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**A Badge of Inferiority:
One Law Student's Story of a Racially Hostile Educational
Environment**

KENDRA FOX-DAVIS*

INTRODUCTION

In 1967, my father was one of four African American students in the entering first year class at the University of Iowa School of Law. My father had journeyed from a historically black college in North Carolina to the Midwest because of a targeted outreach and admission effort for minority students. Before classes started, an associate dean met with my father to discuss faculty reactions to presence of "special admit" students. He was told that the admissions program had been a source of substantial faculty debate, and that some faculty members were still unreceptive to the program. One day, an outspoken conservative professor asked my father to stand up in class and answer a question. My father, not unlike other white students in his class, gave an answer that was apparently incomplete. The professor gestured at my father with a look of disgust. "You see, class?" he said, "this is one the concerns we had admitting minority students who didn't meet our standards."

Nearly four decades later, I was one of fifteen African American students in the class of 2006 at the University of California Los Angeles School of Law (UCLAW). I was admitted to the Critical Race Studies Program (CRS) and the Program in Public Interest Law and Policy (PILP). Before arriving on campus, I received an informational package in the mail from the CRS program. The package included Los Angeles Times editorial

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*B.A. University of California, Los Angeles, 2003, J.D. UCLA School of Law, specializing in Critical Race Studies and Public Interest Law and Policy, 2006. Currently a Staff Attorney at the Lawyers' Committee for Civil Rights of the San Francisco Bay Area. This article is based on a paper written during my third year at UCLA School of Law. It reflects my experiences as an African-American student placed in Professor Richard Sander's property course in 2004, as he advocated against the admission of African-American students he deemed to be unqualified, and prepared to publish his anti-affirmative action article, *A Systematic Analysis of Affirmative Action in Law Schools*.

written by Professor Richard Sander, a member of the law school faculty. The editorial criticized CRS as a “back-door” affirmative action program that admitted unqualified students of color to the law school. After arriving on campus, I learned Professor Sander was conducting a study of African American law student performance as part of an anti-affirmative action paper. I thought of my father’s professor, and hoped I wouldn’t be taught by a faculty member who had already determined I was intellectually unfit to learn beside my white classmates.

As fate would have it, I was one of four African Americans and several CRS students placed in Professor Sander’s first year property course. Every day that I was in Professor Sander’s class, I felt my race was on trial. I alternated between feeling angry, intimidated, and disconnected. These feelings were common amongst other students of color in the class. One the last day of instruction, as we entered our final exam study period, he offered us a draft of his anti-affirmative action paper. It posited, among other things, that African American students were intellectually unprepared for the academic rigor at top law schools and would be better off without affirmative action, and at second tier institutions. He did not have to point a finger, or offer me up for public ridicule as my father’s professor had done forty years before. The message was the same: you are unqualified, undeserving, and intellectually inferior.

This paper explores the role of faculty scholarship in creating and maintaining a racially hostile educational environment. Part I outlines the basic legal framework for Title VI racially hostile environment claims and examines how faculty scholarship may constitute racial harassment. Part II discusses the hostile environment created at UCLAW by Professor Sander’s racially demeaning scholarship and the university’s intentional failure to remedy that environment. Part III suggests remedial and proactive actions the University administration could take to address our institution’s racial environment with minimal impact on the free speech rights of racist faculty. Part IV concludes.

I ground my analysis in my own experience as a Black woman student in the Critical Race Studies Program. At the outset, I should state that I am not advocating for content-based restrictions on faculty speech. I do, however, believe that my law school should follow both the letter and spirit of anti-discrimination laws. When a faculty member’s scholarship degrades and demeans the intellectual capacity of students of color, the university must act to protect the both the interests of minority students and its own educational mission. When, as I argue is the case at UCLAW, the administration intentionally fails to take remedial action, students of color can and should utilize Title VI to enforce our right to an equal education.

I. Title VI and the Racially Hostile Environment

A. Hostile Environment Claims

Title VI prohibits recipients of federal funding from discriminating on the basis of race, color or national origin.¹ The Act provides in relevant part:

[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 601 of Title VI's prohibits intentional discrimination based on race, color, or national origin in covered programs and activities.² Section 602 authorizes federal agencies to effectuate section 601 by issuing rules, regulations, or orders of general applicability which are consistent with achieving the objectives of the statute.³

The section 602 regulations promulgated by the Department of Education (DOE) provide that a school violates Title VI when (1) there is a racially hostile environment; (2) the district had notice of the problem; and (3) it failed to respond adequately to redress the racially hostile environment.⁴

¹ See 42 U.S.C. § 2000d.

² In *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001), the Supreme Court held that Congress intended to provide a private cause of action for individuals alleging intentional discrimination under section 601, but that no "freestanding" private right of action existed to enforce section 602 regulations. *Id.* at 293. Pre-*Sandoval*, courts treated the DOE regulations discussed above as conferring an independent right of action for racially hostile environment. See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998); see also *Davison ex rel. Sims v. Santa Barbara High Sch. Dist.*, 48 F.Supp.2d 1225, 1228-29 (C.D. Cal. 1998). The first circuit court to address the viability of a hostile environment claim in light of *Sandoval* determined that deliberate indifference to a racially hostile educational environment may constitute intentional discrimination. See *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 931 (10th Cir. 2003) (holding genuine issue of material fact existed regarding allegation that school officials intentionally failed to respond to hostile racial environment).

³ *Id.* at 288-89.

⁴ *Monteiro*, 158 F.3d at 1033 (quoting *Racial Incidences and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11448-01, 11449) (Mar. 10, 1994); See *Davison*, 48 F.Supp.2d at 1229 (citing *Racial Incidences and*

Under these regulations, a school cannot cause, encourage, accept, tolerate, or fail to remedy a racially hostile environment of which it has actual or constructive notice.⁵ Once on notice of a racially hostile environment, an institution must take reasonable steps to eliminate it in a timely and effective manner.⁶ A plaintiff alleging a racially hostile educational environment must demonstrate that the institution: (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school.⁷

Title VI hostile educational environment cases typically involve elementary and secondary school students. There are several reasons for the lack of hostile environment claims at the collegiate level. First, the age and experience of the plaintiff is taken into account when evaluating the severity of hostile environment claims.⁸ Younger students may be regarded as more impressionable and thus susceptible to the harms created by racial harassment.⁹ It may also be true that students at the collegiate level have greater agency to organize and directly challenge school administrators and faculty. Responses to racial harassment may therefore be more likely to take the form of direct advocacy than litigation. Additionally, overt racial harassment may be channeled through an institution's own disciplinary proceedings.

Although racially hostile environment claims are less frequent at the university level, racial harassment is common. More recently, evidence of racially hostile environments has recently been utilized to defend the use of affirmative action in law school admissions.¹⁰ Title VI's prohibition against racial discrimination applies with equal force at the post-secondary level, where, although age and experience may increase a student's maturity, racial discrimination still has the power to undermine the learning environment.

B. Understanding Racial Harassment

I began this paper with the story of my father's law school professor in part because it comports with common conceptions of racially

Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448) (Mar. 10, 1994).

⁵ See 59 Fed. Reg. 11449.

⁶ See 59 Fed. Reg. 11450.

⁷ *Bryant*, 334 F.3d at 934.

⁸ See 59 Fed. Reg. 11449.

⁹ *Id.*

¹⁰ See *Grutter v. Bollinger*, 137 F.Supp.2d 821, 859-60 (E.D. Mich. 2001).

discriminatory behavior. My father's professor acted overtly and subjected him to demeaning and unequal treatment on the basis of his membership in a racial group. This type of unequal treatment is easily recognizable as offensive and inappropriate. Harassment in forms other than overt behavior may fail to resonate as racist or offensive, particularly for white students and faculty in white-dominated institutions.¹¹

Students of color experience contemporary racism in myriad of other forms. A recent study of the campus climate at the University of Michigan Law School found that the majority of experiences students of color described as racial harassment involved subtle, covert racial incidents.¹² A racially hostile environment will not always be constructed through the use of racial epithets or physical violence. Contemporary hostile environments involve an aggregation of day-to-day actions that subtly denigrate the accomplishments and capacities of people along racial/ethnic lines.¹³

Expanding our understanding of the type of actions that encompass racial harassment is crucial to fashioning effective remedies. The advent of more sophisticated and subtle forms of discrimination requires broader inquiry into all actions that may contribute to a hostile racial environment, including those that appear to be race neutral.¹⁴ A comprehensive and realistic understanding of harassment must therefore include any action that produces or maintains a group's dominance through the degradation of a targeted individual or group.¹⁵

II. The Racially Hostile Environment at UCLA

Attempting to prove the intellectual inferiority of Blacks is hardly a new endeavor.¹⁶ In the university environment, faculty scholarship that

¹¹ See Darryl Brown, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 341 (1990).

¹² Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity, and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 277 (2001).

¹³ *Id.* at 184-85.

¹⁴ See *Cardenas v. Massey*, 269 F.3d 251, 262 (3rd Cir. 2001).

¹⁵ Elizabeth M. Iglesias et al., *Labor and Employment in the Academy – A Critical Look at the Ivory Tower: Proceedings of the 2002 Annual Meeting of the Association of American Law Schools, Joint Program of the Section on Labor Relations and Employment Law and Section Minority Groups*, 6 EMP. RTS. & EMP. POL'Y J. 129, 178 (2002).

¹⁶ Purported scholarship directed at proving Black intellectual inferiority includes Arthur Jensen's 1969 *Harvard Educational Review* article, which asserted educational programs targeting Black youth would fail due to Blacks having substantially lower

promotes notions of racial inferiority negatively impacts the racial climate by creating a hostile environment for targeted racial groups. Though less overt than Governor Wallace's stance in the schoolhouse door, this type of scholarship is its own form of racial harassment. Consider the following incident, described by Professor Charles Lawrence in *Words That Wound*:

A student walks into class and sees this written on the blackboard: "A mind is a terrible thing to waste, especially on a nigger."¹⁷

The incident described above occurred at the University of Michigan and was reported in the Chicago Tribune. Like my father's experience in law school, it involves an overt racist assertion of intellectual inferiority. If one of the professors at UCLAW had written these words on the blackboard, Black students may have had an easier time convincing our administration and colleagues that a hostile environment both existed and required a response. Instead of a racist slur, we were subjected to racially demeaning scholarship by Professor Richard Sander that questioned our intellectual capacity. I do not suggest that Professor Sander's work and the overt, racist incident described above are *the same*, but I do believe there are significant parallels. The similarities are these: both single out Black students, both derive their power from entrenched ideas of racial inferiority, and both utilized the very environment we are dependent upon for intellectual growth as a forum to degrade our competence.

A. Professor Sander's Racially Demeaning Scholarship

In June of 2003, Professor Sander published an editorial in the Los Angeles Times in which he argued that unqualified students of color were being admitted to UCLA Law School through the Critical Race Studies Program.¹⁸ "Students who apply to the program are, not surprisingly, much more likely to be nonwhite than UCLA law applicants in general. Of these applicants, those who are black or Latino are much more likely to receive the

IQ's than whites, and more recently Charles Murray and Richard Herrnstein's controversial book *THE BELL CURVE*.

¹⁷ Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 55 (1993) (citing an example of racial hostility at the University of Michigan as reported in the Chicago Tribune).

¹⁸ Richard Sander, *Colleges Will Just Disguise Racial Quotas*, L.A. TIMES, June 30, 2003.

staggering numerical boosts that push them into the admissible pool.” He further asserted that the Critical Race Studies program was an example “of a pervasive pattern at the University of California” of “academic programs rigging their admissions systems to admit underrepresented minorities with lower scores and weaker qualifications through the back door.”

Professor Sander was also featured in a Wall Street Journal article, where he asserted CRS admissions “allowed very small numbers of underrepresented minorities with weak qualifications [to be] admitted through back door.”¹⁹ According to Professor Sander, CRS is an avenue for the law school to continue providing race based admissions “preferences” to unqualified students of color, in violation of California state law banning racial preferences.

The editorials were followed in 2005 by an article published in the *Stanford Law Review* entitled *A Systematic Analysis of Affirmative Action in American Law Schools*.²⁰ In the article, Professor Sander asserts that affirmative action enables Black students with lower standardized test scores and grade point averages to attend top tier law schools where we are academically “mismatched” in comparison to white students. He argues the effect of this “mismatch” is that Black students are unable to keep up with the academic rigor we encounter in majority white classrooms, resulting in lower first year grades, and ultimately lower bar passage rates.

A logical extension of Professor Sander’s theory is that Black students admitted through “back door” affirmative action policies like UCLA’s CRS program suffer from the same intellectual “mismatch” and are similarly unprepared to compete with our white colleagues at UCLA. The elimination of affirmative action, Professor Sander contends, would place Black students in second tier institutions, where we could compete in the comfort of a less academically challenging environment. Not surprisingly, the article received widespread attention both within and outside of the legal community.

Professor Sander’s attack on the qualifications of CRS students and his “mismatch” theory denigrates intellectual capacity of students of color and asserts that we are less competent than white students. According to Professor Sander, Black students fail to perform at the level of whites not due to any outside factors, such as an alienating racial environment, but because we are incapable of keeping up. It is the inherent intellectual inferiority of Black students, admitted through affirmative action or under the guise of

¹⁹ Golden, Daniel, *Case Study: Schools Find Ways To Achieve Diversity Without Key Tool*, WALL ST. J., June 20, 2003.

²⁰ Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 367-483 (2004).

other “back door” programs like CRS, which produces lower academic performance. His work stamped Black students, and particularly those of us enrolled in the CRS program, with a badge of inferiority that we carried into our classrooms, job interviews, and professional networks.

B. Proving a Title VI Claim Against UCLAW

Title VI requires plaintiffs alleging a racially hostile educational environment to prove that school officials knew and were deliberately indifferent to severe and pervasive racial harassment which deprived the victim of access to the educational benefits or opportunities provided by the school.²¹ UCLA’s administration received numerous complaints from students regarding the racially hostile environment created by Professor Sander’s actions and failed to provide an adequate remedy. This failure deprived Black students and students of color in the CRS program of equal access to the benefits and opportunities provided to our white colleagues.

An institution is placed on actual notice of a hostile environment once a student lodges a racial harassment complaint.²² Moreover, school officials may be placed on notice of a racially hostile environment prior to the incident that gives rise to the legal complaint.²³ UCLAW’s administration was placed on notice of the racially hostile environment created by Professor Sander’s actions by direct complaints, lodged by individual students and student organizations over a three-year period.

Following the publication of Professor Sander’s editorial in the Los Angeles Times, student of color organizations and faculty voiced concern that the article was an illegitimate attack on the academic qualifications of students of color and undermined the learning environment for CRS students. The Black Law Student Association (BLSA) sent a letter to UCLAW’s top administrators, urging a public response in support of the CRS program:

[Professor Sander’s] comments questioned the academic integrity of the CRS program, undermined the academic

²¹ See *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003); see also *Racial Incidences and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11449 (Mar. 10, 1994).

²² See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998).

²³ See *Davison ex rel. Sims v. Santa Barbara High Sch. Dist.*, 48 F.Supp.2d 1225, 1227 (C.D. Cal. 1998) (complaint by local NAACP chapter lodged two years prior to lawsuit placed school administrators on notice of racial harassment of African American students).

achievements of prospective and current CRS students and marginalized the already embattled students associated with it.

We do not seek to silence Professor Sander or any person who may share his opinion of the CRS Concentration.... Rather, we are disappointed by the UCLA School of Law administration's silence on the matter. As the body that seeks to provide a learning environment conducive for all students, we hope that you keep students of color, as well as those associated with the CRS program in mind as you continue to foster a healthy academic environment for current and future students of the law. Nevertheless, our concern is that the administration's silence on Professor Sander's views of CRS signals complicity...

To students of color, and CRS students, your silence may imply that the School of Law does not value the contributions of the program or those associated with the program.

BLSA met on two occasions with UCLAW administrators, once with Dean Norman Abrams and again with Associate Deans Barbara Varat, Alison Anderson, and Elizabeth Cheadle, who refused to release a public statement in support for the program and the intellectual capacity of its students. In support of the program and its students, CRS faculty member Jerry Kang authored a response editorial.

In the following year, BLSA and a coalition of CRS students continued to press the administration to publicly defend the CRS program and the intellectual competence of its students. Their demand for an institutional response was influenced by the anticipated impact of Professor Sander's anti-affirmative action article. It was public knowledge that this article would focus on Black student "underperformance." BLSA and other student groups repeatedly tried to convince the law school administrators that the article would have a detrimental impact on the learning environment for students of color and that an institutional response was necessary.

Following the article's publication, CRS faculty convened a meeting of students to discuss its immediate impact on Black students and students of color in general. Black students in particular expressed outrage and frustration at being subjected to Professor Sander's degrading assertions of intellectual inferiority. A coalition of student of color organizations began another round of meetings with the law school's new Dean, Michael Schill, to

discuss the article's impact on student morale and academic performance. Alumni of color also contacted UCLAW's dean and faculty to express concern with the increasingly isolating and hostile racial environment.

In addition to direct student complaints, UCLAW's administration was aware that the elimination of affirmative action and its own discriminatory admissions policies left Black and Latina/o students particularly vulnerable to racial discrimination. The combined effect of Proposition 209, the statewide ban on race-conscious admissions policies, and the continued overemphasis on the LSAT in the admissions process, had resulted in a near disappearance of Black students and a severe decline in the numbers of Latina/o students.²⁴ In 2002, UCLAW Professor Cheryl Harris wrote this account of the university environment:

The precipitous and wrenching effect of this decline cannot be overstated; it has fundamentally changed the character of the institution.... One of my first classes at the law school was a class of forty students in which there was no racial majority as between white, Black, Latina/o, and Asian students. In the graduating class of 1997 (the class admitted in 1994) no racial group constituted a majority. This was no utopia but was an extraordinary environment in which to learn and teach.... Today the total number of Black students is less than twenty out of roughly 950 students.²⁵

UCLAW students vigorously contested both the abolition of affirmative action and the university's implementation of discriminatory admissions policies.²⁶ A central concern raised in student protests was the detrimental impact low numbers would have on student of color performance and professional achievement. This point was exemplified by the testimony of Crystal James, a UCLAW student who provided her account of racial isolation in *Gutter v. Bollinger*.

Ms. James entered UCLA in 1999, three years after the passage of Proposition 209, which banned state-sponsored affirmative action and racial preferences in California. She

²⁴ Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1226 (2002).

²⁵ *Id.*

²⁶ For a review of the history of affirmative action in UCLAW admissions, see Albert Y. Muratsuchi, *Race, Class, and UCLA School of Law Admissions 1967-1994*, 16 CHICANO-LATINO L. REV. 90 (1995).

testified that she was shocked to discover that she was one of only two African American law students in her entering class of 300. Ms. James [felt] isolated and believe[d] that students and teachers expect[ed] her to represent the “black viewpoint” when racial issues [were] discussed. She also... experienced a loss of self-confidence and optimism, and a decline in her academic performance, which she attribute[d] to her racial isolation and to subtle forms of racism on campus.... In sum, Ms. James testified that the loss of affirmative action in California has resulted in far fewer underrepresented minority students being admitted to prestigious state universities such as UCLA and Berkeley, and that those who are admitted feel isolated and defeated.²⁷

As our institution’s recent history demonstrates, UCLAW’s racial environment was at issue prior to the publication of Professor Sander’s damaging editorial and article. This arguably severed constructive notice of racial tension and should have heightened our administration’s responsiveness to student complaints regarding the impact of Professor Sander’s work. Once on notice, our administration had an obligation under Title VI to intervene, investigate, and develop a reasonable remedy.²⁸ The Law School failed to meet this obligation.

Once on actual or constructive notice of the problem, an institution has a legal duty to take reasonable steps to eliminate a racially hostile environment.²⁹ An institution is liable for its failure to act if the need for intervention was so obvious, or if inaction was so likely to result in discrimination, that “it can be said to have been deliberately indifferent to the need.”³⁰ Deliberate indifference can be found when a response to known harassment is “clearly unreasonable” in light of known circumstances.³¹ Plaintiffs have successfully stated a claim for deliberate indifference when they have alleged that school officials ignored complaints or where inadequate responses failed to protect victims from continued harassment.³²

²⁷ *Grutter v. Bollinger*, 137 F.Supp.2d 821, 856-857 (E.D. Mich. 2001).

²⁸ *See* *Racial Incidences and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11449 (Mar. 10, 1994).

²⁹ *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998).

³⁰ *Id.* (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989)).

³¹ *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. at 649 (1999).

³² *See* *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 933 (10th Cir. 2003); *see also Monteiro*, 158 F.3d at 1034.

UCLA's administration had responded to Professor Sander's Los Angeles Times editorial with a deafening silence. Despite repeated requests by student of color organizations to make a public statement in support of the qualifications and competency of students in the CRS program, the administration took no action. This silence sent a clear, devastating message to students of color in the CRS program and to the broader university community. It confirmed the editorial's assertion that Black and Latina/o students in the CRS program were academically unqualified and undeserving of our place in the law school.

Despite the institution's intractable silence, the impending publication of Professor Sander's article prompted student groups to begin another round of meetings with Dean Schill. BLSA, the Latino/a Law Students Association (La Raza), and other student organizations met with the Dean over the course of the semester preceding the article's publication. They voiced the negative impact another article deriding minority achievement and intellect would have on student of color morale and performance.

In response, the Dean sent a single email to all students, affirming the law school's commitment to diversity. The majority of the text from this email follows below:

As many of you are aware, Professor Richard Sander of our faculty has authored a study that examines affirmative action in American law schools. The article will be published later this month in the Stanford Law Review. The article contains an econometric analysis of how African American law school students perform in law schools, on bar exams and in the employment market.

Professor Sander has contributed importantly to the debate on affirmative action through his research. As with all empirical work, people will have different views concerning the quality of his data, the assumptions he makes and the way in which he has specified his model. I hope that the work will spark students and social scientists both here and across the nation to test both the robustness of his findings and the validity of alternative hypotheses.

Regardless of these findings, Professor Sander's work does not, for a moment, cause me to question the value and contributions of our Law School's students of color. Since coming to the law school... I have been overwhelmed by how much our diverse student body contributes to the

lifeblood of this institution. The rich variety of perspectives that all of our students provide us with strengthens us and, in itself, contributes immeasurably to the educational mission of this institution. The importance of diversity of all types – racial, ethnic, ideological – cannot be underestimated in an institution that produces people who will become our nation’s future leaders...

As a way of furthering the objective of using the publication of Professor Sander’s article as a learning experience, I have consulted with a number of faculty members and student groups about the appropriate venue to debate the points made in the piece. Because of the impending examination schedule and holiday season, we have decided to hold a panel discussion with Professor Sander in early January. This session will be co-sponsored with student groups and will also include experts who will discuss and critique both the article’s methodology and policy suggestions. I hope that as many of you as possible will be able to attend.³³

Although this email was a step in the right direction, it was a single step that did not match, in depth or breadth, the damage done to our university’s environment. Students returned from winter break to a deluge of newspaper and journal articles debating the legitimacy of Professor Sander’s assertions. CRS faculty attempted to shield Black students from reporters, who were looking to interview living embodiments of Black underachievement. That reporters were interested at all in interviewing Black students at UCLAW, an institution that did not even use affirmative action in its own admissions, illustrates that degree to which the article imprinted all Black students with a badge of inferiority.

As the email itself suggests, the Dean was aware that the article’s assertions cast doubt on the qualifications and legitimacy of UCLAW’s student of color community. Student groups pressed for a public discussion whose audience would involve students, faculty, alumni, and the broader legal community in discussing not only the content of the article but its impact on the racial environment at UCLAW. This forum did not materialize. Instead, Professor Sander organized a brief panel debate between himself and a colleague that focused exclusively on the article’s research methodology. Faculty members met behind closed doors with Professor Sander in a

³³ Email from Michael Schill, Dean, UCLA School of Law, to the UCLA Law faculty, staff, and students, (Nov. 5, 2004, 12:08pm) (on file with author).

discussion that also centered on the legitimacy of his empirical data. The CRS program sponsored a discussion of racial environment that included an interrogation of conceptions of merit in admissions policies. But at no time did UCLAW's administration organize a public discussion of the hostile racial environment created by Professor Sander's actions. There was no public, institutional effort to address the ramifications of his article on the academic, social, and professional lives of UCLAW's students of color, other than the Dean's email affirmation of diversity.

As Title VI's regulations make clear, just *any* response is not an *adequate* response.³⁴ Deliberate indifference may be found where school officials respond to racial harassment complaints in an inadequate manner that exposes victims to continued harassment.³⁵ An appropriate response is one that is both timely and "tailored to redress fully the specific problems experienced at the institution."³⁶ Additionally, an institution's response should reasonably calculated to prevent recurrence and ensure that students are not restricted in their participation or educational benefits as a result of the hostile environment.³⁷ An examination of UCLAW's administration's response fails to meet this standard.

The response to Professor Sander's attack on CRS students was clearly inadequate. This negative impact of the administration's indifference was exacerbated by their decision to place entering first-year CRS students in Professor Sander's property course, which exposed us to continued racial harassment and degradation. We were forced to receive instruction from a professor who had publicly denounced our admission to the law school and who had characterized us as unqualified on the basis of our race. The Dean's email failed to fully redress the problems students of color were and are experiencing as a result of the hostile educational environment. As discussed in the following section, Professor Sander's work has negatively impacted student academic performance, faculty relationships, and professional opportunities. A single email could not and did not remedy the negative ramifications the article unleashed on the academic, social, and professional lives of UCLAW's Black students and students of color in the CRS program.

Given the administration's indifference the hostile environment, it is not surprising that the racial climate at UCLAW continued its downward spiral in the wake of Professor Sander's article. Black enrollees dropped by

³⁴ Racial Incidences and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11454 (Mar. 10, 1994).

³⁵ Nicole M. ex rel. Jacqueline M. v. Martinez Unified Sch. Dist., 964 F.Supp 1369, 1372 (N.D. Cal. 1997).

³⁶ See 59 Fed. Reg. 11454.

³⁷ *Id.*

approximately fifty percent, from 13 in the class of 2007 to only six in the class of 2008. Fifty-four years after *Brown v. Board of Education*, UCLAW had one Black woman in a class of over three hundred students.

III. Title VI Remedies

Professor Sander's scholarship created a hostile environment that was both severe and pervasive. The Ninth Circuit has held that racial harassment creates a hostile environment if it is sufficiently severe that it would interfere with the educational program of a reasonable person of the same age and race as the victim.³⁸

A court's evaluation of whether harassing conduct rises to the requisite level of severity, pervasiveness, and offensiveness is context specific.³⁹ DOE regulations provide that the context, nature, and duration of racial incidents, among other factors, should be considered in a hostile environment investigation.⁴⁰ Further, the regulations direct investigators to consider the identity and relationships of the persons involved, "[f]or example, racially based conduct by a teacher, even an "off-duty" teacher, may have a greater impact on a student than the same conduct by a school maintenance worker or another student."⁴¹ A consideration of these factors demonstrates that Professor Sander's racially demeaning scholarship can fairly be characterized as severe racial harassment.

A. Institutional Context

The institutional context at UCLAW makes Black students particularly vulnerable to the negative impact of racial harassment. Students of color often experience law school environments as hostile environment where they feel alienated, isolated, devalued and attacked.⁴² As previously discussed, this generally unwelcoming environment was exacerbated at UCLAW by the statewide elimination of affirmative action and the law school's continued adherence to racially discriminatory admissions policies.

Additionally, the lack of faculty of color at UCLAW heightens the negative impact of racially demeaning scholarship. The presence of faculty of color demonstrates that people of color are capable of reaching the highest

³⁸ See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998).

³⁹ 59 Fed. Reg. 11449.

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² Allen & Solórzano, *supra* note 12, at 238.

echelons of academic achievement.⁴³ Their absence removes there the institutional counterweight to racist assertions of intellectual inferiority.

A lack of minority faculty also demonstrates an institutional hostility towards people of color that is reflected in the institution's treatment of minority students.⁴⁴ The failure to recruit, employ, and promote to tenure a critical mass of minority faculty is closely associated with the inability or unwillingness to expend the energy and resources needed to recruit, retain, and graduate significant numbers of minority students.⁴⁵ Faculty of color can counter the racial discrimination students of color may encounter from other faculty, staff, and employers by providing academic guidance and access to professional networks. Without faculty of color, students of color are more susceptible to the academic and professional repercussions of racial discrimination and harassment.

B. Nature of Racially Demeaning Scholarship

The nature of the Professor Sander's message adds to the severity of its impact on Black students and other students of color. The power of racist messages is derived from its historical and cultural context.⁴⁶ The idea of Black intellectual inferiority is deeply entrenched in our national consciousness. Efforts to prove Black intellectual inferiority have preoccupied social scientists and have included measuring differences in our cranial shape, IQ tests, and other evidence that meets the societal standard of objectivity. The negative impact of Professor Sander's work is amplified by this history of racial domination. As Professor Mari Matsuda explains,

At some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth. The idea is improbable and abhorrent, but because it is presented repeatedly, it is there before us. "Those people" are lazy, dirty, sexualized, money grubbing, dishonest, inscrutable, we are told. We reject the idea, but the next time

⁴³ *Id.* at 255.

⁴⁴ Stephanie Y. Brown, *Millennium Showdown for Public Interest Law and Non-White Access to Public Higher Education: Wolves Circling at the Henhouse Door*, 7 UDC/DCSL L. Rev. 1, 32 (2003).

⁴⁵ *Id.* at 37-8.

⁴⁶ Mari J. Matsuda, *Introduction to WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 8 (1993).

we sit next to one of “those people”, the dirt message, the sex message, is triggered.⁴⁷

Regardless of Professor Sander’s intention, the social meaning of the work he has produced is that Black students are intellectual inferior and are unqualified to enter the legal profession through the same doors as white students. This meaning resonates with conscious or unconscious racist beliefs widely held by society and increases the severity of its impact on Black students and other students of color.⁴⁸

C. Scope and Duration

In addition, Professor Sander’s racially demeaning scholarship pervaded all aspects of student life for CRS students at UCLAW. His allegations regarding the qualifications of CRS students negatively impacted our ability to be respected by our colleagues, integrated into classroom discussions, student organizations and study groups, and undermined our ability to become a part of the intellectual fabric of the law school. It is not unreasonable to expect that his editorial has also influenced the way employers view CRS students. Professor Sander’s racially demeaning assertions may have also impacted the perceptions of other faculty who CRS students must rely on for letters of recommendation, intellectual and professional development.

The lasting impact of racial stigma was at the core of the Supreme Court’s ruling in *Brown v. Board of Education*.⁴⁹ Manifestations of white superiority, particularly those affirmed in educational environments, “generates a feeling of inferiority as to [Blacks] status in the community that may affect the hearts and minds in a way unlikely ever to be undone.”⁵⁰

D. Relationship Between Students and Faculty

Further, the negative impact of Professor Sander’s work was heightened by his influence as a UCLAW faculty member. Faculty influence extends well beyond the classroom, as they are “both the gatekeepers and

⁴⁷ Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 25 (1993).

⁴⁸ See Lawrence, *supra* note 17, at 59.

⁴⁹ *Id.*

⁵⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

molders of the profession”.⁵¹ Students rely on faculty for far more than classroom instruction. Faculty members influence students’ professional opportunities by writing letters of recommendation, introducing students to professional networks, and sponsoring academic projects. Interaction with faculty members, particularly faculty critique of student academic performance, shapes a student’s perception of their own intellectual and professional potential. The faculty-student dynamic heightens the detrimental impact of Professor Sander’s racially demeaning scholarship.

Three of the Black students placed in Professor Sander’s first year property course were in the CRS program. It is hardly debatable that a faculty member’s assertion his students were academically unqualified for admission would impact the classroom environment.

Students of color enrolled in Professor Sander’s property course describe it as an isolating environment where they believed their intellectual capacity was questioned on the basis of race. As one student of color enrolled in Professor Sander’s class commented, “even though UCLA no longer used affirmative action strategies, I felt like there was still a question regarding our intellectual capacity. It seemed that [Professor Sander] believed that people of color, especially Black students, did not truly belong.”

Another colleague stated that Sander’s articles sent students of color the message that “[w]e are incapable, inferior and do not belong at elite law schools.” Another Black student described the impact on her performance as follows: “The fear of reproducing the stereotype and confirming Sander’s racist research ultimately compromised my performance in his course.”

A consideration of the full context of Professor Sander’s actions and the environment at UCLAW demonstrates that students of color have been subjected to severe and pervasive racial harassment. As the following section details, this harassment denied its victims equal access to education.

E. Deprivation of Educational Benefits or Opportunities

A plaintiff must also prove that the harassing conduct deprived her of access to educational benefit or opportunities.⁵² One way in which racial harassment may deny educational benefits is by negatively affecting academic performance.⁵³ However, an institution’s educational benefits and opportunities are not limited to academic achievement. The benefits offered

⁵¹ Cecil J. Hunt, II, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 776 (1996).

⁵² See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998).

⁵³ See *id.* at 1032.

by legal education, particularly at prestigious universities, includes the opportunity to develop relationships with faculty, create legal scholarship, build professional networks, and gain employment.

Deliberate indifference to racial harassment deprives students of equal access to the full range of these benefits and opportunities. As the Ninth Circuit opined: "It does not take an educational psychologist to conclude that... being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts."⁵⁴ Professor Sander's racially demeaning work robbed students of color of the opportunity to learn, compete, and succeed free of racialized harassment and hostility.

Professor Sander's actions deprived CRS students of the assumption of academic excellence enjoyed by other students admitted to UCLA law school. Beyond the impact on CRS students, his research reinforced racially discriminatory stereotypes that affected all underrepresented students. As one law professor commented in a forum addressing the law school environment, "Stated bluntly, many, if not most, law professors and deans believe that students of color have writing, reasoning, and motivation problems... what lies what lies beneath is a false and pernicious belief in the limited academic ability of most applicants and students of color."⁵⁵ Professor Sander's article provided a vehicle for faculty and staff to discriminate against students of color by legitimizing discriminatory stereotypes about minority student performance.

Further, Professor Sander's work has robbed students of color of the opportunity to be treated as individuals by members of the legal community, particularly other law school faculty. Researchers in a recent study of the environment at University of Michigan Law School found that students of color feel that they are responsible for representing their race every time they succeed or fail.⁵⁶ Further, the researchers found that students of color felt that they were not afforded the privilege to be seen as a positive individual in the midst of overwhelmingly negative ideas about their race.⁵⁷ By making broad generalizations about the intellectual incompetence of students of color in the CRS program and Black students, Professor Sander has stripped us of

⁵⁴ See *id.* at 1034.

⁵⁵ Elizabeth M. Iglesias et al., *Labor and Employment in the Academy – A Critical Look at the Ivory Tower: Proceedings of the 2002 Annual Meeting of the Association of American Law Schools, Joint Program of the Section on Labor Relations and Employment Law and Section Minority Groups*, 6 EMP. RTS. & EMP. POL'Y J. 129, 168 (2002).

⁵⁶ Allen & Solórzano, *supra* note 12, at 278.

⁵⁷ *Id.*

our individuality and our opportunity to learn, make mistakes, and develop free of group stereotypes.

Moreover, Professor Sander's actions may tangibly impact the grades students of color receive. When students feel alienated and perceive their environment as hostile, their educational experiences and outcomes are negatively affected.⁵⁸ One way to understand the impact of Professor Sander's work is through the lens of "stereotype threat"- the fear of being viewed through the lens of a negative stereotype.⁵⁹ Professor Claude Steele's studies suggest that the fear of confirming negative racial stereotypes of intellectual inferiority operate to depress academic performance of achievement-oriented students.⁶⁰

CRS students placed in Professor Sander's course were forced to perform in a high-stakes environment with an instructor who had publicly derided our intellectual capacity. A student's learning experience is adversely affected when they feel an instructor does not value their contributions.⁶¹ The experience of one CRS student of color in Professor Sander's class illustrates the detrimental effect of his work on student performance:

I made a commitment to myself to get the most out of my property course regardless of the instructor's ideology. Notwithstanding that commitment, I believe the "Stereotype Threat" infiltrated my experience in property and spilled over into my remaining courses. I feared reproducing the illustrations of Black intellectual inferiority that Sander alludes to in his articles. The fear of reproducing the stereotype and confirming Sander's racist research ultimately compromised my performance in his course.

By asserting students of color in CRS and Black students are intellectually inferior to white students, Professor Sander has fostered an environment where students of color are more likely to fail.

Furthermore, the negative repercussions of Professor Sander's work have extended beyond the immediate law school community. After his editorial was published in the Los Angeles Times, a Black CRS colleague was asked by an interviewing firm if she had been admitted into CRS as a first year

⁵⁸ *Id.* at 238.

⁵⁹ Claude Steele, *Stereotype Threat and African-American Student Achievement*, in YOUNG, GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS 109 (2003).

⁶⁰ *Id.* at 121.

⁶¹ *Id.* at 774.

student, or had opted to enroll in the program after her first year. The consequence of her answer was clear – if she had been admitted her first year, she was one of those unqualified students who had made it through the “back-door” admissions program. To the extent that his work has restricted employment opportunities for students of color at UCLA, Professor Sander has deprived us of an additional educational benefit enjoyed by other UCLA students.

In sum, Professor Sander’s racially demeaning scholarship has resulted in the denial of educational benefits and opportunities for targeted students. His work has compromised academic our performance, undermined our ability to build relationships with other students, faculty, and staff, and polluted the racial environment at UCLAW. This harm cannot be adequately addressed by anything short of a comprehensive review of the racial climate at UCLAW and an institutional commitment to following both the letter and the spirit anti-discrimination laws.

An adequate response to Professor Sander’s actions could have involved engaging the targeted student communities in decision making bodies, such as admissions committees, that have the power to influence the institutional environment, a public affirmation of the intellectual capacity of students of color to employers, and greater support for programs like CRS that serve to counter institutionalized racism. Students like myself, who were involuntarily assigned to Professor Sander’s class, should have had an opportunity to transfer to another property course.⁶²

UCLAW’s recalcitrance was undoubtedly influenced by First Amendment concerns. The courts have protected speech that is merely “offensive,” and rejected the imposition of discipline where it unreasonably

⁶² Cary Nelson, President of the American Association of University Professors, recently commented that students who have been subjected to a racialized pre-judgment regarding their intellectual deficiencies should be able to opt change classes:

There is simply no excuse for compelling a student to be in that kind of hostile educational environment. Students should have the ability to opt out of the course.... There’s no notion of Academic Freedom in my mind that gives someone the right to view a student from the outset as a less effective competitor in the class.... [In such situations, students] are at risk of not being judged in a fair and objective manner.

infringes on a faculty member's First Amendment rights.⁶³ Title VI regulations are also mindful of First Amendment protections.⁶⁴ Certainly there are many options a university might explore, short of doing nothing, that both respect the First Amendment's rights of faculty members and the rights of its students to learn in an environment free of race discrimination.

Professor Sander's defenders have argued that it was not his intent to undermine students of color. Professor Sander even shared with our class his personal story of raising a bi-racial Black son. But his personal motivations made little difference to us, the students he had targeted by race and publicly assailed as unqualified. Focusing on Professor Sander's personal ideology enabled the larger community of UCLAW faculty to sidestep their role in maintaining an environment free of race discrimination. While many faculty members participated in debates regarding Professor Sander's methodology, few outside of the CRS and public interest programs engaged in a direct discussion with student of color organizations that were advocating for an institutional response.

The interests of the small, embattled community of Black students at UCLAW and the university do converge. Our university has an interest in graduating the next generation of prominent legal scholars, practitioners, and policymakers. A hostile racial environment undermines these interests. Cultivating an environment where all students can realize their full potential enhances the intellectual environment at the law school, attracting other high-caliber students and faculty. And, in an era of declining state support, graduating high-achieving students of color can only increase the base of alumni who may provide financial support for their alma mater. Despite our joint interests, and in the face of continued efforts by Professor Sander to

⁶³ See Arthur L. Coleman and Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom From Discrimination on University Campuses*, 23 J.C. & U.L. 91, 115-120 (1996).

⁶⁴ See Racial Incidences and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11449 (Mar. 10, 1994), explaining:

Of course, OCR cannot endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment to the United States Constitution. Examples of possible elements of appropriate responsive action include imposition of disciplinary measures, development and dissemination of a policy prohibiting racial harassment, provision of grievance or complaint procedures, implementation of racial awareness training, and provision of counseling for the victims of racial harassment.

prove and expand the influence of his “mismatch theory”, a comprehensive remedy has yet to materialize.

IV. Conclusion

In *Plessy v. Ferguson*, Justice Brown argued that if racial segregation “stamps the colored race with a badge of inferiority... it is... but solely because the colored race chooses to put that construction upon it.”⁶⁵ Similarly, many of Professor Sander’s defenders have argued that Black students at UCLA chose to construct racial harassment out of neutral research. But we did not choose to be discriminated against. Professor Sander chose us. Engaging the framework and protections of Title VI might have made it more difficult for our administration to ignore and exacerbate the environment Professor Sander created. Students facing this type of racially hostile environment can and should make a legal intervention. Despite Professor Sanders’ dire predictions, we have, at least, learned how to do that.

⁶⁵ 163 U.S. 537, 551 (1896).