups in contemporary American society. To acknowledge these phenomena as a basis for affirmative action is not, however, to treat them as desirable. Our own vision of the ideal society is one in which race and ethnicity have much less salience than they do today, and we recognize that the race consciousness inherent in affirmative action may work against this goal.<sup>48</sup> But we also believe that the positive effect of these mechanisms in improving the status of some intractably disadvantaged racial groups can outweigh the downside.

*Visible examples of success for group members.* The young members of an intractably disadvantaged group often have low career aspirations, born of a sense of hopelessness and the belief that regardless of their efforts, group members simply cannot succeed. The visible success of other members can challenge this impression and encourage group members to strive for success.

To the extent that social scientists have studied this phenomenon with respect to racial and ethnic groups, it has been in the context of so-called "role modeling" and has focused mainly on African Americans. Although one should be hesitant to draw specific conclusions about other groups, we have no reason to believe that the underlying dynamics are much different.<sup>49</sup>

Children identify with people who look like them and who come from similar backgrounds to determine what level of professional status they themselves can achieve.<sup>50</sup> In particular, African American children look to other African Americans in constructing their professional ambitions.<sup>51</sup> Ronald Taylor argues that the relative paucity of successful African American role models in business and the professions has contributed to African American youths' perception of limited opportunities for assuming responsible adult roles and sta-

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46. See David Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Careers of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993).

47. We distinguish these mechanisms from race-based cronyism—giving jobs and benefits to members of one's group without regard to merit. While such practices have a deep tradition in American history, having benefited Anglo-Saxon Protestants, Irish, and Italians, it is hardly a tradition to be venerated.

48. See text accompanying notes 66-67 *infra*.

49. For example, with regard to the success of the children of recent immigrants, George Borjas has written that "ethnic role models matter" in the performance of future generations. George J. Borjas, *Immigration and Ethnicity*, NBER RPTR., Fall 1993, at 9, 11.

50. Ronald L. Taylor, *Black Youth, Role Models and the Social Construction of Identity*, in BLACK ADOLESCENTS 155, 156-58 (Reginald L. Jones ed., 1989).

51. *Id.* at 158.



tus,<sup>52</sup> to a sense of rage,<sup>53</sup> and to a systematic failure to develop the values and intellectual tools that could ultimately improve their positions in life.<sup>54</sup>

Professor Taylor thus argues that “positive adult role models (i.e., men and women who have successfully surmounted the obstacles to achievement and self-sufficiency) would undoubtedly inspire a greater sense of hope and confidence in the future among [African American] youths.”<sup>55</sup> Role models show careers that are open to young African Americans and demonstrate the behaviors and values necessary to get those jobs. Role models thus “suppl[y] . . . youth with values and beliefs about what is worthwhile in life, inspire[ ] hope in the future, and [in] the youth’s individual chance for success.”<sup>56</sup>

While affirmative action surely can increase the number of visible examples of success, we should note several caveats. First, little is known about the strength of the phenomenon. Second, in an age of mass media, it seems intuitively plausible that roles played by a few fictitious characters—for example, Victor Sifuentes and Jonathan Rollins, the Latino and African American lawyers on *L.A. Law*—may have greater impact than a hundred actual professionals.<sup>57</sup> Third, there is reason to believe that role modeling is more effective for the children of stable working- and middle-class families than for children from severely economically disadvantaged families. The sense of hopelessness of youth from very disadvantaged families makes them less likely than working- or middle-class youth to contemplate or plan for their futures.<sup>58</sup>

Finally, the putative benefits of role modeling may be offset by the feelings of inferiority that affirmative action can engender by implying that minority group members cannot succeed on their own “merits.” Professor Stephen Carter has written of his own experiences in this respect.<sup>59</sup> On the other hand, Ellis Cose suggests that many beneficiaries of affirmative action believe that they are as qualified for their positions as nonminority candidates—that affirmative action serves largely to level an uneven playing field by compensating for cronyism, old-boys’ networks, and conscious and unconscious bias.<sup>60</sup> In Bron Raymond Taylor’s study of affirmative action by the California Parks and Recreation Department,<sup>61</sup> beneficiaries related that, by opening doors for advance-

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52. *Id.* at 167; cf. Jeff Howard & Ray Hammond, *Rumors of Inferiority*, in RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY 367 (Russell Nieli ed., 1991) (arguing that African Americans do not believe they can participate in intellectual pursuits because they lack examples of other African Americans who have done so).

53. Taylor, *supra* note 50, at 165.

54. *Id.* at 164; see Howard & Hammond, *supra* note 52, at 367. As Christopher Jencks warns, “If discrimination convinces its victims that effort is never rewarded, or if it makes them so angry or resentful that they are unable to work with their oppressors, it can have catastrophic economic consequences.” CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY* 26 (1993).

55. Taylor, *supra* note 50, at 171.

56. *Id.* at 163.

57. Cf. Alan Abrahamson, *Applications Hit Record Highs for U.S. Law Schools: Increase Attributed to Impact of Television Hit ‘L.A. Law,’* L.A. TIMES, Aug. 20, 1989, at B1.

58. Taylor, *supra* note 50, at 167. Taylor nonetheless concludes that even children from less stable backgrounds do look to members of their racial group in assessing their chances for success. *Id.* at 168.

59. STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1992).

60. See COSE, *supra* note 21, at 111-13, 115, 122-24, 128.

61. BRON RAYMOND TAYLOR, *AFFIRMATIVE ACTION AT WORK* 83-85, 194-95 (1991).

ment, the Department's program "enhanced [their] self-esteem and self-regard."<sup>62</sup>

Our intuition is that the presence of minority group members in visible positions of success has a positive effect on the aspirations of other, especially younger, members of the group. However, we are uncertain about the strength of this phenomenon compared to the more material benefits of affirmative action mentioned above.

*Changing outsiders' negative stereotypes.* The visible competence of minority group members may reduce outsiders' negative stereotypes and reinforce positive ones about the group as a whole. The reduction of negative stereotypes and the creation of positive expectations may occur when individuals have professional contact with minority group members who are their coworkers, colleagues in business or civic organizations, clients, or attorneys. For example, in the study of the California Parks and Recreation Department mentioned above, many white employees who came into contact with the beneficiaries of affirmative action came to respect their competence as individuals, notwithstanding their resentment of affirmative action.<sup>63</sup> The study concluded that bringing women and people of color into workplaces through affirmative action policies reduced white men's beliefs in the "inferiority of nonwhites and women. . . . [W]hite men increasingly recognize the same range of talents among nonwhites as among themselves."<sup>64</sup> The highly visible success of a minority group member may raise the esteem of the group in the eyes of others, even in the absence of direct contact: We think it likely, for example, that General Colin Powell's role in the Gulf War changed some whites' stereotypes of African Americans.

Stereotypes are resilient, however, and the processes by which they are maintained and modified are complex. We tend to discount the achievements of someone we stereotype negatively rather than to alter our views in the face of counterevidence.<sup>65</sup> Indeed, there is some indication that affirmative action may reinforce beliefs that members of the benefited group are unqualified for the positions they hold and cannot compete successfully on their own merits. For example, in a survey, whites were more likely to agree with negative statements about African Americans when they were first asked about their attitudes toward affirmative action than they were when affirmative action was not mentioned.<sup>66</sup> Whatever the mixture of racism, envy, or competition for scarce resources, Paul Sniderman and Thomas Piazza conclude broadly that "[t]he new

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62. *Id.* at 195 (emphasis omitted). "Even among those affirmative action hires who thought they may have not been the best qualified when they secured a position, after succeeding in that position, they recognized that they did have the talent to perform well in that role." *Id.*; see also Fox Butterfield, *Colleges Luring Black Students With Incentives*, N.Y. TIMES, Feb. 28, 1993, at A1, A30 (reporting that African American high school seniors who were being actively recruited by Ivy League schools were not bothered by the knowledge that their SAT scores were lower than those of their white peers).

63. TAYLOR, *supra* note 61, at 59.

64. *Id.*

65. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. —, — (forthcoming 1995).

66. SNIDERMAN & PIAZZA, *supra* note 14, at 103-04 (1993). When affirmative action was mentioned, 31% of the survey's respondents agreed that African Americans were lazy, in contrast to only

race-conscious agenda has provoked broad outrage and resentment. Affirmative action is so intensely disliked that it has led some whites to dislike blacks—an ironic example of a policy meant to put the divide of race behind us in fact further widening it.”<sup>67</sup>

Our intuition is that affirmative action programs that increase the number of competent minority professionals in visible positions of authority can help reduce negative external stereotypes. As with the internal role-modeling effect, however, we are unsure about the magnitude of this phenomenon.

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Affirmative action under the justice rationales seeks to create a larger class of minority professionals, whose status has external, or multiplier, benefits for other members of their group. The legal profession is a significant route to success, and a minority applicant who becomes a successful lawyer may benefit other members of his or her group. With respect to faculty appointments, law schools are similar to other institutions that employ professionals in prestigious positions. Law professors enjoy a fairly high status in American society. A minority professor may therefore have the same effect on his group’s overall status as would a lawyer, doctor, or corporate executive. Faculty members also serve as the intelligentsia of minority groups, engaging in scholarship and policy advocacy that furthers the group’s interests.<sup>68</sup>

### C. *The Criteria for Inclusion in Affirmative Action Programs*

#### 1. *Diversity: the question of “salience.”*

The educational rationale for affirmative action includes anyone whose presence would contribute to the school’s missions of teaching and scholarship. For example, a law school might seek students with diverse cultural backgrounds, or work, travel, and public service experiences. To the extent that formal affirmative action programs are designed to achieve diversity, however, they almost invariably focus on the same groups encompassed by the justice-related rationales: It is the disadvantaged or subordinated status of the members of those groups that makes their presence especially relevant to the school’s educational mission and that also requires affirmative action to ensure their presence.

20% when it was not mentioned. Sniderman and Piazza found a similar pattern with whites’ characterization of African Americans as irresponsible: 43% compared to 26%. *Id.*

67. *Id.* at 109.

68. Duncan Kennedy defines “intelligentsia” as a ‘knowledge class’ working in education, the arts, social work, the law, religion, the media, therapy, consulting, and myriad spin-offs like charitable foundations, for-profit research ventures, and the like. Intelligentsia members perform multiple functions beyond their formal job descriptions. In self-organizing groups or individually, some of them work at defining their community’s identity (its cultural distinctiveness) or lack thereof, its interests in competition and cooperation with other communities, and its possible strategies.

Duncan Kennedy, *Frontier of Legal Thought III: A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 726 (footnote omitted).

If the goal of an affirmative action program is to ensure the presence of students or faculty from different cultures, the number of candidate groups is extraordinarily large. The point of the memorandum from the the Asian and Pacific Islanders Law Students Association<sup>69</sup> is that there are significant cultural differences between East Asians, who are entering law schools in increasing number without affirmative action, and Southeast Asians and Pacific Islanders. Indeed, there are significant differences among people within each of these broad groups (for example, between Japanese and Chinese) based on their histories of immigration and assimilation—for example, between the progeny of nineteenth century Chinese immigrants and those who have come from China, Hong Kong, and Taiwan in the last several decades. The same is true with respect to the various Native American tribes and the many groups encompassed by the terms “Hispanic” or “Latino.” And there are other immigrant groups and subgroups with high poverty rates that are the objects of prejudice and discrimination and which have little presence in law schools today—for example, Iraqis, Palestinians, and other Arabs; Pakistanis; Belizeans and certain other West Indians; Haitians; and Nigerians, Ethiopians, and other sub-Saharan Africans.<sup>70</sup>

In deciding whom to include in an affirmative action program, a law school might appropriately consider the *salience* of the group in contemporary American society or in the geographic region in which its graduates tend to practice. Among the determinants of a group’s salience are its numerical size and the extent to which its culture differs from the dominant culture of students attending the school. Where groups with different cultural heritages and national origins have similar cultural characteristics vis-à-vis the dominant population, it may be reasonable to treat them as a single group (e.g., Pacific Islanders) for purposes of an affirmative action program.

## 2. *Justice.*

The justice-related rationales suggest several general criteria for determining which groups a law school should include in affirmative action programs. A group is a candidate for inclusion if (1) it is significantly and intractably disadvantaged, (2) (for some theorists) this status is largely the result of discrimination against the group, and (3) if affirmative action will help ameliorate the group’s disadvantaged status.

*Significant and intractable disadvantage.* By “significant” disadvantage, we mean that the aggregate socioeconomic status of the group is much lower than the national average—low enough that one would describe the group as disadvantaged or subordinated. “Intractable” is a shorthand for “intractable in the absence of significant social intervention.” It means that, absent intervention, the children of group members are likely to inherit their parents’

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69. See text accompanying note 2 *supra*.

70. See BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, ANCESTRY OF THE POPULATION IN THE UNITED STATES 5 tbl. 5 (1993). Not all affirmative action programs necessarily encompass black immigrant groups as distinguished from the progeny of American slaves.

subordinate status,<sup>71</sup> or that the group is the object of ongoing discrimination that will significantly affect its members' ability to succeed in successive generations.

The criterion of significant and intractable disadvantage responds to the belief that affirmative action is an extraordinary remedy<sup>72</sup> which should not be used where satisfactory non-group-based alternatives are available. Many of the benefits of hiring or admitting a minority candidate today will take a long time to diffuse to other members of the group. In view of the social and political costs of affirmative action, granting preferences to members of a group whose status is likely to improve without intervention is like treating a wound apt to heal itself with a costly and risky medical procedure. This issue arises especially with respect to immigrant groups. Historically, nearly every large immigrant group in the United States has faced hardship and discrimination<sup>73</sup> but has moved up the socioeconomic ladder over time.<sup>74</sup> Even if the racial prejudice encountered by some Asian and Latino immigrants makes their experience different from that of earlier European immigrants, there is evidence that these newer groups may be following similar patterns of upward mobility.<sup>75</sup>

*Discrimination.* Many commentators argue that affirmative action is essentially a corrective remedy for discrimination.<sup>76</sup> If so, affirmative action is justified only when a group has suffered from discrimination, and its present disadvantaged status is substantially attributable to that discrimination. Attribution may be especially difficult with respect to those immigrant groups whose lack of English literacy and vocational skills both depresses economic opportunities and reinforces negative stereotypes.

How strong must the connection between discrimination against a group and its disadvantaged status be, and who has the burden of proving or disproving it? Some theorists or policymakers may demand affirmative proof of causation. For others, the fact of any significant discrimination will suffice, or will at least create a presumption that discrimination is responsible for the group's present status. The eligibility of a particular group for an affirmative action

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71. The educational and professional attainments of children correlate positively with those of their parents. See Frederick Mosteller & Daniel P. Moynihan, *A Pathbreaking Report*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 3, 22-24 (Frederick Mosteller & Daniel P. Moynihan eds., 1969); cf. Karen R. Wilson & Walter R. Allen, *Explaining the Educational Attainment of Young Black Adults: Critical Familial and Extra-Familial Influences*, 56 J. NEGRO EDUC. 64, 69-70, 72 (1987) (showing strong correlation between parents' and their children's educational attainments). See generally THOMAS G. MORTENSON & ZHIJUN WU, HIGH SCHOOL GRADUATION AND COLLEGE PARTICIPATION OF YOUNG ADULTS BY FAMILY INCOME BACKGROUNDS 197-99 (1990). Needless to say, the phenomenon is complex and may vary in different situations and across different groups. Some scholars, such as Christopher Jencks, believe that parents' socioeconomic status is a poor predictor of their children's success. JENCKS, *supra* note 54, at 4-5.

72. See text accompanying notes 11-15 *supra*.

73. See THOMAS J. ARCHDEACON, BECOMING AMERICAN: AN ETHNIC HISTORY 171-72 (1986) (discussing the Immigration Act of 1924).

74. JENCKS, *supra* note 54, at 27-29 & tbl. 1.1. In fact, some groups that faced severe discrimination as new immigrants to the United States now have household incomes above the national average. For example, Irish Catholic households earn 118% of the national average, and Italians earn 107%. *Id.* at 28 tbl. 1.1.

75. See texts accompanying notes 189-197 & 247-249 *infra*.

76. See text accompanying notes 34-35 *supra*.

program therefore may depend on who has the burden of establishing or refuting the hypothesis, and how great that burden is. We do not try to resolve these questions, but in Part III, we outline some of the evidence to which these presumptions might apply.

*The multiplier effect: the efficacy of affirmative action.* Whatever one's theory of justice, an affirmative program is only as good as its ultimate efficacy in ameliorating the group's disadvantaged status. The corrective as well as the distributive rationale depends on the multiplier effects of affirmative action—for there would be little practical motivation for a policy redressing past wrongs against a group unless one believed that it would benefit the group's members in the future.

Therefore, a policymaker will be concerned to know whether the professional success of the immediate beneficiary of affirmative action helps other group members—through an increase in their wealth and power, by providing visible models of success for the group's youths, or by reducing outsiders' prejudice and discrimination against group members.

The extent to which these goals are met depend on empirical hypotheses that are difficult to establish with confidence. For the same reasons that a policymaker might hold that a history of discrimination against a group justifies the presumption that its present disadvantaged status is the result of that discrimination, so too might one justify giving the benefit of the doubt to affirmative action as a mechanism for ameliorating a group's intractable disadvantage.

### 3. *Individual and group identity.*

The efficacy of affirmative action depends on how an individual included in an affirmative action program identifies with his group. This point is illuminated by Ian Haney López, a law professor at the University of Wisconsin who writes in the genre of critical race theory.

I write as a Latino. . . . My older brother, Garth, and I are the only children of a fourth-generation Irish father, Terrence Eugene Haney, and a Salvadoran immigrant mother, Maria Daisy López de Haney. Sharing a similar morphology, Garth and I both have light but not white skin. . . . Interestingly, Garth and I conceive of ourselves in different racial terms. For the most part, he considers his race transparent, something of a non-issue in the way Whites do, and he relates most easily with the Anglo side of the family. I, on the other hand, consider myself Latino and am in greatest contact with my maternal family.<sup>77</sup>

We imagine that if one were to consider the brothers as law school applicants, Ian Haney López's presence would serve most of the goals of affirmative action: Whether or not Salvadorans as a group should be the beneficiaries of an affirmative action program, his pan-Latino identity may benefit the members of other Latino groups. We doubt that admitting or hiring his brother Garth would serve any of the goals of affirmative action.

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77. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 10 (1994) (footnote omitted).

Whether a school should or could make distinctions of this sort raises institutional questions that lie beyond the scope of our inquiry. Leaving this matter entirely to the candidate's self-identification would inevitably result in the admission of some students whose presence will not serve any of the goals of affirmative action. For the institution to undertake an independent assessment of a candidate's membership in a particular racial group, however, raises discomforting analogies to laws of the Jim Crow era defining "Negro."<sup>78</sup> A school might take an intermediate position by asking applicants to discuss their cultural backgrounds<sup>79</sup> or, to use Professor Haney López's term, their "community" ties.<sup>80</sup>

Must the particular beneficiary of affirmative action herself be seriously disadvantaged by virtue of her group membership? For example, are the rationales for affirmative action served by admitting the child of well-to-do professional African American parents, who herself has been successful—though not quite successful enough academically to be admitted on her scores alone?

William Julius Wilson answers this question no, and criticizes affirmative action in higher education on that ground.<sup>81</sup> However, the rationales for affirmative action developed in this article are not ultimately concerned with the benefits to the candidate who is hired or admitted, but rather with her contribution to the institution's educational mission or the benefits that her success may confer on other members of the group. Granted that the admission of an African American from an impoverished background brings added diversity to a largely middle-class institution, the experiences of growing up even as an affluent African American in the United States are nonetheless quite different from growing up white.<sup>82</sup> Under the justice-related rationales, no effort is made to determine the individual candidate's entitlement to corrective or distributive justice; indeed, the very fact that someone is a candidate for a position in a law school makes an individual distributive claim unlikely. Rather, the candidate's admission or appointment is premised on the multiplier effect—on the external benefits that her success as a lawyer or law professor will have for other members of her group.

It is easy to get sidetracked by the problems of identity posed by the rich contemporary theoretical literature on the construction of identity and the

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78. See CHARLES MANGUM, *THE LEGAL STATUS OF THE NEGRO* 1-17 (1940); cf. Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (quoting the definition of "Jew" in the First Regulation to the German Reich's Citizenship Law of November 14, 1935).

79. See, e.g., Stanford Law School Application for Admission, Question 21 (Sept. 1994) (on file with the *Stanford Law Review*).

80. Ian Haney López, *Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White*, RECONSTRUCTION, Winter 1991, at 46, 49. We should note that an inquiry into an applicant's cultural identification can easily blur into an inquiry into his social or political viewpoints. Professor Derrick Bell put the issue strikingly when he remarked that "the ends of diversity are not served by persons who look black and think white." *Id.* (quoting Bell). We disagree with the suggestion, however metaphorical, that there are "black" and "white" ways of thinking, and with the possible implication that affirmative action is not served by admitting conservative minority students.

81. See generally WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987).

82. See note 21 *supra*.

amazing proliferation of mixed-race and mixed-ethnicity families.<sup>83</sup> However, one should not lose sight of the fact that there are many minority candidates—especially African Americans—whose cultural identity is not a matter of real dispute.<sup>84</sup>

### III. WHICH GROUPS?

#### A. African Americans

##### 1. A demographic profile of African Americans.

As a group, African Americans lag behind whites in socioeconomic status and education. While African Americans comprise about 12 percent of the population of the United States,<sup>85</sup> only 3 percent of attorneys<sup>86</sup> and 7.9 percent of first-year law students are African American.<sup>87</sup> More broadly, only 19 percent of African Americans are classified by the census as “professionals,” compared to 31 percent of the white population.<sup>88</sup> The income of African Americans is about two-thirds that of whites. In 1988, the median African American household earned \$1305 per month, compared to \$2064 for white households; the median African American family had less than a tenth the wealth of white families (\$4170 compared to \$43,280).<sup>89</sup>

There are significant gender differences in the economic success of African Americans. African American college-educated men earn far less than their white counterparts.<sup>90</sup> According to one study, “men’s earnings and other aggregate measures of black income were, relative to white measures, lower in the mid-1980s than in 1970 and in many cases no greater than the levels

83. See Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 964-69 (1995); Lawrence Wright, *One Drop of Blood*, NEW YORKER, July 25, 1994, at 46.

84. See note 117 *infra*.

85. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, GENERAL POPULATION CHARACTERISTICS 7 tbl. 5 (1993) [hereinafter U.S. CENSUS].

86. This percentage has not increased since 1985. Judith N. Collins, *Trends in Legal Hiring*, NALP BULL., Dec. 1993, at 8, 8.

87. 1993 REV. LEGAL EDUC. U.S. 67-68.

88. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES 82 tbl. 82, 86 tbl. 86 (1993) [hereinafter SOCIAL AND ECONOMIC CHARACTERISTICS]; see also FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, THE ENVIRONMENTAL SCAN 64-83 (1995) [hereinafter GLASS CEILING STUDY] (discussing the underrepresentation of African Americans in executive, administrative, and managerial positions).

89. Spencer Rich, *Gap Found in Wealth Among Races*, WASH. POST, Jan. 11, 1991, at A3. Some of this disparity may be due to the fact that so many African American households are headed by a single parent. One out of two African American families is headed by a single woman, compared to one out of six white families. MARTIN CARNOY, *FADED DREAMS: THE POLITICS AND ECONOMICS OF RACE IN AMERICA* 19 (1994). The poverty rate for African American single-parent households is 50%, as compared to 30% for single parent white families. *Id.*

90. White college-educated men earned an average of about \$25,000 in 1991, while their African American counterparts made about \$19,000. CARNOY, *supra* note 89, at 25-26. As Professor Carnoy puts it, there is “trouble ahead for today’s young black college graduates as they reach prime working age. History suggests they will continue to be caught in a trough—their incomes will remain low compared with those of whites. This trough will also affect future black middle class family incomes.” *Id.*



reached in the 1960s.”<sup>91</sup> While African American women graduate from college at lower rates than white women, they graduate in greater numbers than African American men,<sup>92</sup> and college-educated African American women earn about the same as white women,<sup>93</sup> though significantly less than comparably qualified white men.<sup>94</sup>

Some African Americans made significant economic gains in the 1970s.<sup>95</sup> As with the population as a whole, however, income disparities among African Americans widened during the 1980s, and the bottom 40 percent of African Americans became even poorer, real incomes dropping from \$9030 in 1980 to \$8520 in 1990.<sup>96</sup> African American middle-class incomes increased slightly but did not keep pace with whites’ income gains.<sup>97</sup> Professor Martin Carnoy writes that the African American middle class is “suspended—not in poverty but still distant from the American dream.”<sup>98</sup>

## 2. *Discrimination and prejudice.*

Following the end of slavery in the latter nineteenth century, African Americans continued to be subjected to pervasive discrimination and segregation designed to maintain their subordination.<sup>99</sup> Not until the mid-twentieth century was the system of Jim Crow laws declared unconstitutional, and not until the late 1960s did their overt enforcement end. Discrimination against African Americans still persists in housing,<sup>100</sup> employment,<sup>101</sup> and public accommodations,<sup>102</sup> and pervades many other aspects of daily life. Racial prejudice still pervades many whites’ attitudes toward African Americans: Seventy-eight per-

91. COMMITTEE ON THE STATUS OF BLACK AMERICANS, COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION & NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 323 (1989) [hereinafter *A COMMON DESTINY*].

92. See NATIONAL CENTER FOR EDUCATION STATISTICS, *RACE/ETHNICITY TRENDS IN DEGREES CONFERRED BY INSTITUTIONS OF HIGHER EDUCATION, 1980-81 THROUGH 1989-1990*, at 16 (1992) [hereinafter *RACE/ETHNICITY TRENDS*].

93. See CARNOY, *supra* note 89, at 119; JENCKS, *supra* note 54, at 39; see also Sam Roberts, *Educated Black Women Making Big Wage Gains*, *SAN JOSE MERCURY NEWS*, Oct. 31, 1994, at A1 (reporting that college-educated African American women are outearning their white counterparts).

94. CARNOY, *supra* note 89, at 119. Both the inter- and intraracial differences are striking: In 1990, 84% of bachelors’ degrees awarded to women went to white women, and 6.8% went to African American women; 84% of bachelors’ degrees awarded to men went to white men, and 4.7% went to African American men. See *RACE/ETHNICITY TRENDS*, *supra* note 92, at 15-16. Only a small percentage of African American men graduate from college. *A COMMON DESTINY*, *supra* note 91, at 340.

95. CARNOY, *supra* note 89, at 18.

96. *Id.* at 13, 22.

97. *Id.*

98. *Id.* at 14.

99. See MANGUM, *supra* note 78; C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1957).

100. A Federal National Mortgage Association report found that African American and Latino auditors who searched for housing were routinely steered into neighborhoods that were predominately minority. COSE, *supra* note 21, at 185-86.

101. *Hiring Discrimination Against Young Black Men*, 21 *URB. INST. POL’Y & RES. REP.*, Summer 1991, at 4, 4-5. (describing the results of teams of African American and white college students applying for the same entry-level jobs).

102. See Howard Kohn, *Service with a Sneer*, *N.Y. TIMES*, Nov. 6, 1994, § 6 (Magazine), at 43 (describing the practice of some Denny’s restaurants of refusing service to African Americans); Stephen Labaton, *Denny’s Gets a Bill for the Side Orders of Bigotry*, *N.Y. TIMES*, May 29, 1994, § 4 (Week in

cent of the respondents in a recent nationwide survey believed that African Americans were more likely to "prefer to live off welfare" and less likely to "prefer be self supporting,"<sup>103</sup> 53 percent thought they were "less intelligent,"<sup>104</sup> 62 percent said they were lazier,<sup>105</sup> and 56 percent believed they were more prone to violence.<sup>106</sup> Furthermore, surveys have found that most whites would feel uneasy if a close relative were planning to marry an African American.<sup>107</sup> Regardless of their socioeconomic status, African Americans face ongoing prejudice and discrimination.<sup>108</sup>

The causes of the disproportionately low socioeconomic status of African Americans are the subject of considerable dispute among social scientists. In his recent book *Faded dreams*, Martin Carnoy concludes that wage discrimination accounts for 18 percent of the income disparity between African Americans and whites.<sup>109</sup> William Julius Wilson argues that factors such as educational attainment, culture, the prevalence of single parent families, and high rates of unemployment account for a greater share of the disparity.<sup>110</sup> In any event, most of the factors that Wilson mentions have been shaped by the history of discrimination against African Americans.

### 3. *African American identity.*

The vast majority of people who identify themselves as African Americans are identified as such by other African Americans and by persons of other races.<sup>111</sup> Most African Americans could not escape from their identity if they wanted to. De facto segregation continues to be a fact of life for African Americans. "Almost all black children grow up in informally segregated neighborhoods" and attend schools mostly with other black children.<sup>112</sup> Although middle-class African Americans are becoming "ever more separated socially and economically from the poor"<sup>113</sup> and do not live in the same areas as the

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Review), at 4 (reporting that Denny's settled a lawsuit by African American Secret Service agents a Denny's restaurant had refused to serve).

103. Lynne Duke, *Whites' Racial Stereotypes Persist: Most Retain Negative Beliefs About Minorities, Survey Finds*, WASH. POST, Jan. 9, 1991, at A1, A4.

104. *Id.*

105. *Id.*

106. *Id.* Another survey uncovered similar attitudes, with a majority of whites characterizing African Americans as "violent and aggressive" and as "failing to make a genuine effort to work hard and deal responsibly with obligations." SNIDERMAN & PIAZZA, *supra* note 14, at 51.

107. See A COMMON DESTINY, *supra* note 91, at 152.

108. See note 21 *supra*.

109. CARNOY, *supra* note 89, at 118 fig. 6.1 (data point for 1989). However, Carnoy suggests that wage discrimination has been decreasing over time. See *id.* at 118 fig. 6.1 (showing that wage discrimination has decreased from about 30% in 1950 to about 18% in 1989). *But cf. id.* at 32-33 ("Other evidence suggests that racism may be decreasing even as . . . income gaps between blacks and whites increase."). An earlier study found that the difference in wages not attributable to differences in productive characteristics was between 19% and 35% in 1959, but had decreased to between 12% and 24% by 1979. See A COMMON DESTINY, *supra* note 91, at 147.

110. WILSON, *supra* note 81, at 140-59.

111. JENCKS, *supra* note 54, at 29.

112. CARNOY, *supra* note 89, at 3.

113. *Id.* at 22.

poorest African Americans,<sup>114</sup> they tend to live in predominantly African American neighborhoods<sup>115</sup>—often in the same neighborhoods as the African American working poor.<sup>116</sup>

In other ways, too, economic success has not necessarily meant assimilation into the white middle class and loss of African American identity.<sup>117</sup> Many middle-class African Americans value ties to African American communities,<sup>118</sup> and a survey of one hundred “elite” African Americans revealed that a majority identify with working-class African Americans more than with middle-class whites.<sup>119</sup> The survey found that the African American elite feel a special obligation to assist other African Americans.<sup>120</sup>

#### 4. *Implications for affirmative action.*

The legal system created, and for centuries maintained, the subordinate status of African Americans. During the last half century, the law has been a force for undoing that status. Although the past several decades have seen an end to much overt, systematic discrimination against African Americans, prejudice and covert discrimination continue. There is evidence that discrimination depresses the wages and limits the opportunities of African Americans, and a large subgroup appears to be intractably disadvantaged, with the poverty and despair of one generation transmitted to the next. Most African Americans, regardless of their socioeconomic class, are readily visible to outsiders; they share an intragroup identity that cuts across differences of class. Although there are quite a few black professionals, including lawyers, African Americans continue to be vastly underrepresented in positions of authority. Affirmative action in admission to professional schools is a significant route to such positions. Furthermore, the size, history, culture, and contemporary salience of this racial group, and the role law has played in its history, make the presence of African Americans in law schools virtually essential for the responsible education of tomorrow’s lawyers and policymakers.

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114. See John O. Calmore, *Spacial Equality and the Kerner Commission Report: A Back-To-The-Future Essay*, 71 N.C. L. REV. 1487, 1503 (1993).

115. CARNOY, *supra* note 89, at 3; DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

116. Calmore, *supra* note 114, at 1503.

117. LOIS BENJAMIN, *THE BLACK ELITE: FACING THE COLOR LINE IN THE TWILIGHT OF THE TWENTIETH CENTURY* 10-12 (1991). Middle-class African Americans who send their children to predominantly white schools feel it important to live in neighborhoods with other African Americans. They want their children to “come home to a . . . neighborhood where it is the norm to be [African American]; otherwise the children could lose a social and cultural grounding that would militate against them growing up lost not knowing who they are.” Calmore, *supra* note 114, at 1506 (footnotes omitted). Middle-class African Americans do have ambivalent feelings about “lower-class” African Americans, however. In fact, most of the 100 individuals Benjamin surveyed said they did not identify with “lower-class” African Americans, and many expressed dismay at the values they perceived these African Americans held. BENJAMIN, *supra*, at 11-12.

118. Calmore, *supra* note 114, at 1505.

119. A COMMON DESTINY, *supra* note 91, at 199 (based on a 1980 survey). Similarly, a majority of African Americans surveyed agreed that they should shop in African American-owned businesses whenever possible, and a significant plurality (39%) believed that African Americans should always vote for the African American candidate in a political campaign. *Id.*

120. BENJAMIN, *supra* note 117, at 13.

## B. *Native Americans*

### 1. *Who are Native Americans?*

“Native American” is a term of convenience applied to diverse peoples<sup>121</sup> who lived in North America before it was settled by Europeans, and who share a history of being uprooted and dispossessed of their land. This broad group is made up of several hundred different American Indian tribes<sup>122</sup> that are “religiously, culturally, and linguistically diverse, and historically separate and factious groups.”<sup>123</sup> The largest Native American tribes include Cherokee, Navajo, Sioux, Chippewa, Choctaw, Pueblo, Apache, Iroquois, and Lumbee.<sup>124</sup> Because the current socioeconomic conditions of many different Native American tribes are quite similar, and because we have been unable to find much detailed study of particular groups, we discuss the question of affirmative action for Native Americans in the aggregate.

The history of dispossession of Native Americans is well known. In pursuit of Manifest Destiny, the United States government defeated and subsequently displaced Native Americans from land that had been their home for centuries, pushing them into smaller and less productive areas. Native American land was reduced from 138 million acres in 1887 to fifty-two million acres in 1934, and nearly twenty-six million of that was lost by Native Americans through fraudulent transfers.<sup>125</sup> Toward the end of the nineteenth century, the Bureau of Indian Affairs, in conjunction with religious missionaries, instituted a policy of assimilation that placed Native American children in boarding schools—away from their families, tribes, and land—in which they were forbidden to speak their indigenous languages.<sup>126</sup> For the past few decades, the federal government has sought to promote Indian self-determination and autonomy.<sup>127</sup> Today, the majority of Native Americans live in urban areas,<sup>128</sup> while only 24 percent live on reservations.<sup>129</sup>

### 2. *The present status of Native Americans.*

In 1990, the aggregate poverty rate for Native Americans was more than three times that for whites: Thirty-one percent of Native Americans lived in

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121. See Joane Nagel, *The Political Mobilization of Native Americans*, Soc. Scis. J., July 1982, at 37.

122. *Id.* at 37.

123. *Id.*

124. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, CHARACTERISTICS OF AMERICAN INDIANS BY TRIBE AND LANGUAGE tbl. 1 (1994) [hereinafter TRIBE AND LANGUAGE].

125. See Frank Pommersheim, *The Reservation As Place*, 34 S.D. L. REV. 246, 256, 261 (1989).

126. *Id.* at 256-57.

127. Thomas Biolsi, “Indian Self-Government” As a Technique of Domination, 15 NATIVE AM. Q. 23 (1991); Thomas E. Ross, *American Indian Problems and Prospects*, in A CULTURAL GEOGRAPHY OF NORTH AMERICAN INDIANS 314, 318 n.3 (Thomas E. Ross & Tyrel G. Moore eds., 1987).

128. Terrel Rhodes, *The Urban American Indian*, in A CULTURAL GEOGRAPHY OF NORTH AMERICAN INDIANS, *supra* note 127, at 259, 262 tbl. 14.1 (data for 1980).

129. Thomas E. Ross & Tyrel G. Moore, *Indians in North America*, in A CULTURAL GEOGRAPHY OF NORTH AMERICAN INDIANS, *supra* note 127, at 3, 8 fig. 1.1 (data for 1980).

poverty,<sup>130</sup> compared to 8.5 percent of whites.<sup>131</sup> Native Americans are underrepresented in the legal profession.<sup>132</sup> Indeed, only 9.4 percent of Native Americans over twenty-five have completed a bachelor's degree,<sup>133</sup> compared to 25.2 percent of whites and 12.1 percent of African Americans.<sup>134</sup>

Native Americans are stereotyped as lazy, drunken, and unassertive,<sup>135</sup> and those who appear dark skinned also suffer from undifferentiated discrimination against nonwhites. However, Americans often proudly claim to have "Indian blood"—not just to avail themselves of benefits, but to share in the country's Native American heritage.<sup>136</sup> In any event, Native Americans are among the most socioeconomically disadvantaged groups in the United States, and this condition does not seem to be abating.

### 3. *Native American identity.*

The issue of Native American identity is complicated. As Native Americans moved from reservations to urban areas, many intermarried with non-Indians and with members of different tribes, and fewer grew up knowing their tribal language.<sup>137</sup> In the face of this trend toward assimilation, there has been both a growing concern for the preservation of particular tribal cultures<sup>138</sup> and a rise of pan-Native American consciousness.<sup>139</sup> For example, some Native American tribes have established tribal colleges that allow members to earn a degree without leaving the reservation.<sup>140</sup> Some Native Americans who live in urban areas maintain close ties with the Native American community and participate in cultural functions.<sup>141</sup> At the same time, organizations focusing on issues of broad Native American concern play a role at the national and local levels. The American Indian Law Center, for example, was formed in the late 1960s to increase the number of Native American law graduates nationwide.<sup>142</sup> The Center's programs include a prelaw summer orientation program and a

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130. SOCIAL AND ECONOMIC CHARACTERISTICS, *supra* note 88, at 95 tbl. 95. The poverty rates for the nine largest tribes were: Cherokee, 22%; Navajo, 48.8%; Sioux, 44.4%; Chippewa, 34.3%; Choctaw, 23.0%; Pueblo, 33.2%; Apache, 37.5%; Iroquois, 20.1%; and Lumbee, 22.1%. *Id.*

131. *Id.* at 98 tbl. 98.

132. Although about 0.8% of the population is Native American, only 0.4% of law degrees in 1990 were awarded to Native Americans. RACE/ETHNICITY TRENDS, *supra* note 92, at 28. In 1993-1994, however, 0.77% of first-year law students were Native American. 1993 REV. LEGAL EDUC. U.S. 67. Native Americans are also significantly underrepresented in executive, managerial, and administrative positions. See GLASS CEILING STUDY, *supra* note 88, at 84-99.

133. SOCIAL AND ECONOMIC CHARACTERISTICS, *supra* note 88, at 59 tbl. 59.

134. *Id.* at 58 tbl. 58, 62 tbl. 62.

135. GLASS CEILING STUDY, *supra* note 88, at 93-95.

136. P.S. Deloria & Robert Laurence, *What's an Indian? A Conversation about Law School Admissions, Indian Tribal Sovereignty and Affirmative Action*, 44 ARK. L. REV. 1107, 1114, 1123 (1991).

137. Nagel, *supra* note 121, at 37.

138. *Id.* at 44.

139. *Id.* at 42.

140. WAYNE J. STEIN, TRIBALLY CONTROLLED COLLEGES 145 (1992). Each tribal college has developed a curriculum that blends tribal traditions and values with a comprehensive program of community college education. *Id.*

141. Michelene Fixico, *The Road to Middle Class Indian America*, in AMERICAN INDIAN IDENTITY: TODAY'S CHANGING PERSPECTIVES 55, 72 (Clifford E. Trafzer ed., 1989).

142. Philip S. Deloria, *The American Indian Law Center: An Informal History*, 24 N.M. L. REV. 285, 287 (1994).

placement service.<sup>143</sup> Over half of the the 1500 Native American attorneys currently working in some field of Indian affairs received assistance from the Center.<sup>144</sup>

Who is Native American for purposes of law school affirmative action programs? Clearly, someone who has grown up on a reservation and for whom tribal culture continues to play a central role. Beyond this paradigmatic case, the issue is less clear. For example, each tribe sets its own membership criteria.<sup>145</sup> Under some criteria, persons who intermarry with members of other tribes lose their membership, while persons who are lineally descended from early members of a tribe but have no contact with a reservation are considered members.<sup>146</sup> The American Indian Law Center originally required that its admittees have at least one-quarter Indian blood from a recognized tribe—the criterion the Bureau of Indian Affairs uses for federal entitlements—but now bases admission on tribal membership.<sup>147</sup> For purposes of affirmative action, a candidate's "community ties" seem more relevant than formal tribal membership.

#### 4. *Implications for affirmative action.*

Native Americans as a group are seriously and intractably disadvantaged, and this status is to a significant degree the result of government policies. We have little information about the extent to which individual Native Americans identify or are identified with others—whether or not of the same tribe—and we are therefore hesitant to speculate about the multiplier effects of affirmative action. There is, however, no doubt that Native Americans are under-represented in all professions and that affirmative action is essential to ensuring their significant presence in law schools.

### C. *Latinos, or Hispanic Americans*

#### 1. *Who are the Latinos?*

The group called "Latinos" or "Hispanics"<sup>148</sup> includes immigrants or the descendants of immigrants from Puerto Rico, Cuba, and the many countries of

143. *Id.* at 287-88.

144. *Id.* at 285.

145. Michael Haderle, *Trying to Draw the Line*, L.A. TIMES, Dec. 23, 1992, at E1.

146. *Id.*

147. See Deloria, *supra* note 142, at 287.

148. The Census Bureau uses the term "Hispanic," but many prefer "Latino" to describe persons of Central or South American descent. See David Gonzales, *What's the Problem with "Hispanic"?* *Just Ask a "Latino,"* N.Y. TIMES, Nov. 15, 1992 at E6 (reporting that many "Latinos" who identify panethnically prefer "Latino" over "Hispanic" because the latter connotes a history of colonization and assimilation). Peter Skerry reports that many Mexican Americans dislike the term "Hispanic," which they view "as an ill-conceived label concocted by federal bureaucrats," but that many "Hispanic" politicians use it anyway. "Latino" is popular with Mexican Americans in Los Angeles because it links them with the growing Central American population. "Chicano" is the term of choice for "activists and young people espousing the minority perspective," while "Mexican American" is "the most widely used . . . [and is] especially popular among older or more mainstream oriented members of the group." PETER SKERRY, *MEXICAN AMERICANS: THE AMBIVALENT MINORITY* 25 (1993).

Central and South America.<sup>149</sup> In 1991, Mexican Americans, Puerto Ricans, and Cuban Americans accounted for 80 percent of the Latino population in the United States.<sup>150</sup>

Most Mexican immigrants and Mexican Americans live in the West and Southwest.<sup>151</sup> The first Mexican Americans were residents of Mexico at the time their land—including areas that are now Texas, California, New Mexico, and Arizona—was annexed by the United States in the nineteenth century.<sup>152</sup> The descendants of these original inhabitants account for only a small proportion of today's Mexican Americans, most of whom (or whose families) have immigrated since the turn of the century.<sup>153</sup> An estimated 10 percent of the population of Mexico came to the United States between 1900 and 1930, mostly to work in agricultural jobs.<sup>154</sup> In the late 1920s, the immigration laws were changed to disfavor Mexican immigration, and many Mexicans were repatriated.<sup>155</sup> After World War II, Mexicans again began to enter the United States, this time to work in manufacturing jobs.<sup>156</sup> Since the 1960s, generally poor economic conditions in Mexico have encouraged immigration, although many Mexican immigrants have only been able to find low-paying jobs in declining industries.<sup>157</sup> American-born Mexican Americans are poorer than whites.<sup>158</sup> While Mexican Americans constitute 5.4 percent of the general population,<sup>159</sup> only 1.9 percent of first-year law students in 1994 were Mexican American.<sup>160</sup>

Puerto Ricans began to come to the United States mainland in great numbers after World War II, with most (about 400,000) migrating between 1950 and 1960. They live mainly in New York City and Boston. Many come to earn money to support their families in Puerto Rico with the intention of returning home, and there is considerable movement between the island and the mainland.<sup>161</sup> Most Puerto Rican migrants are poorly educated and low skilled. They occupy low-wage occupations in the United States and are the poorest of

149. Most of these countries share a history of Spanish and Portuguese colonization beginning in the 17th century.

150. Mexicans comprise 63% of the Latino population, Puerto Ricans 11%, and Cubans 5%. NATIONAL COUNCIL OF LA RAZA, *THE STATE OF HISPANIC AMERICA 1991: AN OVERVIEW 1* (1992) [hereinafter *STATE OF HISPANIC AMERICA*].

151. Cf. Rebecca Morales & Frank Bonilla, *Restructuring and the New Inequality, in* LATINOS IN A CHANGING U.S. ECONOMY 1, 18 (Rebecca Morales & Frank Bonilla eds., 1993) (describing the steady flow of immigration northward from Mexico since the mid-1960s).

152. *STATE OF HISPANIC AMERICA*, *supra* note 150, at 3.

153. *Id.*

154. See Morales & Bonilla, *supra* note 151, at 17.

155. *Id.* at 18.

156. *Id.*

157. *Id.*; see also Ashley Dunn, *In California, the Numbers Add Up to Anxiety*, N.Y. TIMES, Oct. 30, 1994, at E3 (reporting that most Mexicans who have immigrated since 1970 work in manufacturing).

158. RODOLFO O. DE LA GARZA, LOUIS DESIPIO, F. CHRIS GARCIA, JOHN GARCIA & ANGELO FALCON, *LATINO VOICES: MEXICAN, PUERTO RICAN & CUBAN PERSPECTIVES ON AMERICAN POLITICS* 34 (1992) [hereinafter *LATINO VOICES*].

159. U.S. CENSUS, *supra* note 85, at 7 tbl. 5.

160. 1993 REV. LEGAL EDUC. U.S. 67.

161. Morales & Bonilla, *supra* note 151, at 18-19.

all Latino groups.<sup>162</sup> (According to some measures, they are even poorer than African Americans.<sup>163</sup>) Their transience has contributed to keeping Puerto Ricans “anchored at the bottom of the social ladder among [Latinos] and in United States Society as a whole.”<sup>164</sup> Puerto Ricans constitute 1.1 percent of the United States mainland population, but only 0.6 percent of first-year law students.<sup>165</sup>

Significant Cuban immigration began when Fidel Castro seized power in 1959. Most of the approximately 831,000 Cubans living in the United States (0.42 percent of the population<sup>166</sup>) came to the United States between 1960 and 1980 or are their descendants. The first Cuban immigrants were well educated and from middle- or upper-class families. Each subsequent group has been poorer and less well educated.<sup>167</sup> There has been little Cuban immigration since 1980, with the exception of the Mariel boatlift and the wave of immigration during the summer of 1994. Cubans have settled primarily in Miami and New York.<sup>168</sup> Their geographic concentration has enabled them to “build on their entrepreneurial and professional talents . . . [more than] other Latino groups. It has also provided a base for building on the [Cuban] communities’ wealth.”<sup>169</sup> Although Cubans are among the wealthiest and best educated of all the Latino groups,<sup>170</sup> their median family income still lags behind that of whites.<sup>171</sup> The poverty rate for American-born Cubans is 13.5 percent,<sup>172</sup> compared to 8.5 percent for whites.<sup>173</sup> We do not know how many lawyers or law students are Cuban.

Political unrest in many Central and South American countries, such as El Salvador, Nicaragua, Chile, Honduras, and Guatemala, produced an influx from these countries beginning in the mid-1970s. Immigrants from these regions range from the elites to the economically dispossessed and have come to the United States for a combination of economic and political reasons.<sup>174</sup> Broadly speaking, immigrants from South American countries tend to be better off than those from Central America. According to the 1990 census, 23.8 percent of Central Americans in the United States were living in poverty, compared to

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162. *Id.* at 15; BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, PERSONS OF HISPANIC ORIGIN IN THE UNITED STATES 158-59 tbl. 5 (1993) [hereinafter PERSONS OF HISPANIC ORIGIN].

163. Between 1972 and 1989, Puerto Rican households on average made 62% of the national average household income, African Americans 68%, and Mexican Americans 64%. JENCKS, *supra* note 54, at 28.

164. Juan Manuel Garcia Passalacqua, *The Puerto Ricans: Migrants or Commuters?*, in THE COMMUTER NATION: PERSPECTIVES ON PUERTO RICAN MIGRATION 103, 109 (Carlo Antonio Torre, Hugo Rodrigues Vecchini & William Burgos eds., 1994).

165. 1993 REV. LEGAL EDUC. U.S. 67-70.

166. U.S. CENSUS, *supra* note 85, at 7 tbl. 5.

167. Morales & Bonilla, *supra* note 151, at 19.

168. *Id.*

169. *Id.* at 20 (footnote omitted).

170. STATE OF HISPANIC AMERICA, *supra* note 150, at 8, 15.

171. LATINO VOICES, *supra* note 158, at 33; *see also* NICOLAU SIOBHAN & RAFAEL VALDIVIESCO, A MORE PERFECT UNION: ACHIEVING HISPANIC PARITY BY THE YEAR 2000, at 14 (1990).

172. PERSONS OF HISPANIC ORIGIN, *supra* note 162, at 159 tbl. 5. Foreign-born Cuban Americans experienced a poverty rate of 14.9%, for an average poverty rate for all Cuban Americans of 14.6%. *Id.*

173. SOCIAL AND ECONOMIC CHARACTERISTICS, *supra* note 88, at 98 tbl. 98.

174. Morales & Bonilla, *supra* note 151, at 20.



14.4 percent of South Americans.<sup>175</sup> In 1990, persons classified as "other Hispanics" (i.e., those not of Cuban, Mexican, or Puerto Rican ancestry) comprised 2.0 percent of the general population.<sup>176</sup> The percentage of first-year law students in 1994 classified by the American Bar Association as "other Hispanics" (including Cubans) was 2.9 percent.<sup>177</sup>

## 2. *The intractability of disadvantage among Latinos.*

Latinos, in the aggregate, are seriously disadvantaged compared to whites. They are far more likely than whites to live in poverty,<sup>178</sup> and their economic condition worsened in the 1980s.<sup>179</sup> Latinos are the least well educated of the major ethnic groups.<sup>180</sup> Between 1975 and 1990, Latino high school completion rates dropped by 3 percent, compared to a 12 percent increase for African Americans and a 2 percent increase for whites.<sup>181</sup> Latinos also lag in higher education. Although they constitute about 9 percent of the population of the United States,<sup>182</sup> they received only 3.1 percent of bachelors' degrees awarded in 1990.<sup>183</sup> In 1990, only 3 percent of attorneys<sup>184</sup> and 5.4 percent of first-year law students were Latino.<sup>185</sup>

Some of the gap in socioeconomic status may be due to the fact that recent immigrants account for a large proportion of the total Latino population.<sup>186</sup> The majority of Latino immigrants since 1965 have come to the United States with little education, few job skills,<sup>187</sup> and little or no command of English, all of which relegate them to low-skilled, low-wage jobs.<sup>188</sup>

175. PERSONS OF HISPANIC ORIGIN, *supra* note 162, at 163, 173 tbl. 5.

176. U.S. CENSUS, *supra* note 85, at 7 tbl. 5.

177. 1993 REV. LEGAL EDUC. U.S. 69.

178. In 1990, the poverty rate was 31.7% for Puerto Ricans, 26.3% for Mexican Americans, 14.6% for Cuban Americans, 23.8% for Central Americans (the vast majority of whom are recent immigrants), and 14.4% for South Americans. PERSONS OF HISPANIC ORIGIN, *supra* note 162, at 157, 158, 159, 163, 174 tbl. 5. In contrast, the average poverty rate was 13.1%, and the rate for whites was 8.5%. SOCIAL AND ECONOMIC CHARACTERISTICS, *supra* note 88, at 98 tbl. 98.

179. STATE OF HISPANIC AMERICA, *supra* note 150, at 8.

180. SOCIAL AND ECONOMIC CHARACTERISTICS, *supra* note 88, at 61 tbl. 61.

181. STATE OF HISPANIC AMERICA, *supra* note 150, at 8.

182. U.S. CENSUS, *supra* note 85, at 7 tbl. 5.

183. See RACE/ETHNICITY TRENDS, *supra* note 92, at 8. Latinos, except for Cuban Americans, are in general less well educated than whites: Twenty-five percent of whites above age 25 have at least a bachelor's degree, SOCIAL AND ECONOMIC CHARACTERISTICS, *supra* note 88, at 62 tbl. 62, while only 8.6% of American-born Mexicans and 9.4% of Puerto Ricans do. In contrast, Cuban Americans are fairly well educated. Twenty-six and a half percent of Cubans over the age of 25 have at least a bachelor's degree. PERSONS OF HISPANIC ORIGIN, *supra* note 162, at 81-83 tbl. 3.

184. Collins, *supra* note 86, at 8 (citing 1990 Bureau of Labor Statistics data). Latinos are also underrepresented in executive, administrative, and managerial positions. See GLASS CEILING STUDY, *supra* note 88, at 120-42.

185. 1993 REV. LEGAL EDUC. U.S. 67-70. The percentage of first-year Latino law students has grown since 1989, when it was only 3.8%. *Id.*

186. SIOBHAN & VALDIVIESCO, *supra* note 171, at 8-9.

187. For example, a study conducted in 1989 revealed that only 25% of Mexican immigrants went to school past the eighth grade in their home country. LATINO VOICES, *supra* note 158, at 150. Thirty-eight percent of Cuban immigrants went to school past the eighth grade in Cuba. *Id.*; cf. Borjas, *supra* note 49, at 9-10 (discussing Latinos' educational attainment).

188. Latino immigrants are less likely to hold managerial, professional, or administrative positions than are Latino American citizens. For example, only 4% of Mexican immigrants and 4.5% of Cuban

Immigrants do better as they acculturate to life in the United States,<sup>189</sup> and American-born Latinos are better off than the foreign-born.<sup>190</sup> Will the progeny of recent Latino immigrants move up the socioeconomic ladder?<sup>191</sup> Professor George Borjas argues that the process will be slow and may take as long as four generations.<sup>192</sup> Referring to the relative lack of success of Latino immigrants in the labor market,<sup>193</sup> he writes: "Because ethnic 'role models' matter, it is not surprising that ethnic influences reinforce the intergenerational correlation in skills, and might retard" the advancement of subsequent generations.<sup>194</sup> On the other hand, Professors LaLonde and Topel assert that while Mexican immigrants start out with lower skills and education and therefore earn less than American-born citizens, their wages increase steadily over their lifetimes.<sup>195</sup> A study of Mexican American immigrants in San Diego showed improvement in their economic position over time,<sup>196</sup> while a study of Hispanics in New York showed quite mixed results.<sup>197</sup>

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immigrants held managerial or professional positions, and only 5.6% of Mexican immigrants and 10.3% of Cuban immigrants held sales, technical, or administrative jobs. *LATINO VOICES*, *supra* note 158, at 153. On the other hand, 29.9% of Mexican American citizens and 50.4% of Cuban American citizens reported holding such jobs. *Id.* at 55. Over 70% of Mexican immigrants held jobs in the low-paying service sector, or in agriculture or manufacturing. *Id.* at 153. Forty-three percent of Cubans reported holding such jobs (41.8% were not in the labor force). *Id.* at 153.

189. For example, data from the 1990 census indicate that 29% of Mexicans in Los Angeles who immigrated before 1980 were making less than \$10,000 per year, as compared to 57% of those who immigrated after 1980. See Dunn, *supra* note 157. American-born Latinos are also more educated than are foreign-born Latinos. Of American-born Mexican Americans, 57% have at least a high school diploma, compared to only 30% of foreign-born Mexican Americans. Sixty-four percent of mainland-born Puerto Ricans have a high school diploma, compared to 40% of Puerto Ricans born in Puerto Rico. In a survey, 83% of Cubans born in the United States had a high school diploma, while only 49% of foreign-born Cubans did. *LATINO VOICES*, *supra* note 158, at 29.

190. *LATINO VOICES*, *supra* note 158, at 34.

191. Compare Robert J. LaLonde & Robert H. Topel, *The Assimilation of Immigrants in the U.S. Labor Market*, in *IMMIGRATION AND THE WORK FORCE: ECONOMIC CONSEQUENCES FOR THE UNITED STATES AND SOURCE AREAS 87-88* (George J. Borjas & Richard B. Freeman eds., 1992) (contending that newer immigrant groups assimilate into the United States labor force as successfully as could be expected) with Borjas, *supra* note 49, at 11 (contending that because newer immigrants come to the United States with poorer skills than earlier immigrant groups and live in segregated neighborhoods, their initial disadvantage is passed on to successive generations).

192. Borjas, *supra* note 49, at 11.

193. Professor Borjas estimates that newly arrived immigrants from Mexico earn 50% less than persons born here. *Id.* at 9; see also LaLonde & Topel, *supra* note 191, at 85 (comparing the earnings of newly arrived immigrants with those of native-born workers).

194. Borjas, *supra* note 49, at 11.

195. See LaLonde & Topel, *supra* note 191, at 85.

196. "The Hispanics who were U.S. citizens a generation ago, who found employment on the naval base [in San Diego] or in related government projects, now have been assimilated into the middle class. They are homeowners; significant numbers have established businesses; their children are well educated." Siobhan & Valdivieso, *supra* note 171, at 34 (comparing the socioeconomic status of Latinos in 14 cities).

197. *Id.* at 32. The authors of this study noted:

The socioeconomic status of New York's Hispanics is as diverse as their national backgrounds. While there is a growing Puerto Rican middle-class, the majority of Puerto Ricans as well as first-generation Dominicans have not achieved the educational level of other Hispanic groups in New York. They tend, therefore, to work in low-skilled jobs at low wages, although Dominicans have made a sizeable jump in occupational status from the first to the second generation. Among the other Hispanic groups in the city, educational levels are higher and the employment picture is less bleak . . . . [Although many Hispanic immigrants] experience some downward mobility upon entering the U.S., they usually regain status over time.

### 3. *Stereotypes, prejudice, and discrimination.*

Latinos were typically classified as “white” by the Jim Crow laws that existed between the end of Reconstruction and the mid-1960s, but in other contexts they were considered an inferior “race” and a threat to white racial purity.<sup>198</sup> Latinos have encountered prejudice and systematic discrimination in virtually all realms, including housing, employment, and education.<sup>199</sup> Stereotypes continue to be largely negative: Many see Latinos as lazy, lacking in initiative, unproductive, and on the dole.<sup>200</sup> Outsiders also tend not to differentiate among Latino groups or between native-born Latino Americans and recent immigrants.

The extent to which discrimination has contributed to the poverty of Latinos is open to dispute. Some social scientists attribute much of the wage differential to Latino immigrants’ lack of marketable job skills and English literacy.<sup>201</sup> Others believe that job discrimination also plays a significant role.<sup>202</sup>

### 4. *Latino identity.*

Few Latinos have much contact with members of other Latino national origin groups,<sup>203</sup> probably because different groups tend to live in different parts of the country. For this reason, perhaps, there is little pan-Latino identity. For example, more Cuban Americans, Puerto Ricans, and Mexican Americans identify themselves as white than as Latino<sup>204</sup>—although it may be a mistake

*Id.*

198. RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURALISM IN AMERICA* 330-31 (1993) (describing the nativist reaction to Mexican immigration from 1910 to 1930).

199. For example, Mexican Americans prior to World War II were the victims of de jure school and residential segregation and were effectively denied the right to vote in many parts of Texas. SKERRY, *supra* note 148, at 39, 44-45; *see also* STATE OF HISPANIC AMERICA, *supra* note 150, at 28 (describing the historical discrimination faced by Latinos in housing markets); TAKAKI, *supra* note 198, at 179 (describing political discrimination against Mexican immigrants in California and Texas).

200. LATINO VOICES, *supra* note 158, at 2; *see also* Duke, *supra* note 103 (reporting that a 1991 survey found that a majority of whites held negative views on the work ethic and patriotism of Latinos). In fact, Latinos have the highest labor force participation rate of any group. STATE OF HISPANIC AMERICA, *supra* note 150, at 14.

201. *See, e.g., id.* at 10-12, 17; Martin Carnoy, Hugh M. Daley & Raul Hinojosa Ojeda, *The Changing Position of Latinos in the U.S. Labor Market Since 1930*, in *LATINOS IN A CHANGING U.S. ECONOMY*, *supra* note 151, at 28, 44 (arguing that the wage gap for foreign-born Mexican Americans may be due to “limited English-language capability”); *see also* JENCKS, *supra* note 54, at 28, 30-31 (reporting that Hispanics other than Mexicans and Puerto Ricans made 94% of the national median income between 1972 and 1989); Borjas, *supra* note 49, at 11 (correlating skills differentials and earnings for Latinos).

202. Some studies indicate that discrimination accounts for between 10% and 18% of the income gap between Latino males and White males, and for 30%-40% of the income gap between Latinas and white females. STATE OF HISPANIC AMERICA, *supra* note 150, at 27 (citing JAMES J. FRANKLIN, *THE LACK OF HISPANIC ECONOMIC PROGRESS: PRELIMINARY OBSERVATIONS* (1984); NAOMI VERDUGO, *THE EFFECTS OF DISCRIMINATION ON THE EARNINGS OF HISPANIC WORKERS* (1982); Carnoy et al., *supra* note 201); *see Hiring Discrimination Against Young Black Men*, *supra* note 101, at 5.

203. SIOBHAN & VALDIVIESCO, *supra* note 171, at 9.

204. *Id.* at 21, 49. Cubans identified the most strongly with whites. *Id.* at 49. Peter Skerry found further evidence of cleavages within “Latino” groups. For example, in New Mexico, the descendants of Spanish colonists call themselves “Hispanos” in order to differentiate themselves from Mexican Americans. SKERRY, *supra* note 148, at 26.

to consider these categories mutually exclusive, since some think of Latino as an ethnic classification and white as a racial classification.<sup>205</sup> In any event, the members of one Latino group tend to feel little affinity for the members of others.<sup>206</sup> When asked to identify an organization that best represents their interests, a majority of each group named an organization centered around national origin, and only 6.5 percent named a panethnic organization.<sup>207</sup>

Members of Latino groups do have strong feelings of intragroup identity. They socialize largely within their own group.<sup>208</sup> A majority of both the American-born and foreign-born populations of each group feel that their fate is tied to that of other members.<sup>209</sup> Most Cubans, Mexicans, and Puerto Ricans feel a responsibility to help members of their own group advance.<sup>210</sup>

Divisions between those born in the United States and those born in other countries compound the complexity of Latino identity. A majority of Puerto Ricans, Mexicans, and Cubans believe that too many immigrants are entering the United States<sup>211</sup> and that immigrants from Latin America should not receive preferred status.<sup>212</sup> Mexican Americans born in the United States report that they feel at least as close to Anglos as they do toward recent Mexican immigrants.<sup>213</sup> Puerto Ricans, in contrast, continue to maintain close ties with the island and feel equally close to Puerto Ricans born in Puerto Rico and on the mainland.<sup>214</sup>

To the extent that Latinos face common problems of discrimination, the success of a member of one Latino group may benefit the members of other

205. SKERRY, *supra* note 148, at 9-10. Latino self-identification as white may also be an attempt to escape stereotyping and discrimination. See Haney López, *supra* note 77, at 28, 51-52.

206. LATINO VOICES, *supra* note 158, at 66-67, 69. However, 75% of Mexicans and Cubans thought that Latinos were at least "somewhat similar" culturally. *Id.* at 194. While American-born Mexicans, Cubans, and Puerto Ricans are more likely than foreign-born group members to describe themselves in pan-ethnic terms, only a small number actually do. *Id.* at 40. American-born Mexicans were the most likely to describe themselves as Latino or Hispanic (28.4%), while American-born Cubans were twice as likely to describe themselves as either Cuban (40.6%) or as American (39.3%) as to describe themselves as Latino or Hispanic (20.1%). *Id.*

207. Mexican Americans were most likely to identify with a panethnic organization (6.5% did so), followed by Puerto Ricans (4.1%) and Cubans (3.5%). *Id.* at 114.

208. *Id.* at 66-69. Eighty percent of Cuban Americans reported having "a lot" of contact with other Cuban Americans; 67% of Puerto Ricans reported having a lot of contact with other Puerto Ricans; and 52% of Mexican Americans reported having a lot of contact, and another 30% reported having some contact, with Mexican Americans. *Id.* at 67-68.

209. *Id.* at 133. Interestingly, a majority did not feel that a political representative from their own group would necessarily represent their interests any better than would anyone else. *Id.* at 138. However, the vast majority of respondents said that they would be more likely to vote for a member of their own group in a race against a white person. *Id.*

210. *Id.* at 131-33 (reporting that 55% of Cubans, 73% of Puerto Ricans, and 71% of Mexicans felt a responsibility toward other members of their national origin group).

211. *Id.* at 101. Indeed, many Mexican Americans in California favored proposition 187, the 1994 initiative to deny education and health services to undocumented immigrants. As many as 52% of Latinos favored the initiative in September 1994, although that support dropped to 22% by election day. Pamela Burdman, *A Push to Get Immigrants to Vote: Campaign to Defeat Prop. 187*, S.F. CHRON., Sept. 24, 1994, at A2; K.L. Billingsley, *California illegal-alien measure blocked by judges; 1 of 2 temporary orders cites high court's education ruling*, WASH. TIMES, Nov. 10, 1994, at A17.

212. LATINO VOICES, *supra* note 158, at 101.

213. *Id.* at 69.

214. *Id.*

groups. The existence of legal organizations such as La Raza and League of United Latin American Citizens attests to the importance and usefulness of panethnic unity in some contexts. Because national origin identification tends to be so much stronger than pan-Latino identity, however, we suspect that most of the benefits of wealth, power, and role modeling from affirmative action tend to be concentrated within the beneficiary's national origin group.

#### 5. *Implications for affirmative action.*

The number of Latino lawyers is disproportionately low, and in the absence of affirmative action, there would be few Latino students, particularly Mexican Americans and Puerto Ricans, in the nation's more selective law schools. More generally, the number of Latinos of low socioeconomic status is sufficiently large and persistent to warrant the concern that, absent extraordinary measures, their status may be perpetuated in future generations. It is difficult to pinpoint or disaggregate the causes of this status. Latinos are the objects of prejudice and discrimination, and some studies attribute as much as one-fifth of their wage disparity to discrimination.<sup>215</sup> But at least for recent immigrants, a lack of English fluency and postindustrial skills seems to be a more significant cause of low socioeconomic status.<sup>216</sup> It is also not evident that the poverty of recent Latino immigrants is intractable. Furthermore, since there is little pan-Latino identity, the scope of the multiplier effect from affirmative action is uncertain: An affirmative action program that includes members of one national origin group is far more likely to benefit members of that group than Latinos as a whole.<sup>217</sup>

Under these circumstances, the decision concerning which, if any, Latino groups to include in an affirmative action program may depend on a law school's rationales for the program and on regional demography. Whatever uncertainties there may be about the causes and long-term intractability of the disadvantaged status of Latinos, the social salience of some groups—for example, Puerto Ricans in the East and Mexican Americans in the West—speaks to the importance of their presence to the educational mission of many law schools.

#### D. *Asian Americans*

##### 1. *Who are Asian Americans?*

"Asian American" is usually understood to include persons having national origins in Japan, China, the Philippines, India, Korea, Taiwan, and Southeast

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215. See note 202 *supra*. The data we have on wage discrimination do not distinguish among different Latino groups.

216. Cf. PERSONS OF HISPANIC ORIGIN, *supra* note 162, at 150 tbl. 5 (showing that the poverty rate for Hispanic immigrants who entered the country after 1980 (32.1%) is far higher than for those who entered earlier (19.2%)).

217. To the extent that whites do not distinguish among different Latino groups, if a Mexican American attorney is able to break down some of the negative stereotypes held by whites, the benefits will accrue to, say, Puerto Ricans as well. We would hesitate to place much weight on this phenomenon, however.

Asian countries such as Cambodia and Vietnam. Many Asian American organizations, like the student organization at Stanford Law School, also include Pacific Islanders, such as Tongans, Guamanians, Hawaiians, and Samoans. Together, Asian Americans and Pacific Islanders constitute 3 percent of the population.<sup>218</sup>

Asians have immigrated to the United States for a century and a half. The Chinese first came in the nineteenth century to work on the railroads and in the mines.<sup>219</sup> The Japanese began immigrating to the United States early in the twentieth century,<sup>220</sup> and Filipino immigration began in the 1920s.<sup>221</sup> The Chinese and Filipino immigrants tended to live in urban Chinatowns<sup>222</sup> and "Manilatowns."<sup>223</sup> In contrast, until the passage of Alien Land Laws in the 1920s,<sup>224</sup> many Japanese immigrants lived and worked in rural areas.<sup>225</sup> After they were forbidden to own land, the Japanese also moved to the cities, where they formed Japantowns.<sup>226</sup> Immigrants from these nations created networks that were as separate from each other as from other Americans. They did not conceive of themselves as "Asian Americans."<sup>227</sup> In fact, during World War II, Chinese took great pains to dissociate themselves from Japanese to avoid being targets of anti-Japanese violence.<sup>228</sup>

The early Asian American immigrants encountered widespread prejudice. They could not become naturalized citizens<sup>229</sup> and were subjected to much of the same de jure discrimination as African Americans, including school segregation and antimiscegenation laws.<sup>230</sup> In addition, Japanese Americans were interned during World War II,<sup>231</sup> many lost their businesses, homes, and property, and had to start anew at the end of the war.<sup>232</sup>

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218. U.S. CENSUS, *supra* note 85, at 7 tbl. 5.

219. HYUNG-CHAN KIM, *A LEGAL HISTORY OF ASIAN AMERICANS, 1790-1990*, at 45-47 (1994).

220. BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990*, at 54, 61 (1993).

221. *Id.* at 61, 66.

222. *Id.* at 52.

223. *Id.* at 64.

224. *See id.* at 59.

225. *Id.* at 58-59.

226. *Id.* at 59-60.

227. The lack of identification among these Asian groups played into the hands of industries that employed large numbers of Asian immigrants. For example, in the early part of this century, when Japanese sugar workers in Hawaii agitated for higher wages, the sugar plantation owners recruited large numbers of Filipino workers to show the Japanese how easily replaceable they were. TAKAKI, *supra* note 198, at 253.

228. RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 370-71* (1989).

229. HING, *supra* note 220, at 23.

230. *Id.* at 45; cf. Jim Dickey, *Romeo and Juliet pair overcame prejudice, law*, SAN JOSE MERCURY NEWS, Feb. 14, 1995, at 1B, 2B (describing a California law, passed in 1933 and not repealed until 1959, prohibiting marriage between whites and Asians). At the California Constitutional Convention of 1878, an amendment was proposed (but not adopted) that would have revoked the charter of any California corporation that hired a Chinese worker. *See* 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENEED AT THE CITY OF SACRAMENTO Log of Sept. 28, 1878, at 19 (1880).

231. *See generally* PETER IRONS, *JUSTICE AT WAR* (1983).

232. TAKAKI, *supra* note 228, at 393, 404-05.

Early in this century, Americans feared that Japanese, Chinese, and Filipino immigrants were "taking over white jobs and lowering standards for wages and working conditions."<sup>233</sup> The Immigration Act of 1924,<sup>234</sup> passed in response to such fears, coupled with Philippine independence in 1934, effectively barred all Asian immigration to the United States.<sup>235</sup> These restrictions began to abate after World War II. The Immigration Act of 1965 established a uniform system for immigration from all countries.<sup>236</sup>

Most Koreans, Vietnamese, Cambodians, Hmong, and Laotians have immigrated since 1965.<sup>237</sup> The past decades have also seen an increase in immigrants from Taiwan, Hong Kong, the Philippines, and China. Natives of the Pacific Islands—mainly from Tonga, Samoa, and Guam—have also begun to immigrate, though in relatively small numbers.<sup>238</sup>

Currently, 48 percent of all immigrants to the United States come from Asian countries.<sup>239</sup> Ninety percent of Asian Americans are of Vietnamese, Filipino, Chinese, Taiwanese, Japanese, Indian, and Korean ancestry,<sup>240</sup> but the other Asian groups are growing.<sup>241</sup> A rapidly increasing percentage of Asian Americans are foreign born.<sup>242</sup>

## 2. Socioeconomic status and intractability.

American-born persons of Chinese, Japanese, and Korean ancestry are not worse off than whites in terms of economic and educational attainment,<sup>243</sup> and many are able to attend law school without the benefit of affirmative action.<sup>244</sup> Filipinos present a more mixed picture: While only 6.4 percent of Filipinos

233. *Id.* at 34.

234. Pub. L. No. 68-139, §§ 25-26, 43 Stat. 153, 166-67 (1924) (repealed 1953).

235. HING, *supra* note 220, at 32-36.

236. *See* 8 U.S.C. §§ 1101 *et seq.* (1988 & Supp. V 1993); HING, *supra* note 220, at 38-41. The 1965 Act may nonetheless have a disparate adverse impact on immigration from some Asian countries. *See id.* at 40.

237. HING, *supra* note 220, at 124-32.

238. In 1990, only 0.15% of the United States population (or 365,024 persons) was of Pacific Island origin. 1990 CENSUS, *supra* note 85, at 7 tbl. 5. This number reflects an increase of about 115,000 since 1980. *See* HARRY L. KITANO & ROGER DANIELS, *ASIAN AMERICANS: EMERGING MINORITIES* 122 (1988).

239. HING, *supra* note 220, at 1.

240. *Id.* at 14. In 1990, the United States population included 850,000 Japanese Americans, 1.65 million Chinese Americans, 1.4 million Filipino Americans, 800,000 Korean Americans, and 1.01 million Southeast Asians. Filipinos, Koreans, and Southeast Asians are the fastest growing Asian groups. By the year 2000, there will likely be over two million Filipino Americans, 1.3 million Korean Americans, and 1.575 million Southeast Asians. *See* YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* 105 (1992).

241. HING, *supra* note 220, at 14.

242. For example, 64% of all Chinese Americans are foreign born. U.S. COMMISSION ON CIVIL RIGHTS, *CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s* 14 (1992) [hereinafter *CIVIL RIGHTS ISSUES*].

243. The poverty rates for Chinese, Japanese, and Korean Americans are, respectively, 8.4%, 4.2%, and 8.6%. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, *ASIANS AND PACIFIC ISLANDERS IN THE UNITED STATES* 5 tbl. 5 (1993) [hereinafter *ASIANS AND PACIFIC ISLANDERS*]. Furthermore, 37% of all Asian Americans have at least a bachelor's degree, and 14% had a graduate or professional degree. Paul Ong & Suzanne J. Hee, *Economic Diversity, in THE STATE OF ASIAN PACIFIC AMERICA: ECONOMIC DIVERSITY, ISSUES AND POLICIES* 31, 37 (Paul Ong ed., 1994).

244. *See* Tim Evans, *Young Lawyers in Droves*, *TRANSPACIFIC*, Oct. 1994, at 36, 36-37.

live in poverty, few American-born Filipinos attend college or graduate school.<sup>245</sup>

Recent immigrants from China, Korea, Southeast Asia, and Pacific Islands are economically disadvantaged. In contrast to a white poverty rate of 8.5 percent, poverty rates for Chinese and Koreans immigrating since 1980 are 23 percent and 20.2 percent, respectively. Laotians have a poverty rate of 34.7 percent, Hmong 63.6 percent, Cambodians 42.6 percent, and Vietnamese 25.7 percent.<sup>246</sup> However, if they follow the pattern of preceding immigrant groups—including other Asians—succeeding generations will enjoy improved socioeconomic status as they acquire English and develop marketable skills. Indeed, this already appears to be the experience of Vietnamese and other Southeast Asian groups.<sup>247</sup> Southeast Asian immigrant children have done strikingly well—even in inner-city schools<sup>248</sup>—and family incomes have improved steadily after immigration.<sup>249</sup>

### 3. Stereotypes, prejudice, and discrimination.

To what extent are Asian Americans subject to contemporary prejudice and discrimination? Many whites and other non-Asians do not distinguish among Asian groups,<sup>250</sup> which helps perpetuate what is sometimes called the “model minority” stereotype. According to this stereotype, which has both positive and negative elements, Asian Americans have a good work ethic and a strong commitment to education, leading to great educational and economic success.<sup>251</sup> But while skilled in math and science,<sup>252</sup> they have low verbal abilities and

245. See *ESPIRITU*, *supra* note 240, at 107.

246. ASIANS AND PACIFIC ISLANDERS, *supra* note 243, at 148, 154-60 tbl. 5.

247. Alden E. Roberts & Paul D. Starr, *Differential Reference Group Assimilation Among Vietnamese Refugees*, in REFUGEES AS IMMIGRANTS: CAMBODIANS, LAOTIANS, AND VIETNAMESE IN AMERICA 40, 47, 51 (David W. Haines ed., 1989) [hereinafter REFUGEES AS IMMIGRANTS].

248. See John K. Whitmore, Marcella Trautmann & Nathan Caplan, *The Socio-Cultural Basis for the Economic and Educational Success of Southeast Asian Refugees (1978-1982 Arrivals)*, in REFUGEES AS IMMIGRANTS, *supra* note 247, at 121, 129-31; see also Ruben Rumbaut, *The Refugee Adaptation Process*, in REFUGEES AS IMMIGRANTS, *supra* note 247, at 238, 168-69 (showing that the grade point averages of Southeast Asian immigrant children compare favorably with those of whites).

249. See Young Yun Kim, *Personal, Social, and Economic Adaptation: 1975-1979 Arrivals in Illinois*, in REFUGEES AS IMMIGRANTS, *supra* note 247, at 86, 100.

250. See Robert S. Chang, *Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1246 n.7 (1993). The Detroit autoworkers who beat Vincent Chin to death in 1982 apparently mistook him for Japanese and blamed him for the loss of their jobs. Among other epithets, they called him a “Chink.” *Id.* at 1252; cf. HING, *supra* note 220, at 14-15 (explaining that he groups together various Asian national origin groups because they share a pattern of treatment by whites as “Asian”).

251. See TAKAKI, *supra* note 198, at 417 (describing the model minority stereotype).

252. The media have played a significant role in perpetuating this “positive” stereotype of Asian Americans. In a 1987 broadcast of *60 Minutes*, Mike Wallace highlighted Asian American academic success: “Why are Asian Americans doing so exceptionally well in school? They must be doing something right. Let’s bottle it.” TAKAKI, *supra* note 228, at 474 (quoting Wallace). Similarly, the three major newsmagazines and *Fortune* have all run lead articles on Asians as a “super minority.” See, e.g., *America’s Super Minority*, FORTUNE, Nov. 24, 1986, at 149; *Asian Americans: A ‘Model Minority,’* NEWSWEEK, Dec. 6, 1982, at 39; *Asian Americans: Are they Making the Grade?*, U.S. NEWS & WORLD REP., Apr. 2, 1984, at 41; *The Changing Face of America*, TIME, July 8, 1985, at 24.



communication skills;<sup>253</sup> they are one-dimensional “grinds,”<sup>254</sup> docile and lacking in personality and individuality.<sup>255</sup>

In addition to disguising wide variations among different Asian American groups, even the positive aspects of the model minority stereotypes are misleading. Many Asian Americans are indeed highly educated, and their income per family is higher than the national average.<sup>256</sup> But educational achievement has not necessarily translated into individual salaries commensurate with those of whites with the same level of education<sup>257</sup>—a phenomenon that may evidence wage discrimination.<sup>258</sup> And although Asian American households earn more than white households, the number of wage earners per household is higher for Asian Americans than for whites.<sup>259</sup> The negative aspects of the stereotype—which portray Asians as having poor leadership and interpersonal skills—may have contribute to a “glass ceiling” phenomenon: For all of the educational attainments of Asian Americans, they occupy disproportionately few executive<sup>260</sup> and top management positions<sup>261</sup> in American businesses.

Together with nativist prejudice, the model minority stereotype has led outsiders to resent the successes of Asian Americans, to fear being dominated by them, and in some cases to attempt to limit their success. Recently, several schools and universities have limited (or been accused of limiting) Asian “overrepresentation”—a move with a striking resemblance to quotas imposed on Jewish students earlier in the century.<sup>262</sup>

253. CIVIL RIGHTS ISSUES, *supra* note 242, at 20.

254. Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659, 663-64 (1989).

255. CIVIL RIGHTS ISSUES, *supra* note 242, at 20.

256. See Chang, *supra* note 250, at 1261-62 (citing Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1157 & n.2).

257. See *id.* at 1263.

258. Asian American men who were employed full time earned 10% less than white males, despite the fact that Asian Americans are more likely to have graduate degrees than whites. Ong & Hee, *supra* note 243, at 39-40.

259. Professor Takaki points out that white households have an average of 1.6 workers per family, as compared to 2.1 for Japanese, two for immigrant Chinese, 2.2 for immigrant Filipino, and 1.8 for immigrant Korean households. TAKAKI, *supra* note 198, at 475. Thus, the per capita income for Asians may actually be quite a bit lower than it is for whites. *Id.* Professor Takaki also argues that the data disguise the fact that the majority (59%) of Asian Americans live in three states (California, Hawaii, and New York) that have higher-than-average costs of living. Thus, adjusting for cost of living, Asians may actually make less than the national average. *Id.*

260. While Asian American males are more likely to hold “professional” positions (as classified by the census) than are white males (23% to 14%), Asian American males are less likely to hold “executive management” positions than are white males (14% to 17%). Paul Ong & Suzanne J. Hee, *Work Issues Facing Asian Pacific Americans: Labor Policy*, in THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020, at 141, 147 (1993) [hereinafter POLICY ISSUES TO THE YEAR 2020]. This discrepancy may be due to the fact that the Census classification “professional” includes small business owners, and a larger percentage of Asian Americans own small businesses than in any other racial group. HING, *supra* note 220, at 120; see GLASS CEILING STUDY, *supra* note 88, at 101-19.

261. See CIVIL RIGHTS ISSUES, *supra* note 242, at 132-33 (noting that only 0.3% of CEOs and board members of Fortune 500 companies are Asian); GLASS CEILING STUDY, *supra* note 88, at 101-19.

262. See DANA TAKAGI, RETREAT FROM RACE: ASIAN AMERICAN ADMISSIONS AND RACIAL POLITICS 29, 164-66 (1992) (discussing government investigations of Harvard, Brown, and UCLA); Selena Dong, Note, “Too Many Asians”: *The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027, 1031-34 (1995) (describing the controversy over an admissions ceiling for Chinese Americans at a San Francisco high school); Tsuang, *supra* note

Discrimination does not readily account for the disadvantaged status of recent immigrants, however. As Professors Kitano and Daniels note,

The conditions of [Southeast Asian] emigration—panic; inadequate time; little planning; problems in transit; life in temporary centers; then entrance into a modern, industrial society—would strain the adaptive capabilities of most individuals. . . . The problem for Pacific Islanders is more socio-cultural than based on discrimination and oppression. . . . [T]heir numbers are and small and their resources too slim to develop a structurally separate [and economically viable community].<sup>263</sup>

#### 4. “Asian American” identity.

The members of the various Asian national origin groups differ in virtually every respect one can imagine: national origin, history, language, religion, other aspects of culture, and appearance. Some groups, such as the Japanese and Koreans, harbor mutual animosities rooted in historical conflicts that pitted their countries of origin against each other. Pacific Islanders have radically different cultures from Asians. Moreover, as we indicated above, different Asian groups have had widely varying success in American society: Chinese, Korean, and Japanese Americans—especially those whose families have been in the United States for several generations—have done well, while Southeast Asian and Pacific Island immigrants “suffer disadvantages based on language barriers, lack of educational and occupational status and low income.”<sup>264</sup>

Do individuals from different Asian groups view themselves as “Asian Americans”? Bill Ong Hing observes that the diversity of Asian Americans is the “most obvious challenge to the formation of a single Asian American ethnicity or identity.”<sup>265</sup> American-born Japanese and Chinese Americans are the most likely to think of themselves as Asian Americans,<sup>266</sup> while recent immigrant groups greet pan-Asian movements with indifference or hostility.<sup>267</sup> Recent Chinese immigrants tend not to see themselves as Asian Americans—or indeed, as Americans at all—but as Chinese.<sup>268</sup> Filipinos, who have been in the United States for a long time and still immigrate in large numbers, are generally averse to pan-Asian organizations because they fear their interests

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254, at 672 (describing the University of California’s attempt to curb Asian enrollment in the late 1980s).

263. KITANO & DANIELS, *supra* note 238, at 133.

264. *Id.*

265. HING, *supra* note 220, at 171.

266. See ESPIRITU, *supra* note 240, at 29 (finding that third-generation Chinese and Japanese Americans are the most receptive to a pan-Asian identity because they share a common language and common experiences as “Asians” in the United States and because historical animosities have faded). Espiritu also reports that there is a great deal of intermarriage among Asians from different ethnic groups, in distinct contrast to Latinos, who marry whites but not Latinos outside of their national origin group. *Id.* at 27, 168; cf. HING, *supra* note 220, at 181 (“[T]he so-called new Asian American ethnic identity must be limited to those like myself—those middle class, American-born Chinese or Japanese Americans with exposure to an array of community issues and similar educational experience.”).

267. ESPIRITU *supra* note 240, at 50.

268. HING, *supra* note 220, at 178.

will be subordinated to those of the more powerful and successful Japanese and Chinese Americans.<sup>269</sup>

Professor Hing nonetheless suggests that Asian Americans are united by a “sense of a shared background and culture. . . . For some it flows from having been immigrants”;<sup>270</sup> for others, it comes from having similar “racial features in a predominately white society” or being treated in the same fashion by the “mainstream.”<sup>271</sup> Issues of immigration policy or anti-Asian violence, which affect many Asian groups, may lead to “Asian American” coalitions.<sup>272</sup> Indeed, various advocacy organizations—for example, the Asian American Legal Defense and Education Fund, the Asian Bar Association, the Asian Law Caucus, the Asian Business League, and the Asian Pacific Advocacy and Resource Council—explicitly address Asian American issues, and sometimes address issues of concern to Pacific Islanders.

To the extent that lawyers and other professionals have a panethnic identity, the growing number of lawyers and other professionals of East Asian descent (that is, Japanese, Chinese, and Korean American) may use their power to protect the members of disadvantaged subgroups.<sup>273</sup> And to the extent that outsiders treat “Asian Americans” as a single group, the success of any Asian American will—for better or worse—affect outsiders’ perceptions of Asians from disadvantaged subgroups. As we discussed above, however, Asian and Pacific Island subgroups—including immigrants arriving at different times from the same country of origin<sup>274</sup>—are distinct from one another culturally, economically, and linguistically. Whether one focuses on role modeling or the infusion of economic benefits into a poor community, the success of a subgroup member will likely benefit other members of her subgroup more than the success of an Asian American from a different group.

##### 5. *Implications for affirmative action.*

Over the last decade, the number of Asian American law students has grown from 1.7 percent to 5.5 percent and appears to be still on the rise. The

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269. *ESPIRITU*, *supra* note 240, at 104. Although many Filipinos are highly educated, they are less well off than Japanese and Chinese Americans, *id.* at 32, and also less well represented in colleges and graduate school. *Id.* at 107. Thus, Filipinos have had a powerful “economic incentive to separate themselves from the Asian American rubric.” *Id.*

270. *HING*, *supra* note 220, at 175.

271. *Id.*

272. *Id.* at 177.

273. American-born Japanese and Chinese Americans are the groups most likely to attend law schools absent affirmative action policies, to think of themselves as “Asian,” and to staff Asian American legal advocacy organizations. *Id.* at 177. Professor Hing writes:

The idea that Japanese and Chinese Americans view themselves, or are viewed by others, as spokespersons for Vietnamese or Asian Indians is troubling. All too often, the agenda in these settings has been given a Japanese and/or Chinese American emphasis, amounting to virtually a de facto incorporation or loss of identity for other Asian Americans. [The experiences of Japanese and Chinese Americans] cannot duplicate the Vietnamese refugee, Asian Indian, Korean, or Pacific Islander immigrant experience.

*Id.*

274. For example, third generation Chinese and Japanese Americans say they have more in common with each other than they do with Japanese from Japan or recent Chinese immigrants. *ESPIRITU*, *supra* note 240, at 27.

large majority of these students are Chinese, Korean, or Japanese Americans.<sup>275</sup> To the extent that the status of recent immigrants is tractable and improves over time, one would expect more group members to attend professional schools. In any event, a law school might consider it educationally valuable to have students or faculty members from disadvantaged Southeast Asian or Pacific Island groups—especially groups whose cultures are quite different from those of most others at the school and who by virtue of size or the school's geographic locale may be of significance in the professional lives of its graduates. Whether this calls for a formal affirmative action program or simply being on the lookout for such candidates depends on the school's assessment of its needs and of its pool of prospects.

### E. *The Alternative of Class-Based Affirmative Action*

Some critics of race-based affirmative action have advocated the alternative of preferential admissions for applicants from disadvantaged backgrounds.<sup>276</sup> One might adopt an affirmative action program based on socioeconomic status for either of two reasons. First, without regard to the effect it has on particular racial or ethnic groups, one might believe that a class-based program serves important educational and justice-related goals. Second, because race correlates with class, one might expect that a class-based program would ensure the presence of racial minorities in academic institutions without all of the legal, political, and moral baggage of race-based preferences.

Legal education benefits from the presence of individuals from diverse socioeconomic backgrounds. Legal policies play a tremendous role in the distribution of wealth and power, and it is important that lawyers—who make, change, and implement those policies—appreciate their social and economic effects.<sup>277</sup> While the views of people from disadvantaged backgrounds are important to law, however, they do not substitute for the experience of being a member of a minority racial or ethnic group. Moreover, affirmative action based on class is more problematic in terms of the corrective and distributive justice rationales. For one thing, without knowing more about about a candi-

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275. Cf. L. Ling-chi Wang, *Trends in Admissions for Asian Americans in Colleges and Universities: Higher Education Policy*, in POLICY ISSUES TO THE YEAR 2020, *supra* note 260, at 49, 55.

276. See, e.g., DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 251-53 (1991); Richard Kahlenberg, *Class Not Race*, *NEW REPUBLIC*, Apr. 3, 1995, at 21.

277. The point was eloquently made by Justice Marshall in his dissent in *United States v. Kras*, 409 U.S. 434 (1973), from the Court's decision not to require the waiver of the \$50 filing fee for an indigent bankruptcy petitioner. In response to the majority's statement that the petitioner could pay in installments of \$1.28—"less than the price of a movie and little more than the cost of a pack or two of cigarettes," *id.* at 449, Justice Marshall wrote:

It may be easy for some people to think that weekly savings of \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. . . . A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never get a movie . . . .

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.

*Id.* at 460 (Marshall, J., dissenting).

date other than her socioeconomic status, it is implausible to attribute her disadvantage to discrimination. More importantly, the implementation of the justice-related rationales depend on what we have called the multiplier effect: Candidates are not granted preferences to benefit them as individuals but to benefit other, less advantaged members of their group. The multiplier effect requires a sense of group identity that, at least in contemporary American society, does not converge around class.

What would be the likely racial impact of an affirmative action program based solely on socioeconomic class? Although the minority groups encompassed by most race-based affirmative action programs are on average poorer than whites, many more whites apply to law school.<sup>278</sup> Thus, were socioeconomic status the only basis for granting preferences, a school would likely have to enroll a number of disadvantaged white students—perhaps somewhere between two and eight—to enroll one disadvantaged African American student.<sup>279</sup> Class-based programs seem to us an inefficient means for achieving the goals of affirmative action described in this article:<sup>280</sup> Affirmative action is not likely to have much of a multiplier effect for whites or along class lines. Furthermore, a class-based program would exclude many minority candidates who themselves are not especially disadvantaged but who might be able to benefit disadvantaged members of their group.

In sum, while a school that finds that its normal admissions process does not yield a significant number of students from disadvantaged backgrounds may wish to adopt an affirmative action program based on socioeconomic status, we doubt that such a program alone would ensure the significant presence of African Americans or members of some other minority groups.

## V. CONCLUSION

A law school's affirmative action program for admissions or faculty appointments may be premised on any of three rationales: (1) the educational benefits of a diverse student body and faculty; (2) corrective justice, or compensation for discrimination against the members of a group; or (3) distributive

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278. Cf. 1993 REV. LEGAL EDUC. U.S. 67-70 (showing that of first-year law students, 81% are white, while 19% are from minority groups). There are also more poor whites than there are poor persons from other racial or ethnic groups. About 45% of all persons living in poverty are white, 30% are African American, 20% are Latino, and 4% are Asian or Pacific Islander, and 1% are Native American. See SOCIAL AND ECONOMIC CHARACTERISTICS, *supra* note 88, tbls. 94-98 (derived data).

279. We base this on CENTER FOR EDUCATION STATISTICS, NATIONAL EDUCATION LONGITUDINAL STUDY OF 1988 (NELS 88), SECOND FOLLOW-UP: STUDENT COMPONENT MANUAL (1994). Additional information might be gleaned from CENTER FOR EDUCATION STATISTICS, HIGH SCHOOL AND BEYOND (1986). Our efforts to be more precise have persuaded us of the complexity of the relevant empirical inquiry, and we leave it to others.

280. Proponents of class-based affirmative action may be invoking a different rationale from any we have discussed in this article: that an educational institution should reward individual applicants who have made achievements in the face of severe disadvantage. But it is not obvious that affirmative action is necessary or even appropriate to achieve this goal, especially because admissions committees commonly take into account a candidate's having overcome various kinds of hardships in predicting his or her future performance.

justice, designed to ensure that no group is significantly and intractably disadvantaged.

These rationales are independent and interrelated in the following ways: An affirmative action program might be premised exclusively on the educational rationale, without any concern for corrective or distributive justice. However, a particular group's underrepresentation and its salience to a school's educational mission may be related to the group's subordinate status in society, which in turn may be the result of discrimination. A program might be premised on the distributive rationale without concern either for corrective justice or for the educational benefits of diversity. However, some theorists believe that only the obligation to correct past injustices provides the moral justification necessary to overcome the presumption against race-based measures. Likewise, a program might be premised on the corrective rationale without regard for the educational benefits of diversity. Unless it is a purely symbolic gesture, however, a corrective program must embrace the basic assumptions underlying the distributive rationale—that an affirmative action program will have beneficial multiplier effects.

The application of each of the three rationales depends on empirical assumptions that may vary depending on the particular individuals, groups, and institutions involved. The educational rationale requires that the presence of members of the particular minority group in fact contribute to an institution's research teaching or mission. The corrective justice rationale requires that the disadvantaged status of a particular group be, to a significant extent, the result of discrimination. The distributive rationale requires that the benefits conferred on a preferred candidate have positive multiplier effects for disadvantaged members of his or her group. To the extent that an affirmative action admissions program increases the number of successful graduates of a particular minority group, it may have two sorts of multiplier effects. First, the presence of graduates in positions of power and prestige enables them to help other group members—by protecting and advancing the group's interests, by providing economic and social leadership for minority organizations and communities, and by serving as examples for younger group members. Second, the visible achievements of group members may reduce outsiders' prejudice against the group.

Most of these empirical determinations cannot be made with anything approaching certainty. When all is said and done, the data marshaled above can do little beyond informing one's intuitions on some very fundamental questions. As is often true with respect to matters of law and policy, the allocation of the burden of proof makes all the difference.

African Americans are the paradigmatic group for affirmative action, an extraordinary remedy which was designed to ameliorate the legacy of a history of slavery and pervasive discrimination against them based on their race—a legacy that persists today. Other groups also have suffered from widespread prejudice and mistreatment; other groups have shared identities imposed from without and experienced from within; other groups have populations that are seriously disadvantaged—some, perhaps, intractably so; and many other

groups certainly are salient to contemporary American life. But no other group compares to African Americans in the confluence of the characteristics that argue for inclusion in affirmative action programs.

This does not imply that affirmative action programs need be limited to African Americans. However, in view of the vast number of groups and subgroups that are arguable candidates for such programs, it suggests that policy-makers may reasonably come to different conclusions about which groups to include, and that different institutions may appropriately decide to focus on different groups, based, for example, on the demography of the region. To decide not to include a particular group in an affirmative action program does not entail complacency about its members' circumstances. The alternative to affirmative action is not to do nothing to ameliorate the plight of the truly disadvantaged—whatever the sources of their situation—but to employ remedies that do not valorize racial or ethnic identity.