

MISMATCHED OR COUNTED OUT? WHAT'S MISSING FROM MISMATCH THEORY AND WHY IT MATTERS

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INTRODUCTION

Judges, legal scholars, and policymakers alike are all citing the logic of “mismatch theory” to argue that race-conscious college admissions plans should be abandoned notwithstanding their continued constitutionality.¹ To use a term coined by journalist and best-selling author, Malcolm Gladwell, mismatch theory has “tipped,”² having been cited in sources ranging from Supreme Court opinions to *New York Times* editorials.³ To be sure, mismatch theory has its critics, who largely focus on either assailing its empirical proof or rejecting its

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1 See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2431–32 (2013) (Thomas, J., concurring) (relying on mismatch theory to oppose race-conscious admissions); Richard D. Kahlenberg (with Halley Potter), *A Better Affirmative Action: State Universities That Created Alternatives To Racial Preferences*, THE CENTURY FOUNDATION, 27, 29–30 (2012) (citing Richard Sander’s work to critique the use of racial preferences to support the use of socioeconomic rather than racial preferences); Mark Nadel, *Retargeting Affirmative Action: A Program To Serve Those Most Harmed By Past Racism and Avoid Intractable Problems Triggered By Per Se Racial Preferences*, 80 ST. JOHN’S L. REV. 323, 354–56 (2006); Dan Slater, *Does Affirmative Action Do What It Should?*, N.Y. TIMES, March 17, 2013 (Sunday Review), at 1.

2 MALCOLM GLADWELL, *THE TIPPING POINT* (2000); see also *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) (arguing that race-conscious admissions programs are detrimental to the students that they purport to assist). But see *Fisher*, 133 S. Ct. at 2417–19 (affirming the constitutionality of race-conscious admissions in pursuit of student body diversity notwithstanding arguments regarding mismatch presented by Sander and Taylor as *amici*).

3 See RICHARD SANDER AND STUART TAYLOR, JR., *MISMATCH: WHY AFFIRMATIVE ACTION HURTS THE STUDENTS IT’S INTENDED TO HELP AND WHY UNIVERSITIES WON’T ADMIT IT* 38 (2012) (acknowledging that “mismatch theory” did not gain traction when it was first posed in the mid-1990’s by social scientists Rogers Elliot and A.C. Strata); see also *supra* note 1.

prescriptive claims on normative grounds.⁴ Few, however, have tried to situate “mismatch theory” within the larger body of empirical data and scholarship addressing the issues to which mismatch theory is ostensibly directed. Mismatch theory attempts to answer important questions—namely, are race-conscious admissions plans harmful to underrepresented minority students (“URMS”);⁵ in particular, are URMS admitted under race-conscious admissions plans more likely to have poor outcomes (both academic and professional) because they have been admitted with academic credentials weaker than their same-school peers? The problem with mismatch theory is not its answer to these questions per se, but the fact that it attempts to answer these questions in a vacuum, isolated from a host of interdisciplinary research and scholarship that bears directly on these questions and

4 See, e.g., Matthew M. Chingos, *Are Minority Students Harmed by Affirmative Action? The Brown Center Chalkboard*, THE BROOKINGS INSTITUTION (Mar. 7, 2013), available at <http://www.brookings.edu/research/papers/2013/03/07-supreme-court-chingos> (questioning whether affirmative action harms minority students); Matthew M. Chingos, *Redirecting Students to Less Demanding Colleges Not a Strategy for Success in the Sciences*, *The Brown Center Chalkboard*, THE BROOKINGS INSTITUTION (Mar. 13, 2013), available at <http://www.brookings.edu/research/papers/2013/03/13-science-minorities-chingos> (arguing that there is no reliable data supporting mismatch theory); James E. Coleman, Jr. & Mitu Gulati, *A Response to Richard Sander: Is It Really All About the Grades?*, 84 N.C.L. REV. 1823, 1825–27 (2006) (arguing that mismatch theory is harmful because it contributes to stereotypes); André Douglas Pond Cummings, “Open Water”: *Affirmative Action, Mismatch Theory and Swarming Predators—A Response to Richard Sander*, 44 BRANDEIS L. J. 795, 801–05 (2006) (stating that mismatch theory is flawed because it does not engage in a root cause analysis of the performance gap between minority and non-minority students); Richard Delgado, *Rodrigo’s Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637, 644–46 (2007) (asserting that mismatch theory is an inadequate model for explaining differences in grades); Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch in Legal Education: The Systemic Flaws in Richard Sander’s Affirmative Action Study*, J. BLACKS HIGHER EDUC. (2005) (discussing the harmful effects of ending affirmative action programs); Daniel E. Ho, *Affirmative Action’s Affirmative Actions: A Reply to Sander*, 114 YALE L. J. 2011 (2005) (noting methodological flaws in mismatch analysis); Darrell D. Jackson, *Sander, The Mismatch Theory, and Affirmative Action: Critiquing the Absence of Praxis in Policy*, 89 DENV. U. L. REV. 245, 252–68 (2011) (outlining various critiques of mismatch theory); Richard Lempert, *University of Michigan Bar Passage 2004–2006: A Failure to Replicate Professor Sander’s Results, with Implications for Affirmative Action*, (U. Mich. Law & Econ. Research Paper No. 12-013, 2012), available at <http://ssrn.com/abstract=2120063> (asserting that data used to support mismatch theory is flawed).

5 The term “underrepresented minority students” (“URMS”) has been widely adopted in the literature addressing race-conscious admissions plans, “racial preferences,” and/or affirmative action programs. This term is commonly used and understood to include black and Hispanic students. Although Native American students are underrepresented in college, their numbers are often too small to include in the data concerning URMS. Additionally, Asian Americans are excluded from this reference because, notwithstanding their population status as a minority, they are not generally underrepresented among college students.

offers important insights, for which mismatch theory does not account. Mismatch theory's isolation from the rich store of data and research in the fields of cognitive and developmental psychology is problematic given the intersections between this research and the claims on which mismatch theory is based. Its failure to explore or largely even acknowledge these intersections undermines its force and, when viewed in the context of this more robust data and research, renders it incomplete. This Article explores the interdisciplinary research and scholarship that mismatch theory ignores, draws important connections between these two bodies of research, and suggests that mismatch theory cannot offer a useful prescription for how to answer the question of whether race-conscious admissions plans are harmful to URMS, or understand why URMS tend to have poor academic outcomes relative to their same-school peers, without the benefit of this broader interdisciplinary perspective. Mismatch theory investigates only one question—how do academic credentials influence URMS' likelihood of academic success, prospects for college admission, and subsequent academic performance—but leaves other important questions unanswered. In particular, this Article poses several additional and equally critical inquiries: what other credentials, beyond academics, predict academic success and/or bear on admissions decisions, and what other factors, beyond a student's individual credentials, affect academic performance?

According to mismatch theory, race-conscious college admissions plans are harmful to URMS, and they ought to be severely curtailed, if not altogether abandoned because (due to “large racial preferences,” particularly by the most selective colleges and universities) they result in URMS attending selective colleges and universities where their academic skills are outmatched by those of their peers, causing URMS to underperform academically, and possibly even resulting in stunted professional development.⁶ This Article suggests that mismatch theory offers an incomplete picture of the complex and variable processes affecting race-conscious college admissions in general, and the problem of URMS' academic underperformance specifically. As a result of mismatch theory's narrow focus on academic credentials, to the exclusion of other relevant factors influencing both students' prospects for success or admission and subsequent

⁶ See Richard Sander's discussion of how poor grades in law school stunt later professional development in Peter Arcidiacono, et al., *A Conversation on the Nature, Effects, and Future of Affirmative Action in Higher Education Admissions*, 17 U. PA. J. CONST. L., at 699–700 (2014) (stating that grades are as determinative of both initial success and eventual employment as law school elitence).

academic performance, the policy prescriptions derived from it are inadequate for resolving the problems to which it is directed. This Article attempts to identify the array of factors beyond academic credentials that might also influence a student's likelihood of success, prospects for college admission, and academic performance that might help to more fully explain the relationship between race-conscious admissions programs on the one hand, and the phenomenon of URMS' academic underperformance on the other hand, for which mismatch theory fails to account. An exploration of the empirical data and research concerning these factors and their impact on URMS' academic performance demonstrates why these additional inquiries, otherwise missing from mismatch theory, ought to be incorporated into the debate about the propriety of race-conscious admissions plans and inform how we structure the policy prescriptions that follow.

Part I of this Article examines the competing evidence and alternate theories found in the social science literature that challenge mismatch theory's treatment of academic credentials as central both to predictions about URMS' academic performance in the admissions process, as well as the actual academic underperformance of URMS. These alternate explanations suggest alternate solutions for how to better predict academic performance for URMS and better support the academic success of URMS. Part II then considers these alternate solutions and explains why they are necessary to understanding and addressing the problem of racial and ethnic disparities in academic performance at the post-secondary level by demonstrating the success of these solutions in various post-secondary contexts. Finally, Part III imagines and responds to a rejoinder in favor of mismatch theory.

I. UNPACKING THE CLAIMS OF MISMATCH THEORY: LEARNING, COMPETITION, AND SOCIAL MISMATCH

The most recent and prominent expositors of "mismatch theory" are Richard Sander and Stuart Taylor, Jr., who together (scholar and journalist, respectively) authored a book in 2012 for popular consumption aptly titled *Mismatch: Why Affirmative Action Hurts the Students It's Intended to Help, and Why Universities Won't Admit It*.⁷ The title

⁷ See SANDER & TAYLOR, JR., *supra* note 3, at 3–4 (defining the term "mismatch"). This book contains a useful synthesis of the empirical data underlying mismatch theory's claims. *Id.* at 16–26. (laying out the empirical foundation for mismatch). This data is largely based on the work of Sander, and other empiricists, but not Taylor, who is a journalist and not an empiricist. See *id.* at 308–10 (citations to Sander). So, the theory itself can and has

itself goes a long way toward explaining their thesis, which posits that whatever may be the intended benefits of race-conscious college admissions plans, those benefits cannot outweigh the significant harms incurred to the intended beneficiaries of race-conscious admissions plans, who are presumed to be URMS.⁸ According to Sander and Taylor's "mismatch theory," the harm of these race-conscious admissions plans is that they involve "large racial preferences,"⁹ employed

been largely attributed to Sander, rather than Taylor. However, because citations throughout are to the co-authored book and not the underlying research on which the book is based, the theory as referenced will be attributed to Sander and Taylor jointly, even though Taylor could be viewed as only a proponent of the theory, rather than its author. See also Richard Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 369–70 (2004) (discussing the worse performance of students who are admitted to elite schools based on "racial preferences"); Richard Sander & Stuart Taylor, Jr., *The Painful Truth About Affirmative Action*, THE ATLANTIC, Oct. 20, 2012, www.theatlantic.com/national/print/2012/10/the-painful-truth-about-affirmative-action/263122/ (asserting that race-based affirmative action policies have deleterious effects, most especially on minority students (their intended beneficiaries), notwithstanding their continued use by university administrators).

- ⁸ SANDER & TAYLOR, JR., *supra* note 3, at xi (asserting racial admissions preferences often undermine the success of the people they are intended to help); see also Sander & Taylor, *The Painful Truth*, *supra* note 7, at 2 (defining the "single biggest problem" associated with racial preferences as their "tendency...to boomerang and harm their intended beneficiaries."). However, given the wide-ranging benefits of "student body diversity" cited in support of race-conscious admissions plans by universities, including both the University of Michigan in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and the University of Texas in *Fisher v. University of Texas at Austin*, 631 F.3d 213 (2011), *remanded to 133 S. Ct. 2411* (2013), it may be erroneous to think of URMS as either the sole or exclusive intended beneficiaries of these plans. In fact, none of the reasons that have been cited in support of "student body diversity" seem to inure exclusively or even specifically to the benefit of URMS. Nevertheless, this Article assumes that race-conscious admissions plans, even if they are not intended solely or exclusively for their benefit, should benefit URMS at least as much as any other beneficiary of student body diversity, and should not incur any undue harm to URMS.
- ⁹ Although the term race-conscious admissions plans and racial preferences or "large racial preferences" are often used interchangeably by Sander and Taylor, the two are not necessarily synonymous. Compare SANDER & TAYLOR, JR., *supra* note 3, at xvii (defining "racial preferences" as programs that allocate college admissions . . . based partly on the race of a candidate"), with SANDER & TAYLOR, JR., *supra* note 3, at xviii (defining "large [racial] preferences" as "a preference that is equivalent to adding 80 or more points to the academic index of an applicant"). Race-conscious admissions plans consider race as one of many factors in determining individual admissions to selective colleges and universities, and they have been upheld as constitutional when employed as part of a holistic review process to remedy an institution's own past discrimination. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307, 314–15 (1978). While recognized by the Court as capable of justifying a race-conscious college admission plan, this interest has rarely been proffered and has never been successful in sustaining the use of race in college admissions to achieve student body diversity. *Grutter*, 539 U.S. at 328. This interest was proffered in each of the three cases decided by the Court since *Bakke* and was successful in justifying the race-conscious college admissions plans in two of those cases. Racial

most aggressively by the nation's most selective colleges and universities, which results in URMS being admitted to schools where their academic credentials are weaker than those of their same-school peers.¹⁰ This gap in academic credentials, they assert, lowers URMS' prospects for academic and even future professional success.¹¹ Notwithstanding the calls of many for the wholesale abandonment of race-conscious admissions plans based on this "mismatch theory," Sander and Taylor themselves offer a more restrained prescription, advocating only for a reduction in the size of these "large racial preferences" and an increase in transparency surrounding their use.¹² These solutions, according to Sander and Taylor, would generate better matches between URMS' academic credentials and the academic rigor of the institutions they attend—both because fewer URMS would be admitted to institutions to which they are academically unsuited, and of those, even fewer would choose to attend if given transparent information about their prospects for future academic and profes-

preference and most particularly "large racial preferences," as that term has been used by Sander and Taylor, refers to the statistical probability that an applicant of a particular racial or ethnic group will be admitted to a selective college or university because of his or her race or ethnicity over a similarly situated applicant of a different race or ethnicity. See SANDER & TAYLOR, JR., *supra* note 3, at xviii; see also THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL 93 (2009) (defining admissions preferences by race in terms of the size in statistical probability of admission with blacks demonstrating the largest preference by size). It is easy to conflate the individualized consideration of race as a part of race-conscious admissions with the statistical phenomenon of "racial preferences" when looking at admissions decisions in the aggregate. When admissions decisions are disaggregated, however, evidence that applicants who are not members of a statistically favored racial or ethnic group are nevertheless admitted to selective colleges and universities over similarly or more qualified applicants who are members of a statistically favored racial or ethnic group belies the operation of systematic racial preferences as a part of race-conscious admissions plans. See *Grutter* 539 U.S. at 338 (noting that non-minorities were admitted over more qualified underrepresented minority applicants, belying the operation of a systematic racial preference). This suggests that the increased statistical probability of admission for URMS is not an inevitable feature of race-conscious admissions plans, and it is unclear the extent to which Sander and Taylor would assail race-conscious admissions plans if they did not produce this statistical effect when considered in the aggregate.

10 See SANDER & TAYLOR, JR. *supra* note 3, at 17 (defining credentials gaps in terms of a "300-point black-white gap on the current SAT I test and a 0.4 GPA gap in high school grades").

11 *Id.* at 60 (concluding that "mismatch in law school was roughly doubling the rate at which blacks failed bar exams" thereby impairing students long-term career prospects).

12 Notably, Sander and Taylor forego the suggestion of abandoning race-conscious admissions plans largely because they believe such a prescription would be ignored by colleges and universities and/or would engender a tacit, and perhaps even more pernicious, form of "racial preferences." See *id.* at 171.

sional success.¹³ But even Sander and Taylor's more restrained policy prescriptions may be inadequate to address the problems of URMS' academic underperformance at selective colleges and universities.¹⁴ The problem with mismatch theory is not necessarily that it is unsupported by the data, or that it is unjustified as a normative matter even assuming its proof, but that it offers an incomplete view of the problem. By making academic credentials the central feature of the inquiry, Sander and Taylor create a sort of tunnel vision about the problems associated with race-conscious admissions plans. This tunnel vision generates a narrow set of policy prescriptions that might not follow if we had the benefit of a more complete view of the full range of problems faced by URMS at our nation's most selective colleges and universities.

Mismatch theory is alluring in its simplicity—if the entering academic credentials of URMS are weak relative to those of their same-school peers, it is no wonder the subsequent academic performance of URMS is also relatively weak. The underlying logic of mismatch theory, however, is more complex. Mismatch theory's causal claims linking academic credentials to academic performance actually rely on a series of intermediate assumptions to predict that students with weaker relative academic credentials will experience academic underperformance.¹⁵ Specifically, according to mismatch theory, weaker relative academic credentials generate the following intermediate forms of mismatch: learning mismatch,¹⁶ competition mismatch,¹⁷ and social mismatch.¹⁸ It is these three intermediate forms of mis-

¹³ See Arcidiacono et al., *supra* note 6 at 725 (discussion by Sander); see also SANDER & TAYLOR, JR., *supra* note 3, at 10 (arguing that “[t]ransparency empowers students to evaluate the dangers of mismatch against the already well-known benefits of attending a more elite school”).

¹⁴ See discussion *infra* at II.B. (detailing institutional, rather than academic, impediments to student success).

¹⁵ Arcidiacono et al., *supra* note 6, at 697–98 (discussion by Sander).

¹⁶ When the level of classroom instruction is targeted to the median student, students whose academic credentials are too far below the median will be unable to keep up with the pace of instruction and consequently will fall behind and/or fail to satisfactorily master the course content. *Id.* at 22.

¹⁷ When a student's academic credentials are too far below the median credentials, the student can become demoralized by the rigor of the academic environment and the superior academic preparation and performance of their peers, resulting in academic demotivation and a decline in individual performance, perhaps even resulting in an academic downward spiral with each successive failed effort. *Id.* at 22–23.

¹⁸ When a student's personal and academic profile differs substantially from that of his/her peers, he/she is likely to be isolated socially, and perhaps even shunned, with negative consequent effect to his/her self-image, morale, and personal motivation. *Id.* at 23.

match that ultimately cause academic underperformance.¹⁹ But it is important to note that it is academic underperformance, and not these intermediate forms of mismatch, which is the crux of the harm claimed to accrue to URMS under mismatch theory.²⁰ In fact, Sander at least concedes that if these intermediate forms of mismatch can be disrupted or “offset,” the real harm likely to accrue from the relative weakness of URMS’ academic credentials can be avoided.²¹ In other words, notwithstanding any gap in academic credentials, academic underperformance is not inevitable if these intermediate effects can be offset. The interesting question that mismatch theory does not even attempt to answer is what might be done to offset these intermediate forms of learning mismatch, competition mismatch, and social mismatch, or how might colleges and universities effectively intervene to prevent these intermediate events and forestall the real harm likely to accrue in the form of academic underperformance? These considerations are wholly missing from mismatch theory. This Article seeks to expand the lens through which we view the problems associated with race-conscious admissions plans and generate a more complete picture of the phenomenon of URMS’ academic underperformance, one that understands it as a part of a complex and interrelated set of circumstances, rather than merely the inevitable product of a disparity in academic credentials. In particular, it identifies interventions that have the possibility of disrupting each of the intermediate forms of mismatch, thereby forestalling academic underperformance, and will offer alternative policy prescriptions for redressing the problem of URMS’ academic underperformance that are informed by this broader perspective.

Mismatch theory assumes that these intermediate forms of mismatch—learning mismatch, competition mismatch, and social mismatch—occur as a direct result of a deficit in academic credentials that lead to a devastating effect on URMS’ learning, self-motivation, and socialization. Importantly, mismatch theory also assumes that no interventions are made to offset any of these intermediate effects.²² These intermediate forms of mismatch then become the necessary predicate for academic underperformance.²³ If, however, mismatch theory is incorrect in assuming that each of these intermediate events

19 *Id.* at 23–24.

20 *Id.*

21 *Id.*

22 Arcidiacono et al., *supra* note 6, at 698, 701–02 (acknowledging by Sander that first-order mismatch effects “may be offset” but currently are not).

23 *Id.*

necessarily follows for all URMS who have an academic credentials gap, or if, contrary to its assumptions, some effective intervention is or can be made to mitigate the consequences of any or all of these intermediate events, then academic mismatch may not be inevitable for these students. There is a significant and growing body of empirical data that suggests mismatch theory's exclusive focus on academic credentials as a predictor and/or determinant of academic performance is too narrow and ignores a host of other important factors relevant to students' academic and even later professional success.²⁴ In particular, recent research suggests that certain non-academic credentials are important predictors of students' academic performance and may have the capacity to disrupt the effects of learning mismatch for some students.²⁵ Additional research offers insight on how effective interventions might be deployed to counter the effects of competition mismatch and social mismatch on behalf of URMS, who may experience unique challenges in this regard that are not necessarily related to a disparity in their academic credentials, but rather a racially hostile campus climate.²⁶ This research offers us some alternate theories to consider in trying to understand what variables influence students' academic potential and what challenges might impede their academic success. These alternate theories and additional variables are worthy of equal consideration if we are sincere in our effort to solve the problem of URMS' academic underperformance, which is the presumptive aim of mismatch theory, precisely because they might suggest more comprehensive and effective solutions to this problem than have been offered by mismatch theory. At the very least, if mismatch theory has obscured these other relevant variables, we ought to examine how these variables unsettle the claims of mismatch theory. This Part considers the extent to which non-academic credentials are relevant to predicting a student's academic potential in ways that might disrupt the assumptions of learning mismatch, as well as the ways in which institutional climate might undermine URMS' academic performance such that it precipitates and/or exacerbates competition and social mismatch, but which may be highly amenable to effective interventions by colleges and universities.

24 See *infra* note 34 and accompanying text.

25 *Id.*

26 See *e.g. infra* notes 183–84 and accompanying text.

A. *Academic Credentials, Non-Academic Credentials, and Academic Success*

Mismatch theory focuses on academic credentials as the key predictor of academic performance. Learning mismatch, the first of the three intermediate forms of mismatch that are presumed to follow from a disparity in academic credentials, is premised on the fact that the academic credentials of URMS are far below the median of all students.²⁷ It is learning mismatch, however, rather than an academic credentials disparity per se, that is the necessary predicate to academic underperformance. But what if learning mismatch does not necessarily follow for all students from a gap in academic credentials? To establish that URMS who are the beneficiaries of “large racial preferences” pursuant to a race-conscious admissions plan have a disparity in academic credentials, Sander and Taylor rely heavily on gaps between URMS and their peers in test scores on the college entrance exam.²⁸ These academic credentials, while relevant, are not the only predictors of academic performance.²⁹ In recognition of this fact,

²⁷ See SANDER & TAYLOR, JR., *supra* note 3, at 17.

²⁸ Sander and Taylor also point to gaps in high school grade point average (GPA), but the proof that preferences are particularly large relies most heavily on the gap in test scores. See SANDER & TAYLOR, JR., *supra* note 3, at 17, 29, 34 (noting a gap in both SAT scores and GPA, referring specifically to “test score gap,” and discussing STEM mismatch exclusively in terms of SAT scores); see also Sander & Taylor Jr., *supra* note 7, (describing the size of the racial preference as “often amounting to the equivalent of hundreds of SAT points”). It is particularly problematic to rely most heavily on the gap in test scores on college entrance exams to establish mismatch when data suggest that most schools weigh high school grade point average (HGPA) more heavily than test scores on college entrance exams in determining admission. See NATIONAL ASSOCIATION FOR COLLEGE ADMISSION COUNSELING, REPORT OF THE COMMISSION ON THE USE OF STANDARDIZED TEST IN UNDERGRADUATE ADMISSION, 22 (Sept. 2008), available at http://www.nacacnet.org/research/PublicationResources/Marketplace/Documents/TestingCommission_finalReport.pdf (finding SAT and ACT scores are not the most important factor in college admissions decisions, but that high school grades in college preparatory classes have long been the most important criterion for college admissions officers). Moreover, HGPA is a more reliable predictor of both short-term and long-term college outcomes as measured by cumulative GPA and four-year graduation rates. See Saul Geiser & Maria Veronica Santelices, *Validity of High-School Grades in Predicting Student Success Beyond the Freshman Year: High-School Record vs. Standardized Tests as Indicators of Four-Year College Outcomes*, CENTER FOR STUDIES IN HIGHER EDUCATION 24 (2007) available at files.eric.ed.gov/fulltext/ED502858 (“High-school grades in college-preparatory subjects are consistently the best indicator of how students are likely to perform in college. This is true not only for outcomes such as first-year college grades . . . but also for long-term college outcomes, including four-year graduation and cumulative college GPA.”).

²⁹ Nothing in this Article should be taken to mean that academic credentials generally or performance on college entrance exams specifically are not or should not be relevant determinants of admission to selective colleges and universities. Nor do I mean to suggest that there is no predictive value for those test scores or proven correlation between them and students’ academic performance. See Geiser & Santelices, *supra* note

admissions officers make admissions decisions on the basis of a wide range of credentials, both academic and non-academic.³⁰ Sander and Taylor concede this point.³¹ Yet, in addition to overreliance on test scores as a measure of academic credentials,³² mismatch theory does not fully account for these non-academic credentials in measuring admissions qualifications or future prospects for academic and later professional success.³³ A wide-ranging body of empirical research

28, at 9–11 (discussing the result of a study which shows that HGPA and SAT scores are the best indicators of cumulative fourth year college grades). Rather, the claim here is that the overreliance on these measures in supporting mismatch theory may be misleading given the broader scope of actual admissions decisions and the predictive value of other non-academic measures, as well as their correlation with academic success. *Id.* at 6.

³⁰ See e.g., Brief for Respondents at 6, 13, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (describing the undergraduate admissions process for the University of Texas at Austin used to select those students not admitted under the Top Ten Percent Plan as including both an Academic Index, comprised of “high school class rank, standardized test scores, and high school curriculum” and a Personal Achievement Index, comprised of two essays and a Personal Achievement Score based on “six equally weighted factors including: leadership potential, extracurricular activities, honors and awards, work experience, community service and special circumstances”); *Gutter v. Bollinger*, 539 U.S. 306, 315 (2003) (describing the University of Michigan’s Law School admissions policy as focusing on “academic ability coupled with a flexible assessment of applicants’ talents, experiences, and potential ‘to contribute to the learning of those around them’”). In particular, in addition to undergraduate GPA and LSAT scores, the admissions plan considered the following student attributes: personal statement, letters of recommendation, an essay, the enthusiasm of recommenders, the quality of the undergraduate institution, and the areas and difficulty of undergraduate course selection.). *Id.*; see also ESPENSHADE & RADFORD, *supra* note 9, at 77 (noting that academic credentials do not solely determine admissions, but that “[m]any different qualities in varying combination can also help to qualify a candidate for admission to a top school”); Wolff & Wolff, *infra* note 37, at 386, 388 (noting pedagogical principles of merit need not, and often do not, drive admissions goals).

³¹ SANDER & TAYLOR, JR., *supra* note 3, at 20. *But see infra* note 94 and accompanying text (discussing Sander’s study of the UCLA undergraduate admissions process and his conclusion that these non-academic credentials, even when evaluated in the admissions process, seem to be highly correlated with academic credentials and therefore provide no admissions advantage to URMS to offset their lower relative academic credentials). It may be true that admissions officers currently lack sophisticated tools for evaluating the most relevant non-academic credentials of applicants and effectively selecting among applicants on the basis of these non-academic credentials those most likely to succeed academically or otherwise, but this does not negate the reality that they make an effort to do so, nor does it foreclose the possibility that they could do so. See *supra* note 30 and *infra* note 98 and accompanying text.

³² See *supra* note 28 and accompanying text (recognizing that factors other than test scores are also important in predicting academic success).

³³ Sander and Taylor acknowledge the limitations of measuring these non-academic traits. See SANDER & TAYLOR, JR., *supra* note 3, at 78. They even identified some of the traits that might be relevant to academic success, though not measured by mismatch theory, as “drive, determination, self-discipline, memory, and hard work,” which include some of

suggests that some non-academic credentials are equally, if not more, important in predicting academic and later professional success than are the academic credentials that are the focus of mismatch theory.³⁴ If these non-academic credentials do have demonstrable relevance for predicting academic success, and colleges and universities select among these non-academic credentials those believed to be most relevant to success at their own institutions,³⁵ how then can mismatch theory rely on a gap in academic credentials alone to assail the efficacy of race-conscious admissions plans or explain the disparity in academic performance between URMS and their same-school peers? More important, how can mismatch theory assume that learning mismatch will follow from a disparity in academic credentials without

the traits reflected in the literature as having a positive correlation with academic performance. *Id.* at 54.

³⁴ See, e.g., PO BRONSON & ASHLEY MERRYMAN, *TOP DOG: THE SCIENCE OF WINNING AND LOSING* (2013) (describing a physiological and genetic determinant for managing stress, including academic stress, that is inversely correlated with intelligence); JAMES R. FLYNN, *WHAT IS INTELLIGENCE? BEYOND THE FLYNN EFFECT* 53–54 (2009) (rejecting a cognitive based theory of intelligence in favor of a more complete picture of ability that measures the following: mental acuity, habits of mind, attitudes, knowledge/information, speed of information processing, and memory); ADAM GRANT, *GIVE AND TAKE: A REVOLUTIONARY APPROACH TO SUCCESS* 105–06 (2013) (citing to the work of several psychologists including Angela Duckworth and Tom Kolditz who concluded that “above and beyond intelligence and aptitude, gritty people [defined as passion and perseverance in long-term goals] achieve higher performance”); Marc A. Brackett et al., *Integrating Emotion and Cognition: The Role of Emotional Intelligence*, in *MOTIVATION, EMOTION AND COGNITION: INTEGRATIVE PERSPECTIVES ON INTELLECTUAL FUNCTIONING AND DEVELOPMENT* 175–94 (David Yun Dai & Robert J. Sternberg eds., 2004) (discussing the correlations between non-cognitive abilities and cognitive functioning); Gillian Butler & Kathy Davis, *UCUES 2008 Obstacles to Academic Success*, UC DAVIS STUDENT AFFAIRS RESEARCH AND INFORMATION REPORT #412 (Oct. 2009), available at <http://www.sariweb.ucdavis.edu/downloads/412.Obstacles%20Report.pdf> (identifying issues ranging from job responsibilities to depression, in addition to weak academic skills, as self-reported obstacles to students’ academic success); Paul R. Sackett et al., *High-Stakes Testing in Employment, Credentialing and Higher Education: Prospects in a Post-Affirmative-Action World*, *AMERICAN PSYCHOLOGIST* 302 (Apr. 2001); James J. Heckman, *Lifelines for Poor Children*, *N.Y. TIMES*, Sept. 15, 2013, at SR5 (citing multiple evidence-based research studies demonstrating that “cognitive skills prized . . . and measured by achievement tests are only part of what is required for success in life and that “[c]haracter skills are equally important determinants of wages, education, health and many other significant aspects of flourishing lives”); Jennifer Kahn, *Can Emotional Intelligence Be Taught?*, *N.Y. TIMES*, Sept. 11, 2013, www.nytimes.com/2013/09/15/magazine/can-emotional-intelligence-be-taught.html?pagewanted=all&_r=0 (citing study by Brackett claiming that “dozens of studies” now show that social and emotional intelligence can either enhance or hinder your ability to learn).

³⁵ Both the University of Michigan in the *Grutter* case and the University of Texas in *Fisher* attested to the use of a holistic review in their admissions processes which involved the consideration of multiple non-academic factors in addition to the academic indices cited by Sander and Taylor. See generally *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2433 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

acknowledging or measuring the impact of non-academic credentials on individual student learning outcomes?³⁶ There is ample reason to believe that a robust, holistic review of the sort employed by most selective colleges and universities that considers the meaningful valuation of non-academic credentials in the admissions process, alongside academic credentials, is not just a function of improving the diversity of a college or university (at the expense of academic quality), but also the quality of admitted students and ensuring high prospects for both their academic and future professional success.³⁷

Wharton professor Adam Grant, whose book *Give and Take* surveys which non-academic credentials correlate with professional success

³⁶ Sander and Taylor might argue that the strong correlation between academic credentials and academic performance demonstrated by mismatch theory suggests that these non-academic credentials are either irrelevant or insignificant factors in determining academic performance. However, anecdotal evidence of significant numbers of URMS at selective colleges and universities who have lower academic credentials than their peers but nevertheless perform academically at or above the average of their peers suggests that something other than their academic credentials could be predictive of their academic performance. See *infra* notes 125–32 (discussing the academic performance of The Posse Foundation scholars). They might also argue that these non-academic credentials are incapable of measurement with any degree of reliability, or at least that measures of non-academic ability are far less reliable than standardized test scores are in measuring academic ability. However, the social science research identifying those non-academic abilities (or non-cognitive traits) most reliably correlated with individual success in both academic and professional domains, as well as the development of reliable tools for measuring these abilities or traits is quite advanced, and advancing. See, e.g., PAUL TOUGH, *HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER* 58–59 (2012) (describing the book *Character Strengths and Virtues: A Handbook and Classification* (2004) written by Martin Seligman and Christopher Peterson as a “mirror image of the *Diagnostic and Statistical Manual of Mental Disorders*, or the DSM, . . . [and] an attempt to inaugurate a ‘science of good character,’” which catalogues twenty-four character traits, or non-academic abilities, that are reliable predictors of success across multiple domains of life and that even transcend cultures); see also *id.* at 74–75 (noting that Angela Duckworth has developed a test to measure “grit,” which she aptly calls the “Grit Scale” that is “remarkably predictive of [student] success” and only “faintly related to IQ” or cognitive/academic ability).

³⁷ An abundance of new research suggests that non-academic credentials are more highly correlated with both academic and professional success than are academic credentials. See CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* 57–58 (2006); GRANT, *supra* note 34, at 105–06; TOUGH, *supra* note 36, at 18–19, 52. Moreover, colleges and universities define their own and students’ successes by measures other than academic performance, see *infra* note 208 and accompanying text, and should therefore be permitted to define admissions criteria consistent with this broad measure of success. See also Robert Paul Wolff & Tobias Barrington Wolff, *The Pimple on Adonis’s Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate*, 56 HASTINGS L.J. 379 (2005) (arguing that admissions goals rather than pedagogical goals should inform admission criteria and therefore broad considerations, including diversity, rather than exclusively pedagogical considerations like academic performance, are legitimate criteria for selection in the admissions process).

across a number of occupational domains, describes the necessary quality for success as “grit,” rather than cognitive intelligence.³⁸ In the academic context, this credential has been identified as “diligence” or “self-discipline,” and in a study of eighth graders, was more predictive of academic performance than cognitive ability.³⁹ University of Pennsylvania researchers Angela Duckworth and Martin Seligman tried to determine what individual (versus institutional or social) factors are correlated with academic achievement as measured by the Programme for International Student Assessment (PISA).⁴⁰ Using data from a demographic survey that accompanied the PISA, these researchers measured not the survey responses themselves, but the extent to which students completed the survey.⁴¹ Duckworth and Seligman sought to measure the students’ persistence and motivation

38 Grant adopts this term from psychologist Angela Duckworth, whose research demonstrates that “above and beyond intelligence and aptitude, gritty people . . . achieve higher performance.” GRANT, *supra* note 34, at 105–06. Grant cites a 1980’s study by psychologist Benjamin Bloom, which found that among world-class musicians, scientists and athletes, there was “an unexpected absence of raw talent” but for each there was someone in their childhood who “served as an early catalyst for the intense practice necessary to develop expertise.” *Id.* at 104–05. Grant also cites to the work of military psychologist Tom Kolditz in support of the conclusion that “grit” is important to individual success. *Id.* at 106; *see also* MALCOLM GLADWELL, *OUTLIERS* 17–18 (2008) (demonstrating through a profile of highly accomplished individuals that it is not the smartest people, by measures of cognitive intelligence, that succeed, but those with other traits, including diligence).

39 AMANDA RIPLEY, *THE SMARTEST KIDS IN THE WORLD AND HOW THEY GOT THAT WAY* 120–22 (2013).

40 PISA is a standardized test administered by the Organisation for Economic Co-operation and Development (OECD) to 15-year old students around the world. PISA tests the math and reading skills of students in sixty-five countries to determine and benchmark relative academic achievement across both developed and developing countries. *Id.* at 15, 18. *See also*, the description of PISA from OECD’s own website, available at www.oecd.org/pisa/aboutpisa/.

41 *Id.* at 121–22. Duckworth and Martin conducted another study of the correlation between self-discipline and academic performance. *See* Angela L. Duckworth & Martin E.P. Seligman, *Self-Discipline Outdoes IQ in Predicting Academic Performance of Adolescents*, 16 *PSYCHOLOGICAL SCIENCE* 939 (2005). This time the study was longitudinal and measured self-discipline using a multimethod, multisource approach. They found that self-discipline predicted more than twice the variance in final grades than did IQ. *Id.* at 942. More specifically, Duckworth and Seligman found that the correlation between self-discipline and the studied “academic performance variables ranged from medium to large in effect size, and all were statistically significant.” *Id.* at 941. Whereas, the correlation between IQ and the studied “academic performance variables were at most medium in magnitude, and only half were statistically significant.” *Id.* In framing their research, Duckworth and Seligman noted that notwithstanding the relative lack of research on the correlation between non-academic traits and academic performance, a 1995 study by R.N. Wolfe and S.D. Johnson found the correlation between self-discipline and UGPA to be more robust than that between SAT scores and UGPA. *Id.* at 939.

by examining their diligence in completing the survey.⁴² Duckworth and Seligman found that most students completed the survey, but also discovered, much to their surprise, that small differences in completion rates explained large differences in academic performance.⁴³ In fact, this simple measure of students' diligence was more predictive of student performance on the PISA than any other factor studied, including cognitive ability as measured by IQ.⁴⁴ Even in the field of psychometrics, which gave birth to the college entrance exams, scholars have repudiated cognitive intelligence as the sole basis for gauging individual aptitude for learning and success.⁴⁵

If non-academic credentials, such as “grit,” “self-discipline” or “diligence,” are relevant to and predictive of academic and even later professional success—more predictive according to some research than cognitive measures, including the achievement tests used to determine college admissions⁴⁶—and if colleges and universities do in

⁴² RIPLEY, *supra* note 39, at 121.

⁴³ *Id.* at 122.

⁴⁴ *Id.* Duckworth has found that these non-academic credentials, in addition to being highly predictive of academic success, are also only minimally correlated with academic credentials. See Duckworth & Seligman, *supra* note 41, at 942–43.

⁴⁵ For a discussion of the origin of college entrance exams, see NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999); see also FLYNN, *supra* note 34, at 53–54 (explaining the Flynn Effect, whereby there was an observed rise in the measure of general intelligence, or IQ, over time across multiple world populations, by rejecting a unitary measure of general intelligence and instead suggesting that “g” can be disaggregated into discrete skills that include (1) mental acuity; (2) habits of mind; (3) attitudes; (4) knowledge/information; (5) speed of information processing; and (6) memory, which operate at both the individual and environmental level and some of which are highly amenable to environmental influence); Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1256–57 (2011) (challenging the use of standardized tests as reflective of an “outmoded” view of intelligence theory and test design based on “single, unitary, linearly rankable, measurable generalized mental energy” defined as “g” or intelligence, but noting more recent intelligence theory and test design reject “g” as a standard unitary measure of intelligence and offer multiple alternate theories that define cognitive abilities more broadly, including triarchic theory, PASS theory, and multiple intelligence theory, noting that these latter test designs have more predictive value than the tests based on a unitary measure of “g” or intelligence).

⁴⁶ It is worth noting that the proliferation of the SAT as the predominant academic credential for determining admission to selective colleges and universities was intended to have the effect of expanding opportunities for diversity among the student bodies of these institutions, at least according to its most ardent and early proponent, James Bryant Conant, President of Harvard University from 1933–1953. See generally LEMANN, *supra* note 45, at 44–45 (describing Conant’s desire that the SAT serve as an “anthropometer” to evaluate the merit of individuals to be part of “a new American elite, drawn from every region and background”). Arguably, the fact that it has had the opposite effect can be attributed to its erroneous definition of “merit,” defined solely in terms of a particular measure of intelligence that has proven to be highly amenable to manipulation and which now tends to favor precisely those persons who are most likely to have the

fact account for these non-academic credentials in determining admission,⁴⁷ mismatch theory's exclusive focus on academic credentials, to the exclusion of non-academic credentials, in adjudging the efficacy of race-conscious admissions plans and predicting the academic success of URMS is at best over-simplified and possibly even erroneous.⁴⁸ The simple, causal relationship between academic credentials and academic performance, on which mismatch theory relies for its assumption that URMS with lower academic credentials are harmed by race-conscious admissions plans because they are likely to experience learning mismatch and consequently to have lower academic performance, fails to account for a student's grit, self-discipline and/or diligence. These important non-academic credentials might act to offset any academic credentials gap, thereby allowing the student to avoid learning mismatch. There are significant numbers of URMS, and others, who are admitted to selective colleges and universities with academic credentials below those of their peers who do not underperform academically.⁴⁹ In fact, they are able to thrive academically.⁵⁰ If these students perform well academically at least in part

advantages of wealth operating in their favor at every step in the educational and admissions process. *Id.* at 85.

47 Both the University of Michigan Law School and the University of Texas at Austin explained the holistic admissions processes by which they select students for admission. These processes included consideration of a number of personal traits, such as leadership, persistence, and character. *See, e.g.*, Brief for Respondents at 46–47, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

48 Sander and Taylor seem to contradict themselves on the relevance of these traits to admissions decisions. On the one hand, they admit that these “unobserved traits” might be relevant in making admissions decisions. *See SANDER & TAYLOR, JR., supra* note 3, at 54. On the other hand, Sander and Taylor try to explain away the relevance of these non-academic credentials in determining admissions decisions by claiming that the professed “holistic review” by selective colleges and universities is just “fanciful and admissions decisions are made by fairly mechanical decision rules” that essentially eliminate the impact of these factors, leaving only the academic and racial considerations to predominate the admissions process. *Id.*

49 David Laude, the Senior Vice Provost for Enrollment and Graduation Management at the University of Texas at Austin, piloted a program several years ago in which he identified those students who were most at risk of low academic performance based on profile factors including their race/ethnicity, socioeconomic status, and SAT scores, and provided them with smaller class sections, academic advisors, and peer mentors among other things. Notwithstanding these additional resources, Laude said he held the students to the same rigorous academic standards as all other students and reinforced his belief in their ability as “high-achieving scholars.” The result was that despite a 200-point gap in SAT scores, these students had academic performance on par with that of their peers and had both retention and graduation rates above the UT average over the course of their tenure. *See* Paul Tough, *Who Gets to Graduate?*, N.Y. TIMES, May 15, 2014, available at <http://www.nytimes.com/2014/05/18/magazine/who-gets-to-graduate.html>.

50 *See infra* note 138 and accompanying text.

because of these non-academic credentials, as suggested by the research described above (as well as the case studies described below), mismatch theory offers an incomplete hypothesis for assailing the efficacy of race-conscious admissions plans and explaining the phenomenon of URMS' academic underperformance.

B. Individual Credentials, Environmental Hazards, and Academic Success

Just as mismatch theory fails to account for non-academic credentials (in addition to academic credentials) in predicting academic success, it similarly fails to account for the impact of environmental, in addition to individual, factors in influencing the academic performance of URMS.⁵¹ There are two important environmental factors in particular that are well-covered in the literature, namely, stigma and stereotype threat,⁵² especially the impact these factors may have on

51 Although many early psychometricians, who studied cognitive ability and designed intelligence tests, thought intelligence, or cognitive ability, was largely a function of individual aptitude, and highly heritable, these theories have largely been abandoned in favor of a more complex view of intelligence as being derived from both individual aptitude and environmental influences. See, e.g., FLYNN, *supra* note 34, at 53–54; THOMAS SOWELL, *INTELLECTUALS AND RACE* 22–23 (2013) (describing generally how views of intelligence as fixed and heritable, especially among eugenicists who linked intelligence to race, have largely been abandoned in favor of a more malleable and non-heritable view of intelligence).

52 Critics of race-conscious admissions plans and/or “racial preferences” often cite the “stigma” associated with these programs as a cause for their elimination. See William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 71–73 (2013) (identifying the stigma debate and its key proponents and opponents in the legal literature). Justice Clarence Thomas has been the most prominent jurist associated with the stigma argument concerning the race-conscious admissions programs employed by selective colleges and universities after he dissented in the *Grutter* case, arguing, in part, that,

[t]his problem of stigma does not depend on determinacy as to whether those stigmatized are actually the ‘beneficiaries’ of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.

Grutter, 539 U.S. at 373 (Thomas, J., dissenting). A related, though different, phenomenon is stereotype threat. Claude Steele first studied the phenomenon he called “stereotype threat” in the late 1990’s. Claude M. Steele, *Thin Ice: “Stereotype Threat” and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44, 47 [hereinafter Steele, *Thin Ice*]; see also CLAUDE M. STEELE, *WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US* (2010). “Stereotype threat” describes a phenomenon whereby situational priming of negative stereotypes (or stigma) associated with one’s social identity group in relation to some task suppresses subsequent performance on that task. *Id.* at 5. Although Steele’s experiment demonstrating “stereotype threat” involved priming African American students of negative stereotypes relating to black academic

URMS presumed to be the beneficiaries of “large racial preferences.” Mismatch theory gives these theories only passing consideration.⁵³ Despite this cursory treatment by mismatch theory, there is a significant and growing body of research and data suggesting that these environmental factors, reflecting both diminished expectations of and a negative institutional climate toward URMS, might contribute to URMS’ academic underperformance in very meaningful ways.⁵⁴ It is important to note that proponents of mismatch theory, including Sander and Taylor, as well as opponents of race-conscious admissions plans generally, acknowledge the existence of stigma threat and stereotype threat, and their associated harms, and cite these phenome-

achievement, with a resulting suppression of performance on academic achievement tests (particularly powerful proof for present purposes), “stereotype threat” has been demonstrated in a number of situational contexts involving a number of different social identity groups. See, e.g., Carol S. Dweck, *Is Math a Gift? Beliefs That Put Females at Risk*, in *WHY AREN’T MORE WOMEN IN SCIENCE? TOP RESEARCHERS DEBATE THE EVIDENCE*, (S.J. Ceci & W. Williams eds., 2006); Corinne A. Moss-Racusin et al., *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 *PROC. OF THE NAT’L ACAD. OF SCI. OF THE U.S.* 16474 (2012), available at <http://www.pnas.org/content/109/41/16474.abstract> (discussing the presence of gender bias against women in the sciences).

⁵³ See SANDER & TAYLOR, JR., *supra* note 3, at 96–97 (noting multiple possible reasons for low grades of students who receive “large racial preferences,” including both mismatch and stigma or stereotype threat). Another commonly cited negative effect of race-conscious admissions plans and/or “racial preferences” is that they engender hostility and resentment towards URMS by whites. See, e.g., Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1294 (2011) (citing Justice Powell’s concern in *Bakke* that affirmative action would stimulate racial resentment).

⁵⁴ See, e.g., FLYNN, *supra* note 34, at 54 (attesting to substantial environmental influences on the development of cognitive ability); GRANT, *supra* note 38, at 106 (describing the importance of teachers in the cultivation of natural ability); STEELE, *supra* note 52; see also 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, 238–39 (2001) (discussing an empirical study of campus climate at the University of Michigan Law School and its four primary feeder schools, including Berkeley, Harvard, Michigan State, and the University of Michigan, demonstrating that campus climates were hostile across schools and this hostility contributed to the phenomenon of “stereotype threat” as described by Claude Steele); Jonathan Crane, *Exploding the Myth of Scientific Support for the Theory of Black Intellectual Inferiority*, 20 *J. BLACK PSYCH.* 189 (1994) (offering proof of environmental effects on cognitive skills); Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?* 96 *CALIF. L. REV.* 1299, 1318–19 (2008) (citing a study by Allen and Solórzano demonstrating that minorities students are less “likely to feel stigmatized” when situated among a critical mass of minority students than when isolated); Jodi Kantor, *Harvard Case Study: Gender Equity*, *N.Y. TIMES*, Sept. 8, 2013, at A1 (profiling the success of a pilot study at Harvard Business School designed to improve the academic performance of female students by creating a more inclusive institutional culture for female students); Steele, *Thin Ice*, *supra* note 52, at 47 (recounting an experiment demonstrating the effect of “stereotype threat” on the academic performance of African American college students, particularly those with the strongest academic credentials).

na as problematic for URMS.⁵⁵ For proponents of mismatch theory, these phenomena are used to justify the elimination of race-conscious admissions plans.⁵⁶ Neither, however, are viewed as significant causes of URMS' academic underperformance, or problems in and of themselves deserving of attention separate and apart from race-conscious admissions plans.⁵⁷ Recall that an important assumption of mismatch theory's claim that academic underperformance follows from lower relative academic credentials is that no interventions are made to offset the intermediate, and presumed inevitable, effects of lower relative academic credentials, including competition and social mismatch. Only if unmitigated, however, do competition and social mismatch lead to lower academic performance. But there is nothing inevitable, and perhaps something very counterintuitive, about mismatch theory's assumption that these effects will or should be left unmitigated. What mismatch theory may be helpful for understanding, therefore, is *not* who can and cannot succeed at our most selective colleges and universities, but why, notwithstanding their ability to succeed academically, URMS might need special interventions to realize their full potential in these environments, which are often hostile to their presence.⁵⁸

Stigma and stereotype threat are related phenomena that have a compound effect on URMS in the college and university context.⁵⁹ On the one hand the stigma that URMS are unqualified for admission based on their academic credentials results in lowered expectations of their performance; while on the other hand, stereotype threat engages this stigma and has the effect of impairing URMS'

55 SANDER & TAYLOR, JR., *supra* note 3, at 99. *But see* Arcidiacono et al., *supra* note 6, at 709–10 (questioning by Sander of proof of stereotype threat).

56 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J. dissenting) (“[W]hen blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement.”).

57 SANDER & TAYLOR, JR., *supra* note 3, at 100 (citing the “danger” as “the widespread use of large racial preferences” rather than harms that accrue from stereotype or stigma threat directly.).

58 *See infra* Part II.B.2.

59 *See* Daniel Solórzano, Miguel Ceja & Tara Yosso, *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. NEGRO EDUC. 60, 60 (2000) (explaining the phenomenon of stigma threat and the related harm of hostility/resentment in terms of racial “microaggressions” defined as “stunning, automatic acts of disregard that stem from unconscious attitudes of white superiority and constitute a verification of black inferiority” (citing Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1576 (1989))). Solórzano, Ceja, and Yosso demonstrate how those faculty who harbor stigmatized views of URMS' academic abilities lower their expectations of them, resulting in the self-doubt that triggers the performance-depressing phenomenon of stereotype threat. *Id.* at 67–69.

confidence in their own abilities.⁶⁰ Alone, either of these phenomena would be damaging to URMS' academic performance, but together they can be devastating.⁶¹ Similarly, hostility/resentment toward URMS born of this stigma causes them to feel isolated, unwelcomed, and/or threatened, thereby compromising the institutional and individual support of these students and impairing their psychic, emotional, and sometimes even physical, well-being.⁶² It is not hard to see how any or all of these environmental effects might demoralize and isolate URMS, leading to competition and social mismatch, and consequently, a decline in their academic performance.⁶³ However, rather than cite these phenomena as potential causes of URMS' academic underperformance, Sander and Taylor cite these phenomena as merely the collateral consequences of race-conscious admissions plans themselves, and the inevitable result of mismatch, merely amplifying its harms.⁶⁴ Addressing this issue of symptom or cause, Angela Onwuachi-Willig describes it as a problem of determining "Which Came First—Stigma or Affirmative Action?"⁶⁵ Onwuachi-Willig describes an anecdotal study of Harvard Law School students that concluded stigma, rather than being caused by race-conscious admissions plans, is the result of both institutional and societal racism.⁶⁶ Onwuachi-Willig also found that the harm of stigma can be exacerbated by the lack of institutional support minority law students re-

60 See Arcidiacono et al., *supra* note 6, at 708–09 for a further explanation of these phenomena.

61 See *infra* Part II.B.

62 See Allen & Solórzano, *supra* note 54, at 288.

63 For articles discussing the negative academic consequences of an impaired sense of emotional well-being, see Sylvia Hurtado et al., *Assessing the Value of Climate Assessments: Progress and Future Directions*, 1 J. DIVERSITY IN HIGHER ED. 204, 209 (2008); Gregory M. Walton & Geoffrey L. Cohen, *A Question of Belonging: Race, Social Fit and Achievement*, 92 J. PERSONALITY & SOC. PSYCH. 82 (2007).

64 See SANDER & TAYLOR, JR., *supra* note 3, at 99–100.

65 Onwuachi-Willig et al., *supra* note 54, at 1307.

66 *Id.* at 1319–20. Deirdre Bowen's work also demonstrates that stigma threat exists irrespective of the existence of race-conscious college admissions plans. See Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 DENV. U. L. REV. 751, 781 (2011) [hereinafter Bowen, *Meeting Across the River*] (noting that her own study of the experiences of URMS on college campuses reveals that feelings of stigma accompanied the presence of URMS even at schools that did not employ race-conscious admissions plans, concluding that such plans "do[] not appear to be the cause of stigma"); see also Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of an Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1225 (2010) [hereinafter Bowen, *Brilliant Disguise*] (noting that a study of undergraduate and graduate students across a range of colleges and universities revealed that as self-reported by URMS, stigma was actually more pervasive at schools without race-conscious admissions plans).

ceive from both faculty and peers.⁶⁷ A more extensive study conducted by Walter Allen and Daniel Solórzano involving students at five different campuses of four different elite universities also found that negative campus climates, in particular the presence of stigma/stereotype threat, impaired both the academic performance and educational opportunities of URMS.⁶⁸ This evidence suggests that we should investigate the possibility that lowered expectations of URMS' academic performance, both by themselves and others (stigma/stereotype threat), and lack of institutional support for URMS (born of hostility/resentment), might precipitate and/or exacerbate the intermediate forms of competition and social mismatch independent of URMS' academic credentials or the use of race-conscious admissions plans.

Even accepting the correlation between academic credentials and academic performance demonstrated by mismatch theory, if race-conscious admissions plans mean that URMS are both more likely to have lower relative academic credentials than their same-school peers and also more likely to suffer from stigma/stereotype threat, and the related harms of lowered expectations and less institutional support, how can we know the relative importance of stigma/stereotype threat and their impact on the phenomenon of URMS' academic underperformance just by measuring the correlation between their academic credentials and academic performance?⁶⁹ Sander and Taylor, after acknowledging that stigma/stereotype threat surely exist, and that they undoubtedly affect the academic performance of URMS, nevertheless dismiss these phenomena as significant causal factors of URMS' academic underperformance.⁷⁰ Why? There is nothing in

67 Onwuachi-Willig, et al., *supra* note 54, at 1320.

68 Allen & Solórzano, *supra* note 54. In particular, Allen and Solórzano cite to examples of URMS being viewed by others on campus as “unintelligent and taking the place of ‘more academically qualified’ Whites.” *Id.* at 245, 250, 256. Allen and Solórzano note that URMS attempt to ameliorate the negative effects of this stigma threat by establishing “counterspaces” that “challenge the dominant deficit notions of people of color and promote a positive racial climate,” but even these efforts dilute their energies and ultimately undermine academic performance. *Id.* at 259–62.

69 Sander and Taylor suggest that the “hallmarks of healthy academic discourse” include acknowledging what is *not* disputed, clarifying hypotheses and engaging in careful debate. SANDER & TAYLOR, JR., *supra* note 3, at 68. I hope that this argument in particular, and the broader claims made throughout, are received in that spirit.

70 SANDER & TAYLOR, JR., *supra* note 3, at 99 (noting that students who receive preferences “take on an unearned guilt, which triggers a host of psychological maladies . . . which in turn harms performance”); *id.* at 111 (noting that “large racial preferences” undercut the “intellectual self-confidence that is the vital handmaiden to learning”). *But see id.* at 179 (describing higher education as “an environment where discrimination is either absent altogether or so minimal as not to affect academic performance”). Notably, Sander also

the data presented, or in the theory itself, that forecloses stigma/stereotype threat and the related harms of lowered expectations and lack of institutional support as significant causal factors contributing to URMS' academic underperformance. To the contrary, the prospect that stigma/stereotype threat and their related harms are important factors in URMS' academic underperformance is as consistent with the data as is mismatch theory itself.⁷¹

Sander's two primary data sets in support of mismatch theory are comparisons between (1) the academic performance of URMS at elite colleges and universities (where they are presumed to be the beneficiaries of large, though according to Sander not the largest, racial preferences) and students with comparable academic credentials who attend less elite schools (where they are unlikely to be the beneficiaries of preferences); and (2) the academic performance of URMS at the UC system before (with preferences) and after (without preferences) Proposition 209.⁷² Sander concludes from the superior academic performance of the latter group over the former group in each of these two data sets that better matching credentials to environment through the elimination of race-conscious admissions plans, i.e., mismatch, accounts for this difference.⁷³ This difference (or at least some part of it), however, could equally be explained by the relative lack of stigma/stereotype threat and the absence of the associated harms of lowered expectations/lack of institutional support suffered by those in the latter groups as compared to the former groups. In other words, whites who attend less elite schools where their credentials are better matched with their classmates' might perform better than URMS at more elite schools where their credentials are more "mismatched," not because of this "mismatch" per se, but because the

dismisses alternate hypotheses related to similar institutional and environmental causes in his parallel work assailing diversity plans in the legal hiring context. See Richard H. Sander, *The Racial Paradox of The Corporate Law Firm*, 84 N.C. L. REV. 1755, 1813-14 (2006) (dismissing systemic and/or individual discrimination as significant causes of underperformance by black and Hispanic lawyers in elite corporate law firms).

71 Other scholars have attributed African American student academic performance in particular to these phenomena. See VINAY HARPALANI, RACIAL STEREOTYPES AND ACHIEVEMENT-LINKED IDENTITY FORMATION DURING ADOLESCENCE: AN INVESTIGATION OF ATHLETIC INVESTMENT AND ACADEMIC RESILIENCE 151 (2005) (suggesting a link between both stereotype threat and "counterstereotypic identity" and black student academic achievement).

72 See, e.g., SANDER & TAYLOR, JR., *supra* note 3, at 79, 116 (discussing law school mismatch and UC admissions). Proposition 209 was a ballot initiative passed in 1996 by the citizens of California that amended the state constitution by forbidding the consideration of race, sex, or ethnicity in college admissions, employment, or contracting by any government entity. *Id.*

73 *Id.*

stigma of this mismatch (i.e., those with lower credentials are perceived as incapable of performing and thus fail to perform) and/or because the stigma of preference (i.e., that URMS who receive preferences are perceived as incapable of performing and thus fail to perform), and the accompanying performance suppressing phenomenon of stereotype threat is absent. The elimination of stereotype threat (related to both preference and academic credentials), rather than the elimination of “mismatch,” could also explain the improvement in performance by URMS within the UC system after the approval of Proposition 209.⁷⁴ The conclusion that the underperformance of URMS is explained, at least in part, by stigma/stereotype threat, and their related harms is further bolstered by the fact that the academic performance of URMS is actually *overpredicted* relative to their own credentials.⁷⁵ This suggests that something other than aca-

⁷⁴ Importantly, Sander and Taylor acknowledge that there were additional institutional supports provided to URMS after the passage of Proposition 209 that may also account for some of the performance improvement of URMS following passage of Proposition 209. See SANDER & TAYLOR, JR., *supra* note 3, at 147; see also Geiser & Santelices, *supra* note 28. This is a particularly important factor in understanding the academic improvements experienced by URMS within the UC System following the passage of Proposition 209, both because the research suggests that stigma threat is not necessarily negated by the elimination of race-conscious admissions plans, see Bowen, *Brilliant Disguise*, *supra* note 66, at 1225 (demonstrating that even URMS at colleges that do not employ race-conscious admissions plans self-reported high levels of stigma threat), and because it confirms the importance of institutional support for URMS as a critical determinant of academic outcomes. See *infra* text accompanying notes 142–44. Thus, the claim here is not, as some would argue, see, e.g., Grutter v. Bollinger, 539 U.S. 306, 349, 373 (2003) (Thomas, J., dissenting), that eliminating race-conscious admissions should be desired because it eliminates stigma threat, which is an argument that I expressly disclaim. See *infra* text accompanying note 218. Rather, the argument is that this stigma may be less internalized by URMS who know they have been admitted on the basis of their academic credentials, rather than by “racial preference,” and may be less likely to succumb to the compounding harms of stereotype threat. See Robert J. Rydell et al., *Multiple Social Identities and Stereotype Threat: Imbalance, Accessibility, and Working Memory*, 96 J. PERSONALITY & SOC. PSYCH. 949 (2009). Rydell et al. use social identity theory to explain that when two possible identities are available to an individual in a given domain, in this instance the generally stigmatized identity of URMS as intellectually inferior, and the specific identity as a student admitted to a UC school on the basis of academic merit, the individual will activate the positive social identity and will thereby reduce vulnerability to stereotype threat notwithstanding the presence of the negative identity. This phenomenon could explain why, notwithstanding the continued presence of stigma threat, URMS attending UC System schools post-Proposition 209 were able to mitigate some of the harmful effects of stereotype threat on their academic performance. This does not mean, however, that there were not still negative academic consequences suffered as a result of the stigma that remained; it simply means that rather than suffer under the weight of multiple threats to their identity, some of these students may have been able to effectively offset some of this harm.

⁷⁵ SANDER & TAYLOR, JR., *supra* note 3, at 25 (noting that “[o]n average, the academic index of [URMS] admitted with large preferences *overpredicts* their academic performance in

demographic credentials is also suppressing the academic performance of URMS.

If academic underperformance is predicated on the intermediate forms of competition mismatch and/or social mismatch, it is easy to see how the harms of stigma/stereotype threat could precipitate both competition mismatch (for example, when URMS are subjected to lowered expectations) and social mismatch (*e.g.*, when institutional hostility/resentment is directed towards URMS) as much as any deficit in academic credentials. One way to determine whether stigma/stereotype threat or their associated harms are significant contributing causes of academic underperformance by URMS is to determine whether students with weak academic credentials excel in an environment without stigma/stereotype threat, or whether students underperform academically when stigma/stereotype threat is present notwithstanding strong academic credentials. Claude Steele and Joshua Aronson's research on "stereotype threat" proves that even the academic performance of URMS with strong academic credentials suffers when stereotype threat is engaged.⁷⁶ Moreover, evidence cited by Sander and Taylor suggests that URMS, regardless of academic credentials, can succeed academically when placed in supportive environments where stigma threat is not likely to be present.⁷⁷ This latter phenomenon can be called the "HBCU Effect," as Sander and Taylor repeatedly note throughout *Mismatch* that historically black colleges and universities (HBCUs) produce a disproportionate number of successful URMS as measured by an array of educational and occupational outcomes.⁷⁸ Mismatch theory appears to rely on the success of URMS who matriculate at HBCUs to demonstrate that URMS perform significantly better academically when they do not at-

college; in other words, students tend to do somewhat worse than whites with the same academic index" (emphasis in original)).

⁷⁶ Steele, *Thin Ice*, *supra* note 52, at 50–51.

⁷⁷ See SANDER & TAYLOR, JR., *supra* note 3, at 82–83 (acknowledging that the "tighter social bonds" and other environmental effects of HBCUs might contribute to better academic outcomes for black students who attend these schools); see also *infra* text accompanying notes 123–32 concerning the academic success of Posse Foundation scholars at selective colleges and universities even where they are academically "mismatched."

⁷⁸ See SANDER & TAYLOR, JR., *supra* note 3, at 82 (noting this "HBCU Effect" when HBCUs are removed from the data on law school mismatch and cause the mismatch effect to "disappear"); see also *id.* at 36, 43, 82, 109 (citing HBCUs as producing 40% of blacks with bachelor degrees in science and engineering and the disproportionate number of black MacArthur Prize winners produced by HBCUs, and noting that the mismatch effect disappeared in a study by Ian Ayres and Richard Brooks which excluded HBCUs from the analysis and that "students who attend [HBCUs] [] have very strong outcomes on a whole array of measures").

tend an elite school.⁷⁹ In other words, mismatch theory's proof that URMS who attend less elite schools (where their credentials are presumed to be comparable to their same-school peers) outperform those who attend more elite schools (where their credentials are presumed to be weaker than their same-school peers) counts among those URMS who attend less elite schools the disproportionate number of successful URMS attending HBCUs.⁸⁰ Interestingly, however, when Ian Ayres and Richard Brooks tested mismatch theory by comparing URMS with equivalent credentials who attended more elite law schools with those who attended less elite law schools, but excluded those URMS attending HBCUs, "the mismatch effect goes away."⁸¹ This suggests that even URMS with academic credentials comparable to their same-school peers, i.e., those who attended less elite schools in the Ayres and Brooks study, do not appear to perform any better academically when they attend institutions where, notwithstanding their credentials, they are likely to suffer from the harmful effects of stigma/stereotype threat.⁸² Similarly, it could be assumed that URMS who attend HBCUs experience disproportionate success because they do not suffer from the harmful effects of stigma/stereotype threat, i.e., the HBCU Effect.⁸³ This data seems to support the claim that stigma/stereotype threat are important phenomena in understanding, and redressing, the academic underperformance of URMS relative to their same-school peers, whether at elite or non-elite schools. Numerous accounts exist of URMS (or others) who are admitted to academically rigorous college programs and who succeed where they have robust personal and/or institutional support systems to facilitate their success.⁸⁴ Moreover, there is

79 See *id.* at 82.

80 *Id.*

81 *Id.*

82 *Id.* Sander and Taylor express disapproval of Ayres's and Brooks's methodology, but it is not clear why they would question this methodology, other than the fact that it skews the results against mismatch.

83 Even Sander and Taylor themselves ponder why URMS who attend HBCUs are so successful as determined by various academic and occupational measures. *Id.* at 109. The uniquely supportive environment created by not only HBCUs but also affinity-based resources on majority campuses has been cited by others as facilitating the "safe space" necessary for URMS to thrive academically. See Vinay Harpalani, *Narrowly Tailored But Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. (forthcoming 2014) (discussing the benefits of intraracial diversity derived from affinity-based resources on majority campuses, or what he calls "race-conscious spaces," including the ability to help URMS feel less isolated and more empowered); see also Allen & Solórzano, *supra* note 54, at 263 (discussing the "safe spaces" URMS create on majority college campuses to insulate themselves from the effects of stigma/stereotype threat).

84 See *infra* Part II.A.2.

a substantial, and expanding, body of research to support the claim that high expectations accompanied by adequate academic support are important in fostering high academic achievement.⁸⁵ At the very least, the data suggest that the impact of stigma/stereotype threat and the associated harms of low performance expectations and increased hostility/resentment should be measured to determine how they might act to suppress the academic performance of URMS in concert with or even independent of academic credentials by exacerbating or precipitating the intermediate forms of competition and social mismatch.

II. WHAT'S MISSING FROM MISMATCH THEORY AND WHY IT MATTERS

Mismatch theory attempts to explain the disparity in academic performance between URMS and their same-school peers by suggesting that the weaker relative academic credentials of URMS doom them to academic underachievement at selective colleges and universities and that the best hope for their academic success lies in redirecting these students to less selective schools.⁸⁶ Mismatch theory focuses on academic credentials, to the exclusion of non-academic credentials, in predicting who might be successful academically. It further suggests that academic performance follows ineluctably from individual credentials without any consideration of environmental influences on student outcomes. But the preceding analysis cites to research and data challenging these assumptions and suggests mismatch theory might offer an incomplete picture of the impact of race-conscious admissions plans, and the resulting academic credentials disparity between URMS and their same-school peers, on the phenomena of URMS' academic underperformance. Instead, this re-

⁸⁵ Steele, *Thin Ice*, *supra* note 52, at 51–52; *see also* RIPLEY, *supra* note 39, at 193. Sander and Taylor seem to also acknowledge that institutional factors do contribute to the academic performance of students. For example, they credit academic support programs for student athletes generally, law students at UCLA School of Law, URMS at the most “super elite schools,” URMS at UCLA post-Proposition 209, and students with lower than average levels of academic preparation generally, for improving academic performance. *See* SANDER & TAYLOR, JR., *supra* note 3, at 27, 52, 106–107, 147, 179.

⁸⁶ There are several scholars who demonstrate that the data do not bear out this fate, at least at the most elite colleges and universities, where URMS tend to have positive outcomes relative to URMS at less elite schools on several measures, including graduation rate, professional attainment, and earnings. *See* WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 257 (1998); *see also* ESPENSHADE & RADFORD, *supra* note 9, at 226; *see also* Arcidiacono, et al., *supra* note 6, at ___ (explaining Espenshade's conclusion that the benefits of attending an elite school actually outweigh any negative academic effects that accrue to URMS from mismatch).

search and analysis suggests that several other variables might be equally important for understanding the academic potential and academic performance of URMS at the nation's most selective colleges and universities. In particular, the evidence suggests that learning mismatch may not follow for all students with lower relative academic credentials if the student is possessed of important non-academic credentials such as grit, self-discipline, and determination. Additionally, this evidence suggests that environmental factors, such as stigma/stereotype threat and their associated harms of lowered expectations of and increased hostility/resentment toward URMS, might play a bigger and more direct role in suppressing the academic performance of URMS than is accounted for by mismatch theory. This Part explores these additional variables in greater detail and attempts to reconcile them with the claims of mismatch theory, as well as suggests some alternate solutions for resolving the problem of URMS' academic underperformance that are obscured by mismatch theory's narrow focus on academic credentials as the sole measure of academic ability and performance.

A. *Who is Capable of Succeeding in College?*

Mismatch theory assumes that one need only consider academic credentials to predict who is likely to succeed at a given college or university.⁸⁷ However, as previously demonstrated, colleges and uni-

⁸⁷ In particular, mismatch theory is premised on an overvaluation of test scores on college entrance exams as a measure of academic credentials. See SANDER & TAYLOR, JR., *supra* note 3; see also West-Faulcon, *supra* note 45, at 1277–81 (explaining the origins of the SAT as based on a measure of cognitive ability that defines intelligence by the unitary of “g,” suggesting that its valuation of intelligence as a unitary measure is “outmoded” in view of scientific advances in intelligence theory and test design, and offering alternate, non-unitary theories of intelligence as a basis for more predictive and less racially skewed testing). Even James Flynn, one of the preeminent psychometricians, has recently developed a more robust theory of intelligence directed away from overreliance on “g” as a single, unitary measure of intellect and toward a more complete picture of ability. FLYNN, *supra* note 34, at 54–55. For instance, Flynn posits that this more complete measure of ability might entail the following elements of measurable intelligence: (1) mental acuity, (2) habits of mind, (3) attitudes, (4) knowledge/information, (5) speed of information processing, and (6) memory. *Id.* at 53–54. Citing the work of Duckworth and Seligman, among others, Flynn concedes the importance of personal, non-cognitive attributes (defined as emotional quotient or EQ) in addition to (and perhaps even over) IQ as a predictor of cognitive performance. *Id.* at 77–80. Although not the focus of inquiry here, it would be equally valuable to disaggregate academic credentials by test scores and HGPA to determine whether the size of racial preferences vary depending on the relative weight given to each of these credentials. In light of the heavier emphasis placed on HGPA by most selective colleges and universities, see, e.g., Geiser & Santelices, *supra* note 28, it may be that the size of preferences measured by the Sander and Taylor

versities consider non-academic credentials in their admissions processes.⁸⁸ Research has proven that certain of these non-academic credentials are at least as predictive of academic and later professional success as are the academic credentials on which mismatch theory relies so heavily for its conclusion that URMS with relatively weak academic credentials should not be admitted to the most selective colleges and universities, but should instead be redirected to less elite schools.⁸⁹ So why should mismatch theory exclude these important non-academic credentials in predicting URMS' likelihood of academic success or adjudging the efficacy of race-conscious admission plans? Moreover, given the high predictive value of certain of these non-academic credentials for academic performance specifically,⁹⁰ they might play more than a nominal role in predicting students' likelihood of academic success. Thus, their exclusion from mismatch theory should not be dismissed as inconsequential.⁹¹

To be fair, Sander and Taylor give some acknowledgment to this issue in *Mismatch*,⁹² but assert that whatever non-academic credentials are evaluated by selective colleges and universities in the admissions process, they have little, if any, impact on actual admissions decisions.⁹³ In a separate study of the UCLA undergraduate admissions process, Sander concluded that these non-academic credentials were highly correlated with academic credentials and therefore offered no admissions advantage to URMS to offset the disparity in academic credentials precipitated by the use of "large racial preferences."⁹⁴ So

model overemphasizing test scores overstates the actual size of "racial preferences" accorded to URMS in the admissions process.

88 See *supra* note 30.

89 See *supra* note 34.

90 See *supra* note 34 (addressing how certain measures of student self-discipline are more highly correlated with academic performance than are cognitive measures such as scores on standardized tests of intellectual ability).

91 See *supra* note 36 and accompanying text.

92 See SANDER & TAYLOR, JR., *supra* note 3, at 20 (acknowledging that "[s]chools do not, of course, rely solely on academic [credentials] to select students").

93 *Id.* at 186.

94 Compare Richard Sander, *The Consideration of Race in UCLA Undergraduate Admissions* (Oct. 20, 2012), available at <http://www.seaphe.org/pdf/uclaadmissions.pdf> ("Holistic admissions by itself did not add anything to African-American admissions at UCLA; rather, it provided a cover for illegal discrimination by UCLA's admissions office."), with Robert D. Mare, *Holistic Review in Freshman Admissions at UCLA* (Jan. 2012), available at <http://www.senate.ucla.edu/committees/cuars/documents/uclareportonholisticreviewinfreshmanadmissions.pdf> (concluding from an analysis of the UCLA holistic review system for the years 2007 and 2008 that academic credentials are not wholly determinative of admissions, but that other non-academic credentials make "small contributions" to favorable admissions decisions); see also Arcidiacono, et al., *supra* note 6, at 694–96 (explaining Sander's research).

how do we reconcile Sander and Taylor's claims that academic credentials are most relevant to the process of predicting academic performance and selecting for college admissions with the claim that colleges and universities do value non-academic credentials in the admissions process and the research demonstrating that certain of these non-academic credentials are highly predictive of future academic success?

First, we ought to take seriously the claim by selective colleges and universities that they value and select for non-academic credentials in the admissions process.⁹⁵ At the same time, however, we should seek to better understand how these non-academic credentials figure into the admissions processes of selective colleges and universities to ensure that they employ them effectively as measured by the increased likelihood of academic and later professional success for admitted URMS.⁹⁶ Sander and Taylor concede that the data set on which they primarily rely to establish the mismatch hypothesis does not have the level of granularity on non-academic credentials necessary to analyze this factor against academic performance, let alone any other measure of student outcomes, with any degree of statistical rigor.⁹⁷ If we could first identify those non-academic credentials that colleges and universities consider in making admissions decisions, even if only im-

⁹⁵ The University of Michigan's undergraduate admissions plan, for instance, considered information in a student's "application, essay or high school counselor's recommendation" to determine whether an applicant demonstrated "personal achievement, as evidenced by persistence, character, commitment to high ideals, and level of awards." See Brief for Respondents at 9, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516). Similarly, the University of Texas at Austin compiles a Personal Achievement Index as a part of its holistic review process that considers, among others, the following non-academic credentials in evaluating students for admission: leadership potential, extracurricular activities, honors and awards, work experience, community service and special circumstances. Brief for Respondents, *supra* note 30.

⁹⁶ This is one of the critiques made by Sander and Taylor of the use of race-conscious admissions plans, namely that the colleges and universities employing race-conscious admissions plans do not adequately substantiate the claim that these race-conscious admissions plans are effective in selecting URMS who are capable of and likely to succeed academically at their institutions or in any other way beneficial to URMS' academic interests. See Arcidiacono, et al., *supra* note 6, at 695–96. Moreover, Sander does concede the need for colleges and universities to be held accountable for demonstrating the efficacy of their race-conscious admissions plans as measured by the success of admitted URMS. See Arcidiacono, et al., *supra* note 6. However, for the reasons stated in Arcidiacono et al., *id.*, I would not necessarily embrace the recommendation to limit the use of race-conscious admissions plans based on student academic achievement as measured by the median of student performance. *Id.* at 712.

⁹⁷ See SANDER & TAYLOR, JR., *supra* note 3, at 171 (observing that the UC system data in particular lacks sufficient detail to "answer many important questions" about exactly how "racial preferences" operate or precisely how they impact URMS' academic performance).

plicity, we might be able to quantify the relationship between these non-academic credentials and academic or professional success, much as mismatch theory has done for the correlation between academic credentials and academic success. Only then might we have a more complete view of the effect, if any, of credentials, both academic and non-academic, on the likelihood of admission and subsequent academic performance of URMS relative to their peers. Perhaps more important, we could offer useful insight on how admissions officers might better evaluate applicants for admission and better predict their likelihood of academic success that would result in more an effective prescription than simply eliminating the use of race-conscious admission plans and/or redirecting URMS to less selective colleges and universities based only on a single measure of academic potential.⁹⁸ In support of their mismatch theory, Sander and Taylor variously utilize measures of college graduation, class rank, and later professional success to identify the ways in which URMS underperform relative to their same-school peers.⁹⁹ If we can similarly identify and quantify correlations between certain non-academic credentials and these various measures of student success, we might develop a more robust theory of how credentials, both academic and non-academic, influence student performance. Several scholars and researchers have already begun to undertake this work, and their research is instructive.

Some of the most promising and advanced work on this topic comes from Professors Marjorie Shultz and Sheldon Zedeck in the law school admissions context.¹⁰⁰ Law schools, perhaps even more than undergraduate schools, rely heavily on academic credentials to

98 Research by Linda Wightman suggests that better predictions of academic performance, rather than the elimination of racial preferences per se, would improve graduation rates for all students, including URMS, which is one of the measures of academic performance on which Sander and Taylor rely to establish mismatch. See Linda Wightman, *Are Other Things Essentially Equal? An Empirical Investigation of the Consequences of Including Race as a Factor in Law School Admission*, 28 SW. U. L. REV. 1, 35 (1998) (finding that URMS whose academic credentials were farthest from the mean of all students, i.e., had the largest credential gap, did not have consistently low graduation rates relative to their peers, whereas students whose academic performance was underpredicted based on their credentials, regardless of whether they received an admission preference based on race, were least likely to graduate).

99 See SANDER & TAYLOR, JR., *supra* note 3, at 34, 55, 57, 61 (citing graduation rate, class rank, and professional success).

100 This context is particularly salient in view of Sander and Taylor's heavy reliance on law school data to establish the existence of mismatch. *Id.* at 60-61.

determine admissions.¹⁰¹ Acknowledging the limitations of this narrow selection process for predicting professional success as a lawyer,¹⁰² in addition to its limitation in facilitating student body diversity, Shultz and Zedeck undertook a study to explore the possibility of incorporating non-academic indices into the law school admissions process.¹⁰³ Shultz and Zedeck viewed this as a way to both improve diversity and increase the effectiveness of admissions decisions in predicting the future professional success of students, something the Law School Admissions Test (“LSAT”), which figures prominently in law school admissions, is unable to do, notwithstanding its high correlation with first-year grades.¹⁰⁴ The twenty-six factors that emerged from the Shultz and Zedeck study are designed to measure individual capacity for professional success as defined by effective lawyering.¹⁰⁵

The twenty-six factors were grouped into eight clusters, among them “character,” which purports to measure an individual’s passion and engagement, *diligence*, integrity/honesty, stress management, community involvement and service, and self-development.¹⁰⁶ This character factor seems comparable to the kind of non-academic credential Grant, Duckworth, and Seligman variously described as “grit,” self-discipline, and diligence and found to be highly correlated both with academic and professional success. Shultz and Zedeck devel-

¹⁰¹ See Arcidiacono, et al., *supra* note 6, at 695 n.33 (noting that law schools rely almost exclusively on LSAT scores and undergraduate grade point average (“UGPA”) to determine admissions).

¹⁰² The LSAT is most effective for predicting first-year grades in law school (FYGPA), but even this measure has only a .47 correlation and explains only 22% of the variance in FYGPA. Marjorie M. Shultz & Sheldon Zedeck, *Admission to Law School: New Measures*, 47 *EDUC. PSYCHOLOGIST* 51, 52 (2012); see also Kristen Holmquist et al., *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 *J. LEGAL EDUC.* 565 (2014).

¹⁰³ This study was based on methods developed in the field of personnel or industrial psychology to implement hiring and selecting procedures for employers. *Id.* at 576–77. These methods begin with an analysis of the skills and competencies required to perform the constituent tasks associated with a job, and then devise “situational judgment, biographical and personality assessments that reveal aptitudes, tendencies, and behaviors that correlate with the essential skills and competencies required for success in the job.” *Id.* at 576. Using this methodology, Shultz and Zedeck undertook this analysis and identified the skills and competencies associated with effective lawyering. *Id.* at 577.

¹⁰⁴ Shultz & Zedeck, *supra* note 102, at 53; see also Marjorie M. Shultz & Sheldon Zedeck, *Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering*, CELS 2009 4TH ANNUAL CONFERENCE ON EMPIRICAL LEGAL STUDIES PAPER 12–14 (July 31, 2009), available at <http://ssrn.com/abstract=1442118>. For a discussion of the heavy reliance on the LSAT for law school admissions, see SANDER & TAYLOR, JR., *supra* note 3, at 58.

¹⁰⁵ Shultz & Zedeck, *supra* note 102, at 54 (describing the process of identifying the factors through interviews with lawyers across an array of practice areas and sectors that allowed for the development of a behaviorally anchored rating scales (BARS)).

¹⁰⁶ *Id.*

oped tests to measure these twenty-six factors and determine their correlation with effective lawyering.¹⁰⁷ They concluded from their research that these twenty-six factors were not only more predictive of lawyer effectiveness measures than the LSAT, but also had some degree of independence from the traditional academic indices measured by the LSAT in these predictions.¹⁰⁸ Thus, adding these twenty-six factors to the law school admissions process would result in improved predictions about future professional success, which mismatch theory concedes is a relevant measure of student success and therefore a proper consideration for admission.¹⁰⁹ Further research on this issue, including in the undergraduate admissions context, is needed. In particular, we ought to do the following (1) identify those non-academic credentials correlated with the relevant measures of student success; (2) ensure that these credentials are incorporated into admissions decisions as appropriate; and (3) track student performance to measure the predictive value of these non-academic credentials. Only then will we have a clearer picture of the relative value of academic and non-academic credentials in determining admissions and influencing student performance across the range of relevant measures of student success.

1. *Why “Grit” Matters*

Even if we were able to identify and quantify the correlation between non-academic credentials and predictions for academic or later professional success, however, mismatch theory assumes that these measures are irrelevant because academic credentials tell us all we need to know about predicting academic performance. So, the second thing necessary for reconciling the claims of mismatch theory with the data and research demonstrating the importance of non-academic credentials for predicting academic performance, is to demonstrate that non-academic credentials offer some useful measure of academic potential that is distinct from and not neatly correlated with academic credentials. Shultz and Zedeck’s work does demonstrate in the law school admissions context that some non-academic credentials could provide incremental value in predicting student success, as measured by effective lawyering, over and above the predictive value of the LSAT. But it is useful to understand how

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See SANDER & TAYLOR, JR., *supra* note 3, at 64 (demonstrating law school mismatch in part by calculating the extent to which URMS fail to achieve professional success).

these non-academic credentials work to influence academic performance and even later professional success more broadly. Duckworth, the leading “grit” scholar, defines “grit” as “having passion and perseverance in long term goals.”¹¹⁰ In a 2004 study, Duckworth and her colleague and frequent collaborator, Martin Seligman,¹¹¹ found that among 140 eighth graders their measure of “grit” was more predictive of final grades, standardized achievement test scores, and admission to a competitive high school program than their measure of cognitive intelligence (or IQ), with grit accounting for more than twice as much variance as IQ in each of these academic outcomes.¹¹² In fact, Duckworth and Seligman found that while most correlations between IQ and the selected academic performance variables were medium in magnitude and only half were statistically significant in the predicted direction, the correlations between “grit” and the selected academic performance variables “ranged from medium to large in effect size and all were statistically significant.”¹¹³ This research is helpful for understanding why mismatch theory with its overvaluation of academic credentials and heavy emphasis on the gap in scores on college entrance exams in particular, which are themselves a measure of intelligence similar to IQ testing,¹¹⁴ may unwittingly distort our view of the predictive value of an admissions process that also places some importance on non-academic credentials such as “grit.”

Adam Grant helps to further explain how “grit” works and its correlation with individual success as measured by professional outcomes by citing to the 1980s study of psychologist Benjamin Bloom.¹¹⁵ Bloom “conducted a landmark study of world-class musicians, scientists, and athletes” and found that they all possessed an “unexpected

110 GRANT, *supra* note 34, at 105–06 (explaining Duckworth’s definition of grit).

111 Duckworth was actually Seligman’s graduate student and protégé. TOUGH, *supra* note 36, at 57.

112 Duckworth and Seligman referred here to this non-academic credential as “self-discipline” but defined it consistently with “grit.” Angela Duckworth & Martin Seligman, *Self-Discipline Outdoes IQ in Predicting Academic Performance of Adolescents*, 16 PSYCHOL. SCI. 939, 940–41 (2005) (measuring the effect of self-discipline and intelligence on academic achievement).

113 *Id.* at 941 (noting the larger magnitude of correlation between “grit” and academic performance than the magnitude of correlation between intelligence and academic performance).

114 See generally LEMANN, *supra* note 45, at 30–31 (explaining that the SAT was designed to measure student aptitude akin to intelligence or IQ, rather than student achievement).

115 See GRANT, *supra* note 34, at 104–05 (citing a study by Bloom arguing that the encouragement of mentors played a large role in achievement). This research also highlights the importance of high expectations in determining individual performance outcomes. See *id.* at 98–100 (explaining studies that claim to show that teacher’s beliefs about students affect the performance of students).

absence of raw talent,” or “aptitude,” but also found that just some special skill, when encouraged by teachers and others, provided the necessary incentive to engage in the kind of self-discipline and “intense practice” that led to their eventual success.¹¹⁶ In other words, “grit” is the fuel that drives individuals to realize their full potential, whether academic, artistic, athletic, or professional. If an individual is possessed of some aptitude, but lacking in the requisite “grit,” she is unlikely to reach the full measure of her potential.¹¹⁷ Conversely, if an individual is possessed of a healthy dose of “grit,” even a modicum of aptitude can be leveraged into success.¹¹⁸

Carol Dweck, a Stanford psychologist renowned for her work on how “mindset,” rather than intelligence, determines success in various domains of life, including academic and professional life, explains this critical non-academic credential in terms of a “growth” versus “fixed” mindset.¹¹⁹ According to Dweck people with a “fixed mindset” believe in ability (or aptitude) over effort, whereas people with a “growth mindset” believe in effort over ability (or aptitude).¹²⁰ In studies of both junior high school and college pre-med students, Dweck found that those with an effort or “growth” mindset outperformed their peers in progressively more challenging academic environments, even when they had previously demonstrated comparable academic ability.¹²¹ Speaking in terms that align the growth mindset

116 *Id.* (discussing studies indicating that when teachers raised their expectations, student performance increased).

117 *See* GLADWELL, *supra* note 38, at 38–39 (explaining studies indicating that sustained effort is the most important factor in determining success).

118 Malcolm Gladwell helps to explain this phenomenon in his book *Outliers*. In a study of individuals who have achieved uncommon success across a number of occupational domains, Gladwell demonstrates that it is not those who possess the highest level of ability who achieve the greatest success, but those who combine some level of ability with the diligence necessary to develop this ability, which he defines as 10,000 hours of practice, who achieve the most. *See id.* at 39–41. This could also explain why some students with even moderate credentials are able to succeed academically. *See* Arcidiacono, et al., *supra* note 6, at 693, 714 n.99 (describing a study that found non-academic factors to be more predictive of college success than academic factors).

119 *See* DWECK, *supra* note 37.

120 *Id.* at 40–41.

121 *See id.* at 57–58 (describing Dweck’s study, which finds that junior high school students with an effort or growth mindset increased their grades after an initial transition period, whereas grades continued to decline for students with an ability or fixed mindset); *id.* at 60–62 (describing the difference in motivation and study habits between pre-med students with a growth mindset and those with a fixed mindset, and attributing the difference in academic performance to their mindset, rather than the fact that “they were smarter or had a better background in science”). Vinay Harpalani, using Dweck’s work on mindset, studied low-income secondary school students and found that high-achieving black students in particular were more likely to have a growth mindset than either

with Duckworth and Seligman's valuation of "grit," Dweck defines the necessary ingredients for individual success as "clear focus, all-out effort, and a bottomless trunk full of [coping] strategies," and suggests that these are the qualities that provide growth mindset students with a competitive advantage over their peers.¹²²

2. A Case Study: The Posse Foundation

But perhaps the best evidence in support of the claim that non-academic credentials influence student performance as much as academic credentials and that these non-academic credentials can be identified, incorporated into a rigorous selection process, and measured against student academic outcomes is The Posse Foundation. The Posse Foundation has a track record that belies the simple linear relationship between academic credentials and academic performance on which mismatch theory relies.¹²³ Deborah Bial established the Posse Foundation in 1989 with a mission of "finding talented young leaders with extraordinary academic and leadership *potential* and connecting them to the best educational opportunities in America."¹²⁴ Over 63% of Posse scholars are URMS,¹²⁵ and they attend some

marginally achieving black students or students from other racial and ethnic groups. See HARPALANI, *supra* note 71, at 47. Harpalani hypothesized that a growth mindset allowed high-achieving black students to more effectively counter stigma or stereotype threat within the academic environment, thereby improving their academic performances. *Id.* Harpalani suggests that teaching black college students to adopt a growth mindset could be an effective intervention for closing the achievement gap between URMS and their same-school peers. *Id.* at 151.

¹²² *Id.* at 67.

¹²³ See THE POSSE FOUNDATION, INC., *Fulfilling the Promise: The Impact of Posse After 20 Years*, THE POSSE FOUNDATION ALUMNI REPORT 8 (2012) (explaining how students in the Posse program had SAT scores well below the median of their same-school peers yet demonstrated academic success); see also Duckworth & Seligman, *supra* note 112, at 941 (finding that self-discipline better predicts academic achievement than does IQ). Sander and Taylor measure academic performance in terms of class rank. See SANDER & TAYLOR, JR., *supra* note 3, at 7.

¹²⁴ Bial was a 2007 recipient of a MacArthur "Genius Grant" Fellowship for her work as the President and Founder of the Posse Foundation. See *A Chronicle Q&A with Barack Obama*, THE CHRONICLE OF HIGHER EDUC. (Nov. 12, 2007), <http://chronicle.com/article/A-Chronicle-Q-A-with-Barack/42970/> (explaining Bial's use of non-traditional measures of potential, like leadership and teamwork, to identify promising students and match them with elite colleges and universities); see also *MacArthur Fellows Program: Meet the Class of 2007 (Deborah Bial)*, MACARTHUR FOUNDATION (Jan. 28, 2007), <http://www.macfound.org/fellows/816/>. This focus on students' "potential" is consistent with Dweck's assessment that potential is more important than demonstrated ability. See DWECK, *supra* note 37, at 27–28. Dweck dismisses talent and ability as the predominant determinant of future success and defines potential as the "capacity to develop . . . skills with effort over time." *Id.* Dweck cautions that "[a]n assessment at one point in time has

of the most selective colleges and universities in the country, those which Sander and Taylor suggest employ the most aggressive “racial preferences,” in groups aptly called “posses.”¹²⁶ By the academic measure on which mismatch theory places the most emphasis—test scores on either the SAT or ACT—Posse scholars demonstrate a familiar academic credentials gap with their same-school peers.¹²⁷ The Posse scholars report a median SAT score of 1056, compared to a median SAT score of their same-school peers of 1210 to 1475.¹²⁸ However, rather than being evaluated solely on the basis of these academic credentials, Posse scholars are selected based on a broad range of credentials, both academic and non-academic. These credentials include not only traditional academic measures such as grades and standardized test scores, but also non-academic measures

little value for understanding someone’s ability, let alone their potential to succeed in the future.” *Id.* at 29.

125 See THE POSSE FOUNDATION, INC., *supra* note 123, at 4 (documenting the percentage of underrepresented minority students in the Posse program).

126 Vanderbilt University was the first school to partner with The Posse Foundation in 1989, and the program has since grown to include a list of colleges and universities that rank among the top private universities and liberal arts colleges in the country, including Bard College, Brandeis University, Bryn Mawr College, Bucknell University, Hamilton College, Middlebury College, Northwestern University, Oberlin College, Pepperdine University, Tulane University, UC Berkeley, UCLA, University of Pennsylvania, and University of Wisconsin. For a full list of participating colleges and universities, see *Partner Colleges and Universities*, THE POSSE FOUNDATION, INC., <http://www.possefoundation.org/our-university-partners/participating-schools> (listing the foundation’s partner universities and colleges). Students attend the partner schools in groups of ten, which provide emotional and social support necessary for each student’s success. See THE POSSE FOUNDATION, INC., *supra* note 123, at 1 (explaining the size of the “posses” and the importance of the social support that the Posse program provides through its cohorts); see also *infra* note 134 and accompanying text.

127 Sander and Taylor cite a credentials gap on the SAT between URMS and their white and Asian peers of approximately 240 points. See SANDER & TAYLOR, JR., *supra* note 3, at xviii; see also *id.* at 17 (indicating a 300-point gap between black and white students on the current SAT I test).

128 See THE POSSE FOUNDATION, INC., *supra* note 123, at 8 (2012). Although HGPA was not provided for the Posse scholars, we can assume that their HGPA was high, given the rigor of the screening. See *id.* at 7. However, the rigor of the scholars’ high school curriculum was likely low because more than a third (38%) of Posse scholars reported that their high school peers did not attend college or community college, only ten percent of their high school peers attended a four-year private college, and nearly three-quarters (73%) of the scholars attended a better ranked college than their high school peers. *Id.* (documenting the low educational attainment of the high school peers of Posse participants). The fact that this presumptively high HGPA, even from a less than competitive high school, is more predictive of the success of Posse scholars than the SAT contradicts the often-cited concern that HGPA is not a reliable indicator of academic performance given the variability in rigor across high school curriculums. See Geiser & Santelices, *supra* note 28, at 18 (claiming to measure the effect of high school grades and SAT scores on academic achievement in college).

such as their “drive.”¹²⁹ Based on their academic credentials alone, mismatch theory would condemn these Posse scholars to academic underachievement in college, but Posse scholars defy the logic of mismatch theory. They do not underperform academically; instead, they substantially overperform as measured by both graduation rate and class rank.¹³⁰ Notwithstanding standardized test scores “far below” the mean for their schools,¹³¹ Posse scholars graduate at a rate of 90% and a full 51% of Posse scholars make the dean’s list, while 24% graduate with academic honors.¹³² This is success by any measure.¹³³ The success of these Posse Scholars suggests that something is missing in the logic of mismatch theory. Instead of focusing exclusively on their academic credentials, perhaps what makes Posse scholars successful academically is that they have the requisite non-academic credentials, like “drive” or “grit,” to avoid learning mismatch and succeed in a highly competitive academic environment, notwithstanding academic credentials below the median of their same-school peers. This is the same phenomenon observed by scholars like Adam Grant and as demonstrated in studies like those of Duckworth, Seligman, and Dweck. However, there is also another important lesson to be learned from the Posse Scholars, one that reveals an equally important gap in the logic and data of mismatch theory. In addition to “grit,” Posse scholars also have the individual and institutional sup-

129 See THE POSSE FOUNDATION, INC., *supra* note 123, at 4 (explaining the variety of factors, both academic and non-academic, considered when choosing students for the program). This “Dynamic Assessment Process,” or “DAP,” results in a rigorous and highly selective admission process, despite not relying heavily on standardized test scores. *Id.* (explaining the Posse program selection criteria). The acceptance rate at the Posse Foundation, for instance, is lower than at Harvard (4% vs. 5%), and Posse has created an online database of applicants to allow partner schools to recruit from among those finalists not selected to participate in the program. *Id.* at i (describing the database of Posse applicants to which partner schools are given access for recruiting additional students outside of the Posse program).

130 *Id.* at 8 (documenting the academic honors earned by Posse participants).

131 This is the most definitive measure that Sander and Taylor designate as predictive of academic performance under mismatch theory. See SANDER & TAYLOR, JR., *supra* note 3, at 17, 29, 34 (noting gap in SAT scores, referring specifically to “test score gap”, and discussing STEM mismatch exclusively in terms of SAT scores).

132 This compares to graduation rates cited by Sander and Taylor of 38% and 40% respectively, for blacks and Hispanics in the UC system even after racial preferences had been ostensibly eliminated (or 22% and 27%, respectively, with racial preferences). *Id.* at 146.

133 In 2012, for instance, only 59% of full-time, first-time undergraduate students obtained a bachelor’s degree within six years. See *Fast Facts*, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, nces.ed.gov/fastfacts/display.asp?id=40. The rate was 40% for black students and 51% for Hispanics. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, http://nces.ed.gov/programs/digest/d13/tables/dt13_326.10.asp.

port necessary to combat environmental harms that might otherwise hinder their academic success.¹³⁴

B. The Impact of Environmental Factors on Academic Performance

Mismatch theory assumes that stigma and stereotype threat, to the extent they exist, only affect the academic performance of URMS by at most compounding the harm of weak academic credentials.¹³⁵ According to mismatch theory then, the harm accruing to URMS from these phenomena is mere collateral damage. This dismissal of the effects of stigma and stereotype threat as neither direct nor substantial discounts the magnitude of their effect on URMS' academic performance. However, stigma/stereotype threat should be a bigger cause for concern. Stigma/stereotype threat and their associated environmental harms in the form of lowered expectations of and increased hostility/resentment toward URMS are well-documented in the social science literature and could provide particularly important insights for understanding why URMS underperform not only as compared to their same-school peers, but also compared to predictions based on their own entering credentials.¹³⁶ Although mismatch theory acknowledges these phenomena, they are presumed only to cause collateral damage, rather than presenting a primary threat to the ac-

¹³⁴ Posse scholars attend college in a cohort of ten students who provide personal and academic support for one another. In fact, The Posse Foundation is named for a student who once told Bial, "I never would have dropped out of college if I had my posse with me." THE POSSE FOUNDATION, INC., *supra* note 123, at 1. This positive association as Posse scholars may itself insulate these students from some of the effects of stereotype threat. Research has shown that where both positive and negative social identities are available to individuals, they will activate the positive social identity in order to mitigate stereotype threat. See Rydell et al., *supra* note 74, at 949–66 (explaining that when a positive self-identity is present, it may outweigh the detrimental effects of negative stereotypes).

¹³⁵ SANDER & TAYLOR, JR., *supra* note 3, at 104–05 (citing stereotype threat as "worse[ning]" academic performance). *But see* Arcidiacono et al., *supra* note 6, at 709–10 (questioning the empirical support for stereotype threat). This seeming conflict may arise from some confusion in the use of the term "stereotype threat" by Sander and Taylor to refer interchangeably to both stigma threat and stereotype threat. See SANDER & TAYLOR, JR., *supra* note 3, at 43, 100 (referring to a side effect of mismatch as "stereotyping" rather than stigma threat and citing "negative stereotypes about minority performance and perhaps minority ability in the minds of students of all races"); see also *id.* at 104–05 (referring to "stereotype threat" as one of the "most widely discussed but most often misunderstood" strains of diversity research).

¹³⁶ See Wightman, *supra* note 98, at 10–12 (defining "underperformance" by URMS as performance that is below predictions based on entering academic credentials, showing that the entering academic credentials of URMS actually "overpredicts" their subsequent academic performance).

ademic success of URMS.¹³⁷ Moreover, mismatch theory presumes that colleges and universities cannot, or should not, intervene to disrupt the intermediate forms of competition and social mismatch that may accrue directly from stigma/stereotype threat. However, the social science literature describes a number of effective interventions that can, and should, be employed by colleges and universities to offset these harms, disrupt the intermediate forms of competition and social mismatch, and forestall URMS' academic underperformance. This data and research suggests a very different solution than the reduction or elimination of race-conscious admissions plans suggested by mismatch theory. Rather, the solution suggested by this alternate data and research is to eliminate the harms of stigma/stereotype threat directly by increasing the academic expectations of and institutional support for URMS.¹³⁸

1. “*The Soft Bigotry of Low Expectations*”

As previously explained, stigma and stereotype threat are related phenomena in that stigma threat precipitates a belief in the intellectual inferiority of URMS based on the assumption that they have been the beneficiaries of “large racial preferences.”¹³⁹ The effects of stigma threat are insidious, causing URMS not only to internalize this stigma in the form of stereotype threat and devalue their own abilities, thereby triggering competition mismatch and suppressing academic performance,¹⁴⁰ but also causing faculty and administrators with whom URMS interact to lower their expectations of URMS' academic performance.¹⁴¹ These lowered expectations can become a self-

¹³⁷ Sander and Taylor do reference a destructive downward spiral that can be triggered by stereotype threat, but they do not address the related phenomenon of stigma threat at all. SANDER & TAYLOR, JR., *supra* note 3, at 99 (observing that the effects of racial preferences are that URMS “take on an unearned guilt, which triggers a host of psychological maladies . . . which in turn harms performance”). Moreover, by addressing stereotype threat as a collateral harm of racial preferences themselves rather than an independent and uniquely harmful phenomenon, Sander and Taylor attempt to minimize its explanatory power for understanding why URMS underperform academically. *Id.* at 104-05 (noting “the preexisting test-score gap is real, but performance can be worsened by activating stereotype threat.”); *see also id.* at 151 (quoting a retired professor at UC Santa Cruz who recalled that black students “were woefully underqualified students who were then psychologically harmed by their lack of preparation . . .”).

¹³⁸ *See supra* note 49.

¹³⁹ *See supra* note 52 and accompanying text.

¹⁴⁰ *See supra* note 59 and accompanying text.

¹⁴¹ *See id.*

fulfilling prophecy and themselves suppress academic performance.¹⁴² Extensive social science research has demonstrated that teacher expectations are a critical determinant of student performance.¹⁴³ Thus, lowered teacher expectations due to stigma threat could directly trigger competition mismatch and significantly suppress URMS' academic performance independent of any individual student's academic credentials and/or credentials-based predictions for their academic performance.¹⁴⁴ Both Adam Grant and Amanda Ripley demonstrate the importance of teacher expectations in determining a student's academic success and how lowered expectations might substantially and directly impair student performance. Grant cites the classic "Pygmalion" study by Harvard psychologist Robert Rosenthal in which Rosenthal studied the effect of teacher expectations by administering the Harvard cognitive ability test to students in a San Francisco elementary school.¹⁴⁵ Rosenthal selected 20% of the students at random, irrespective of their performance on the test, and told their teachers they had shown "potential for intellectual blooming or spurting" based on their test scores.¹⁴⁶ During the course of the school year, the designated "bloomers" gained an average of twelve IQ points compared with average gains of only eight points for

¹⁴² Adam Grant cites to the famous Pygmalion study by Harvard psychologist Robert Rosenthal, subsequently replicated by others in which he concluded that "teachers' beliefs created self-fulfilling prophecies" because when teachers have high expectations of students "they set high expectations . . . engaged in more supportive behaviors . . . communicated more warmly . . . gave more challenging assignments . . . called on them more often . . . and provided them with more feedback." GRANT, *supra* note 34, at 99; *see also* RIPLEY, *supra* note 39, at 193 (identifying high teacher expectations as a key determinant of student performance in the high-performing PSIA countries and conversely low/varied teacher expectations as a key determinant of performance in the US, whose students perform relatively poorly, as measured by PISA); David Scott Yeager et al., *Breaking the Cycle of Mistrust: Wise Interventions to Provide Critical Feedback Across the Racial Divide*, 143 J. EXPERIMENTAL PSYCH.: GENERAL 804, 812–20 (2014) (discussing a study in which setting high expectations for URMS, along with other key interventions, resulted in dramatic increases in academic achievement).

¹⁴³ *See supra* note 142.

¹⁴⁴ *See* Robert Rosenthal & Lenore Jacobson, *Pygmalion in the Classroom*, THE URBAN REVIEW 16, 20 (1968) (noting the importance of teacher expectations in particular to the performance of stigmatized minority groups). This phenomenon could explain why URMS underperform academically even relative to predictions based on their own academic credentials. *See also* Wightman, *supra* note 98, at 25 (demonstrating that while white students generally performed better than their pre-admission predictions, minority students generally performed worse than those predictions).

¹⁴⁵ The Harvard cognitive ability test purports to measure verbal and reasoning skills. GRANT, *supra* note 34, at 98 (explaining the implementation of the study).

¹⁴⁶ *Id.* (explaining the design of the Rosenthal study).

their peers, despite having been selected at random.¹⁴⁷ Grant notes that “many experiments have [since] replicated these effects,” demonstrating that teacher expectations indeed exert substantial and direct influence on students’ academic performance.¹⁴⁸ Moreover, the original Pygmalion study also looked at the interaction of minority status with teacher expectations and found that higher teacher expectations generated even greater benefit for minority students than for non-minority students.¹⁴⁹

It may seem counterintuitive, especially at the most selective colleges and universities where the rigor of the curriculum is uniformly high relative to other institutions, but lower academic performance by URMS in these academically competitive environments might actually be caused by variations in teacher expectations, and Amanda Ripley explains why. In her book, *The Smartest Kids in the World and How They Got That Way*, Ripley attempted to uncover the secret of student academic success in some of the highest-performing countries in the world, as determined by their PISA rankings.¹⁵⁰ Ripley cited, as did Grant, the importance of teacher expectations for students’ academic success.¹⁵¹ When comparing the relatively poor academic performance of the United States to high-performing countries like Finland, South Korea, and Poland, Ripley explained that uniformly high teacher expectations and across-the-board academic rigor in these countries “mattered most of all.”¹⁵² She explained, for instance, that South Korea’s “sky-high” PISA scores were mostly a function of students’ “tireless efforts” because of the shared assumption that “performance was mostly a product of hard work—not God-given talent.”¹⁵³ By contrast, Ripley said, American students learn that failure means you are not good at something and it should be avoided, ra-

147 *Id.* at 98–99 (highlighting the results of the Rosenthal study). Interestingly, this study demonstrates the significance of teacher expectations by documenting continued IQ gains of “bloomers” relative to their peers even two years later, despite being with different teachers. *Id.* at 99 (highlighting the lasting effects of teacher expectations on performance).

148 *Id.* at 99–100 (documenting the experimental support in the literature for Rosenthal’s results); see also Yeager et al., *supra* note 142, at 818–20 (discussing the significance of teacher expectations as self-fulfilling prophecies of students’ academic success).

149 See Rosenthal & Jacobson, *supra* note 144, at 20 (noting that the minority student population at the studied school was Mexican, and that those who looked most Mexican, as rated by teachers based on photographs, benefited from a favorable expectation most of all); *id.* at 19.

150 See RIPLEY, *supra* note 39, at 193.

151 See RIPLEY, *supra* note 39, at 192 (emphasizing that while parents did not have high demands, the classroom needs a “culture of rigor” to ensure success).

152 *Id.* at 193.

153 *Id.* at 60, 64.

ther than treating failure as a lesson that something can be mastered with hard work, time and persistence.¹⁵⁴ This also reinforces the data and research of Carol Dweck demonstrating that students with a “growth” or effort mindset (S. Korea) outperform those with a “fixed” or ability mindset (U.S.).¹⁵⁵ In short, the expectations in America, unlike in South Korea, were not uniformly high, but variable based on perceived aptitude/ability, and so the performance of its students was also far more varied, according to Ripley.¹⁵⁶ Citing the high performance of Finland on the PISA exam, Ripley similarly explained that “Finnish schools followed a strict ethic of equity That left only one option: [a]ll kids had to learn.”¹⁵⁷ And, as previous studies have consistently demonstrated, students will perform consistent with teacher expectations.¹⁵⁸ Could this help explain why URMS on selective college campuses across the country are underperforming academically? Is the demotivation to perform that attends competition mismatch, which mismatch attributes solely to a disparity in academic credentials, also attributable in some part to differences in teacher expectations of students? Is it no wonder, for instance, that URMS underperform in law school classes when they are taught by professors who admittedly have a “very strong intuition” that African-American students “would be better off at a less selective law school[?]”¹⁵⁹ If lower expectations rather than, or in addition to, lower academic credentials triggers competition mismatch and precipitates a decline in academic performance, the appropriate response would not be to divert URMS students to less selective schools where expectations would be uniformly lower, but to increase expectations of URMS where they are. This solution might be better demonstrated in a different context where the issues are similar, but not as fraught as race.¹⁶⁰

If Ripley’s conclusion that South Korea’s “sky-high” PISA performance is attributable to its students’ growth mindset, then it is not

154 See *id.* at 192–93 (explaining that while students in other countries were forced to “grapple with complex ideas and think outside their comfort zones,” American students faced “few obvious consequences” when they failed and were therefore not able to learn from their mistakes).

155 See DWECK, *supra* note 37.

156 *Id.*; see RIPLEY, *supra* note 39, at 100 (discussing that American students do not study as much as those in other countries because less is demanded of them).

157 RIPLEY, *supra* note 39, at 139.

158 See *supra* note 142.

159 SANDER & TAYLOR, JR., *supra* note 3, at 87–88.

160 See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 302–03 (1978) (Powell, J., writing for the plurality) (acknowledging that gender is unlike race in our nation’s history).

surprising that Dweck's work offers further proof of the link between high expectations and student performance.¹⁶¹ In trying to understand the oft-cited phenomenon of the low presence of women in the STEM disciplines, Carol Dweck found that women with a fixed mindset were more susceptible to stereotype threat, which triggered competition mismatch and suppressed performance, than those who possessed a growth mindset.¹⁶² In trying to mitigate this problem, Dweck found that addressing and counteracting the "fixed mindset" itself was highly effective in eliminating the vulnerability to stereotype threat among the ability-believing women.¹⁶³ Dweck concluded that one of the most damaging aspects of the belief in ability is not that it "makes us think we can know in advance who has the [ability]," but that it can "harm people's academic performance who are told they don't have the [ability] and that they don't belong."¹⁶⁴ If Dweck is right, then the fixed mindset of the law professor who believes that African American students do not have what it takes to succeed at an elite law school and "would be better off at a less selective school" and the undergraduate professor who believes that his African American students are "woefully underqualified" might be just as damaging to their prospects for academic success as any deficit in their academic credentials. If, as the research demonstrates, competition mismatch is not inevitable even when abilities differ if expectations are uniformly high in what students can achieve through individual effort, then the way to mitigate this effect is not to divert URMS to less rigorous educational environments, but to negate the assumptions of faculty and peers and counteract the belief among URMS themselves that among those students who are admitted to selective colleges and universities on the basis of their individual merit, URMS are the ones who "don't have the [ability] and that [] don't belong."¹⁶⁵ It may be

161 See *supra* note 119 and accompanying text.

162 Dweck, *supra* note 52; see also Brian A. Nosek et al., *Math = Male, Me = Female, Therefore Math ≠ Me*, 83 J. PERSONALITY & SOC. PSYCH., 44, 50 (2002) (finding that variations in implicit math-gender stereotypes predict math attitude, identity, and performance such that women's stronger negative implicit stereotypes about math and women corresponded to weaker math identity and performance).

163 See Dweck, *supra* note 52. By contrast, Dweck found that praising the women resulted in a "host of undesirable consequences," including reinforcing the belief in innate ability. *Id.* at 6.

164 *Id.* at 10–11.

165 See Dweck, *supra* note 52, at 11. On this point, I found a personal account by education advocate and President of the Harlem Children's Zone Geoffrey Canada quite poignant. In an introduction to his chapter in the book, *All-In Nation: An America That Works for All*, Canada chastises "those adults who don't believe all children can learn," by citing to the story of his own brother who had been labeled as "slow" and placed in a remedial track in

that we are so quick to dismiss URMS as “unable” to perform academically that this perception of their academic inability, as much as any deficiency in academic credentials itself, triggers competition mismatch and dooms them to academic failure.¹⁶⁶ Rather than attribute the academic underperformance of URMS solely to a gap in academic credentials, or resign ourselves to the inevitability of competition mismatch, we can foster a growth rather than a fixed mindset. We can promote a belief, among both students and faculty, in the value of individual effort and hard work, rather than reinforcing the erroneous belief that aptitude solely determines success. As Dweck’s research shows, these interventions are proven to reduce the vulnerability to stereotype threat, and by consequence competition mismatch. If we can reduce competition mismatch, then we can avert the real harm of academic underperformance for URMS, and perhaps even more broadly.

In addition to understanding how lowered teacher expectations, born of stigma threat, engage competition mismatch and impair student performance, it is also necessary to understand how students’ own self-perceptions, triggered by stereotype threat, also engage competition mismatch to impair student performance and how to counteract this phenomenon without redirecting URMS to less selective schools. A study led by David Yeager demonstrates why URMS who are the object of stigma threat might be more susceptible to the performance-suppressing effects of stereotype threat than their white peers and offers helpful guidance on how to effectively combat this vicious and self-defeating cycle.¹⁶⁷ Yeager and his colleagues explain that African American students in particular have higher mistrust of teachers than white students based on the pervasive stigma of black

his youth, despite eventually becoming a nuclear engineer. GEOFFREY CANADA, *Unlocking the Potential that Lies Within Every Child*, in ALL-IN NATION: AN AMERICA THAT WORKS FOR ALL 104, 104, available at <http://allinnation.org/book/>.

¹⁶⁶ Opponents might counter that we either cannot or should not waste time waiting for these URMS to realize their potential. Rather, we should expend our limited educational resources on those students most able to take advantage of academic opportunities immediately. See, e.g., Wolff & Wolff, *supra* note 37, at 381 (synthesizing this opposition argument as the merit principle, which holds that “the only fair way to select among these applicants is to determine which are more deserving of the scarce resource for which they are competing”). The Wolffs, however, offer an alternative distributive principle guided by the broader admission goals of the universities, including diversity, rather than the narrow pedagogical goals of the classroom. See *id.* at 386.

¹⁶⁷ See Yeager et al., *supra* note 142, at 815 (explaining that mistrust between minority students and teachers can lead to a damaging cycle, but also noting that when trust was developed between teachers and minority students, minority students benefitted from constructive, performance-enhancing feedback more than non-minority students).

intellectual inferiority and the “real possibility” of discrimination, both of which are conveyed through “subtle and not-so-subtle cues.”¹⁶⁸ This mistrust can, in turn, trigger a “social-cognitive barrier . . . that obscures the meaning of constructive feedback and prevents students from learning from it.”¹⁶⁹ Yeager refers to this phenomenon as “attributional ambiguity,” which is high for these African American students, but low (or nonexistent) for similarly situated white students who are able to take constructive feedback at face value.¹⁷⁰ Consequently, while white students are able to construe this feedback as a positive statement of the teacher’s high expectations and belief in the student’s ability, African-American students may construe it negatively, either as confirmation of stereotypes about black intellectual inferiority generally, or a lack of confidence in the individual student’s ability in particular.¹⁷¹ However, in a rigorous field study, Yeager and his colleagues found that this attributional ambiguity can be mitigated and the academic performance of African-American students can be significantly improved by engendering trust between teacher and student.¹⁷² Their work offers guidance on how to improve URMS’ academic achievement that is consistent with the conclusions of many other scholars who have studied student performance, including Grant, Ripley, Rosenthal, and Dweck. Their recommendations include (1) setting high expectations; (2) assuring students they have the potential to reach these expectations, i.e., fostering a growth mindset; and (3) providing the resources/support

168 *Id.* at 805. Yeager et al. cite to harsher disciplinary action, colder social treatment, and patronizing praise as the “subtle and not-so-subtle cues” given by white teachers to African American students that might engender mistrust and demotivate academic performance. *Id.* Yeager et al. are explicit in their claim that “it is not the case that African Americans lack motivation in school. Rather they understandably may be uncertain as to whether they should invest their effort and identity in tasks where they could be subjected to biased treatment.” *Id.*

169 *Id.* at 822.

170 *Id.* at 821.

171 *Id.* at 821–22. Interestingly, Yeager et al. note that attempts to counteract this mistrust on the part of African American students by “overpraising mediocre work or withholding criticism in an effort to boost self-esteem or build trust” only backfire. *Id.* at 820. African American students are able to see through this ploy and perceive these efforts as disingenuous, thereby reinforcing the belief that they are being viewed stereotypically. *Id.*; see also Kent D. Harber, *Feedback to Minorities: Evidence of a Positive Bias*, 74 J. PERSONALITY & SOC. PSYCH., 622, 627 (1998) (testing this theory specifically by demonstrating that white teachers are more likely to exhibit a positive bias in their subjective evaluation of black students when there is a threat of “intergroup concern,” but finding multiple negative consequences accruing from this positively biased feedback).

172 *Id.* at 807, 820–22 (analyzing the results of three studies on the effect of student-teacher trust, as generated by “wise criticism,” on the performance of African American middle school and high school students).

necessary to achieve these expectations.¹⁷³ According to Yeager and his colleagues these simple interventions will “create a positive attributional space for students to interpret [the] critical feedback [necessary for improvement].”¹⁷⁴ When critical feedback is given to African American students under these conditions, Yeager and his colleagues found that it is received as a vote of confidence in the student’s ability to succeed, rather than misconstrued as a belief in the student’s individual inability.¹⁷⁵ In a field experiment employing these strategies, Yeager and his colleagues were able to increase the academic performance of African-American students in just one marking period by a third of a grade on a four-point scale, closing the academic achievement gap in the process by 39%.¹⁷⁶

2. *Campuses as Racially Hostile Environments*

But it is not enough simply to counteract negative perceptions of URMS’ academic ability. If there is still palpable resentment and hostility that attends the presence of URMS on college campuses, this negative campus climate will also impair the academic performance of URMS in numerous ways.¹⁷⁷ In a study of campus climate across five different selective universities, Walter Allen and Daniel Solórzano found that due to stigma/stereotype threat URMS felt “unwelcomed” and “struggl[ed] with self-doubt and feelings of alienation.”¹⁷⁸ Alt-

173 *Id.* at 820–21 (“A series of randomized field experiments showed that communicating high standards and a personal assurance of the student’s potential to reach them can bolster minority adolescents’ school trust and improve their academic behavior in response to critical feedback. . . . Wise criticism interventions can remove a barrier to better performance, but they must also be accompanied by real opportunities for growth.”).

174 *Id.* at 806.

175 *See id.* at 818–20 (examining implications of a study of African American students explicitly encouraged to view a teacher’s criticism as an indication of the teacher’s high standards and belief in the student’s academic potential).

176 *Id.* at 819 (analyzing data collected during the same study).

177 SANDER & TAYLOR, JR., *supra* note 3, at 99 (noting that the effects of poor performance by URM students causes them to “take on an unearned guilt, which triggers a host of psychological maladies . . . which in turn harms performance”).

178 Allen & Solórzano, *supra* note 54, at 264. An African-American professor at Vanderbilt remarked that “the walls seem to whisper, White males are superior . . . African Americans and Hispanics are inferior.” SANDER & TAYLOR, JR., *supra* note 3, at 101. URMS at colleges and universities across the country have recently taken to social media to express the extent of isolation and psychic harm they experience from the hostility and resentment that seem to pervade the atmosphere on these campuses. *See e.g.*, AshantetheArtist, *I, Too*, *Am Harvard (Preview)*, YOUTUBE (Mar. 3, 2014), <http://www.youtube.com/watch?v=uAMTSPGZRiI>; RecordtoCapture, *33*, YOUTUBE (Feb. 10, 2014), <http://www.youtube.com/watch?v=uAMTSPGZRiI>.

though Allen and Solórzano described the “counterspaces” URMS created to generate a more positive social climate for themselves, they lamented that even the time and psychic toll of these efforts could impair academic performance.¹⁷⁹ Sander and Taylor do not dispute the fact that the hostility/resentment towards URMS engendered by stigma threat undermines their academic performance.¹⁸⁰ Social mismatch is the intermediate effect that attempts to explain how a gap in academic credentials precipitates a decline in academic performance. However, mismatch theory assumes that this social mismatch effect, that this isolation and hostility, will not be offset in some way by colleges and universities. If mismatch theory is correct, then it might be reasonable to also assume that the only way to avoid social mismatch, and the consequential impairment to URMS’ academic performance, is to eliminate and/or reduce reliance on the race-conscious admissions plans that are believed to cause it.¹⁸¹ But, if mismatch theory is incorrect in assuming that colleges and universities will not or cannot act to offset these intermediate social mismatch effects, then it may also be incorrect in assuming that they will necessarily have a deleterious effect on URMS’ academic performance.¹⁸²

To offset social mismatch, colleges and universities must ensure that their campuses are welcoming environments for URMS and that they provide URMS with the institutional support necessary to realize their individual potential unimpeded by the threats to their dignity and self-perception occasioned by the hostility and resentment that currently is felt by URMS across predominantly white college and university campuses.¹⁸³ The Posse Foundation model is again instruc-

com/watch?v=5y3C5KBcCPI; Sy Stokes, *The Black Bruins [Spoken Word]*, YOUTUBE (Nov. 4, 2013), <http://www.youtube.com/watch?v=BEO3H5BOIFk>.

179 Allen & Solórzano, *supra* note 54, at 262 (quoting student comments on the stress associated with balancing involvement in a social counterspace with academic studies).

180 SANDER & TAYLOR, JR., *supra* note 3, at 104–05, 111 (acknowledging that the interrelated phenomena of stigma/stereotype threat impairs academic performance and arguing that the stigma/stereotype threat that attends racial preferences “undercuts the intellectual self-confidence that is the vital handmaiden to learning”).

181 Angela Onwuachi-Willig suggests that race-conscious admissions plans do not cause stigma/stereotype threat, but they exist independent of these plans. *See* Onwuachi-Willig et al., *supra* note 54, at 1343 (analyzing the results of a study of law school affirmative action programs).

182 It is also possible that race-conscious admissions plans are not the sole, or even primary, cause of this hostility and resentment toward URMS. *See id.* (finding that a study of law school affirmative action programs had little if any effect on race-based stigma); *see also* Bowen, *Meeting Across the River*, *supra* note 66 (arguing that affirmative action plans actually have the effect of decreasing preexisting racial isolation).

183 *See supra* note 133 (citing statistics on college graduation and academic achievement); *see also* Harpalani, *supra* note 83 at 55–59 (discussing the ways in which these “race-conscious

tive. Notwithstanding the likely exposure to the type of hostility and resentment experienced by other URMS at many colleges and universities, Posse scholars are able to use the “cohort model as both a structure for support and a catalyst for community development and change.”¹⁸⁴ It is not that Posse Scholars are immune from the challenges of life as URMS,¹⁸⁵ but the support and encouragement of their institutional and organizational allies causes them to succeed even in the face of these obstacles.¹⁸⁶ Rather than teachers and administrators who assume they do not belong or cannot succeed academically, Posse Scholars have the benefit of academic and social support networks that believe in their ability to excel.¹⁸⁷ The Posse cohort model has been so successful in fostering URMS’ success that it was adopted by DePauw University, a Posse partner school, for its entire freshman class.¹⁸⁸ After just one year, DePauw boosted its freshman retention rate from 86% to 92%.¹⁸⁹

The inexplicable success of URMS, especially African-American students, who attend HBCUs also supports the hypothesis that where the environment is not hostile to the presence of URMS, but supportive of them, these students are better able to thrive academically.¹⁹⁰

campus spaces” can insulate URMS from the hostility and the isolation of majority campuses).

184 THE POSSE FOUNDATION, INC., *supra* note 123, at 1. It is quite possible that a similar phenomenon caused the class of 1974 at Boalt Hall Law School to experience uncommon success. See Richard Delgado, *1998 Hugo L. Black Lecture: Ten Arguments Against Affirmative Action – How Valid?* 50 ALA. L. REV. 135, 135–37 (1998). Delgado explained how his own law school class had been the first to experience “a fully diversified student body throughout all three years,” comprised as it was of 30% minority students, and also managed to avoid the perils of “mismatch” by posting both graduation and bar-passage rates by minorities equal to that of non-minorities and accomplishments that reads like a Who’s Who of the legal elite. *Id.*

185 34% of Posse alumni reported that, at some point during their academic tenure, they considered dropping out of college. See THE POSSE FOUNDATION, INC., *supra* note 123, at 14.

186 *See id.*

187 *See id.*

188 *Id.*; Tina Rosenberg, *Beyond the SAT, Finding Success in Numbers*, N.Y. TIMES, Feb. 15, 2012, http://opinionator.blogs.nytimes.com/2012/02/15/beyond-sats-finding-success-in-numbers/?_r=0 (profiling the success of the Posse Foundation program and the DePauw program modeled on it).

189 Rosenberg, *supra* note 188.

190 *See supra* notes 77–78 and accompanying text. Sander and Taylor acknowledge this phenomenon, citing to the large number of black students with STEM degrees, the disproportionate number of black MacArthur “genius” grant winners from HBCUs, and the significant pipeline from HBCUs into academia as evidence of the uncommon success of URMS who attend HBCUs. SANDER & TAYLOR, JR. *supra* note 3, at 43–47. For the same reasons that Sander and Taylor are able to assume that mismatch does not exist at these schools because of the absence of racial preferences, so too we are able to assume

Although Sander and Taylor attribute this uncommon success to the absence of mismatch, they concede that beneficial “institutional and environmental effects” might contribute to the academic success of URMS at HBCUs.¹⁹¹ Once again, the wisdom of this approach—focusing on institutional climate rather than individual ability as an impediment to academic success—might be best demonstrated by reference to women. The Harvard Business School was plagued by the problem of female academic underperformance.¹⁹² This underperformance could not be explained by mismatch because female students entered with academic credentials comparable to their male colleagues, but performed less well academically during their tenure.¹⁹³ To combat this problem of female academic underperformance, the Dean of the Harvard Business School decided he would try to change the “institutional culture” of the school to better foster female students’ success.¹⁹⁴ This involved changing how students “spoke, studied, and socialized” to be more inclusive of female students.¹⁹⁵ Although the program was only piloted for a single academic year, the Dean is already touting its success as measured by the increased number of female students participating in class,¹⁹⁶ the record number of women winning academic awards, and what students self-described as a “much-improved environment.”¹⁹⁷ Asked about the reason for the program’s success, one professor cited the program’s

that the hostility and resentment that attends such preferences is also absent. *Id.* at 36 (citing HBCUs as a place where “blacks would be well matched with their peers” to support the academic success black students experience who matriculate at HBCUs).

191 *Id.* at 82–83.

192 Kantor, *supra* note 54 (reporting results of steps taken to close the gender gap in achievement at Harvard Business School).

193 *Id.* This is the same academic underperformance, relative to credentials, noted by Sander and Taylor. See SANDER & TAYLOR, JR., *supra* note 3, at 25 (noting that the academic index of black and Hispanic students actually overpredicts their academic performance, that they underperform relative to their academic credentials).

194 Kantor, *supra* note 54 (discussing pre-case study statistics on academic achievement among female students and retention of female junior professors at the business school, and approaches taken to address these issues).

195 *Id.* (outlining the steps taken in the case study to decrease the gender gap in achievement, which included: stenographers in every classroom, seminars for women on hand raising, formalized study groups set by the school, and new grading software that allowed professors to view gender patterns in their grading).

196 Class participation was found to be correlated with academic performance. *Id.* (reporting that, before the case study, women did “fine” on tests but lagged behind men in class participation, which comprised 50% of final class marks).

197 *Id.* (reporting that the case study resulted in “more women participating in class, record numbers of women winning academic awards, and a much-improved academic environment” and that “[t]he grade gap had vaporized so fast that no one could quite say how it happened”).

ability to minimize students' unconscious bias about women's ability (or stigma threat) as a source of the program's success.¹⁹⁸ If stigma threat similarly creates hostile and unwelcoming environments for URMS, similar efforts to counteract these negative biases and foster more supportive campus climates might also positively impact their academic performance.

If the hostility and resentment experienced by URMS on the campuses of selective colleges and universities is impeding their academic success in ways unaccounted for by mismatch theory, then we must address these challenges directly, rather than assuming that they are only incidental to the problem of mismatch.¹⁹⁹ Cohort programs like the Posse Foundation, or even its equivalent implemented by DePauw University, offer promise for the ways in which colleges and universities can create support systems that facilitate the success of all of their students, including URMS, rather than just some students presumed to have the "ability" to succeed.²⁰⁰ Likewise, efforts to improve institutional cultures, and especially to counteract stigma threat, such as those adopted by the Harvard Business School, could also positively impact the academic performance of URMS. Most important, as suggested by the work of Yeager, Dweck, and others, selective colleges and universities, as well as the faculty and administration of those schools, must resist the temptation to lower their expectations of URMS because of a belief in their academic inferiority (i.e., a fixed mindset) and must instead hold all of their students to the same high standards of academic excellence and support them in achieving academic success by believing that academic achievement is as much about hard work, or "grit," as demonstrated ability (i.e., a growth mindset).²⁰¹

None of this is to dismiss the legitimacy of the data highlighted by Sander and Taylor's mismatch theory or the problematic phenomena documented by it. The fact of lower entering academic credentials and lower academic performance by URMS relative to their same-

¹⁹⁸ *Id.* (commenting on possible reasons behind the case study's success).

¹⁹⁹ Further evidence of the direct academic effects of hostility towards minorities on predominantly white college and university campuses is presented by data showing that URMS, and even Asian American students, underperform relative to their academic credentials. *See generally* Arcidiacono et al., *supra* note 6, at 710–11. This underperformance, therefore, cannot be explained by mismatch.

²⁰⁰ *See generally* DWECK, *supra* note 37 and accompanying text; Tough, *supra* note 49 (describing the program implemented by David Laude at the University of Texas).

²⁰¹ *See* Yeager et al., *Breaking the Cycle of Mistrust*, *supra* note 142, at 820–22 (presenting findings of three studies on the effect of specific teaching methods on minority student academic performance).

school peers is real and troubling. We must commit to better understanding and addressing these issues and the challenges they pose to improving the diversity of our colleges and universities, as well as ensuring the academic success of URMS. However, mismatch theory ignores many important variables, including the relevance of non-academic credentials in predicting academic performance or the harmful effects of racially hostile campus climates on URMS' academic performance, in concluding that the only way to solve these problems is by discontinuing race-conscious admissions plans and/or re-directing URMS to less selective colleges and universities. This Article has posed some alternate theories and solutions that better account for these additional variables. In an effort to defend these alternate theories and solutions, below I briefly respond to some anticipated objections.

III. FIELDING OBJECTIONS

A. "Merit" is All That Matters

Those who subscribe to mismatch theory, and those who oppose race-conscious admissions plans more generally, are likely to reject the broad conception of "merit" proposed here. These opponents subscribe to a view of educational "merit" that rejects non-academic considerations of any kind.²⁰² In their opinion, allocation of the scarce resource of admission to a selective college or university should be based on academic merit alone.²⁰³ They would likely view the suggestion that "grit," or any other non-academic credential, could be a legitimate consideration for admission to our most selective colleges and universities with as much skepticism as the consideration of race in admissions.²⁰⁴ Those researchers, including Sander and Taylor, who have demonstrated a reliable correlation between academic credentials and academic performance, might also dismiss these non-academic credentials as irrelevant to the phenomenon of

²⁰² Although Sander and Taylor do not necessarily reject the utility of non-academic considerations in the admissions process, they do suggest that of these considerations only race receives any significant weight in the admissions decisions of selective colleges and universities. See SANDER & TAYLOR, JR., *supra* note 3, at 54 (dismissing non-academic factors as possible predictors of law school performance).

²⁰³ See Wolff & Wolff, *supra* note 37, at 381 (discussing the merit-based theory of admissions as intelligence-based); see also ESPENSHADE AND RADFORD, *supra* note 9, at 75.

²⁰⁴ See generally Wolff & Wolff, *supra* note 37 (synthesizing this position).

mismatch.²⁰⁵ Neither of these objections, however, forecloses the possibility that colleges and universities can and should incorporate a more robust conception of “merit” into their admissions decisions both to expand educational opportunities for a broader range of students and to better determine among eligible students who is most capable of succeeding at their institutions.²⁰⁶ The Posse Foundation has demonstrated for over two decades that this more robust conception of merit can yield sustained academic success for students, including for URMS.²⁰⁷

Moreover, the narrow conception of success adopted by mismatch theory ignores a whole host of measures by which colleges and universities might define success vis-à-vis their students and by which students might define their own success.²⁰⁸ As demonstrated by the work of Schultz and Zedeck, these additional measures of success might only be minimally correlated with academic credentials, and much better correlated with other non-academic credentials, which individual colleges and universities must be at liberty to identify and define for themselves.²⁰⁹ Colleges and universities, especially public ones, have expressed the view that they serve broad public interests; so they should not be measured solely by students’ academic and oc-

205 See also Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools?*, 10 J. EMPIRICAL L. STUDIES 171, 194 (2013) (finding support for mismatch theory in data on minority law school graduation and bar passage rates from The Bar Passage Study).

206 See generally Arcidiacono et al., *supra* note 6, at 688–89 (demonstrating that race-conscious admissions plans affect where URMS attend school, rather than whether they attend school).

207 See *supra* note 132 and accompanying text.

208 Sander and Taylor’s conception of academic success includes high academic performance as measured by graduation rates, class rank, and professional success. Compare SANDER & TAYLOR, JR., *supra* note 3, at 34, 55, 57, 61 (highlighting graduation rates, class ranks, and professional success), with NAT’L ASS’N FOR COLL. ADMISSION COUNSELING, REPORT OF THE COMMISSION ON THE USE OF STANDARDIZED TESTS IN UNDERGRADUATE ADMISSION (Sept. 2008) (noting that college success “is a term of sufficient breadth that includes degree attainment, a wide range of GPAs, and the acquisition of experiences and skills that will propel a student into the workforce, graduate education, or responsible citizenship”); see generally Wolff & Wolff, *supra* note 37, at 385 (offering a broad conception of a college or university mission and educational goals vis-à-vis admissions decisions).

209 See Wolff & Wolff, *supra* note 37, at 385, 390 (suggesting that admissions criteria should be defined in relation to the mission of the university using whatever measure results in “the greatest likelihood of [students] fulfilling the educational goals that the institution has set for itself” and rejecting academic merit as the central principle guiding admissions decisions because there is “nothing necessary or essential about [the] particular conception of merit in the admissions process”).

cupational success.²¹⁰ These broader public interests, served by educating a broad swath of students, have long been recognized by the Supreme Court as an enduring value that undergirds our system of public education.²¹¹ Even as we hold colleges and universities accountable for the academic performance of its URMS, as we must, we should not lose sight of these other important measures of success both for schools and their students.

B. *The Inherently “Divisive” Nature of Race*

Even if data were to demonstrate that URMS underperform academically relative to their same-school peers at least in part because of the pervasive effects of stigma/stereotype threat and their harmful effects, proponents of mismatch theory might nevertheless argue that stigma/stereotype threat are the inevitable consequences of race-conscious admissions plans because of their inherently divisive nature.²¹² Therefore, they might argue, it is impossible to eliminate stigma/stereotype threat or their harmful effects on URMS without eliminating the race-consciousness that precipitates them.

Neither race-consciousness, nor stigma/stereotype threat premised on the presumed academic inferiority of URMS, however, can be so neatly cabined. Both pervade society, including educational institutions, in ways that are not likely to be undone merely by the elimination of race-conscious admissions plans in higher education.²¹³ For instance, the existence of an academic achievement gap between URMS on the one hand and white students on the other hand beginning in elementary school and continuing through high school is a widely documented fact.²¹⁴ It receives such significant and wide-

²¹⁰ See Brief for Respondents, *supra* note 47 (arguing that public universities serve broad public interests); see also BOWEN & BOK, *supra* note 86, at 257 (defining student success not just in economic measures but also in terms of civic engagement).

²¹¹ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) in recognizing the fundamental role of education in “awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment”); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (recognizing that education is the foundation of good citizenship).

²¹² See Siegel, *supra* note 53, at 1294.

²¹³ See R.A. Lenhardt, *Understanding the Mark: Race, Stigma and Equality in Context*, 79 N.Y.U. L. REV. 803, 835 (2004) (noting that stigma-based stereotypes are so commonly held that they have become “cultural truth” or “actual facts”); see also Stacy Hawkins, *Diversity, Democracy, & Pluralism: Confronting the Reality of Our Inequality*, MERCER L. REV. (forthcoming 2014) (describing our increased race-consciousness in modern times).

²¹⁴ See generally NAT’L CTR. FOR EDUC. STATISTICS, NCES No. 2011-459, ACHIEVEMENT GAPS: HOW HISPANICS AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND

spread attention that it could hardly escape anyone's consciousness that race coincides with academic performance and educational opportunities notwithstanding the elimination of race-conscious admissions by selective colleges and universities.²¹⁵ In fact, it is this pervasive race-consciousness that causes many researchers and scholars to assert that stigma threat on college and university campuses does and would exist independent of any use of race in college admissions.²¹⁶

This is also true, at least in part, because the stigma of black intellectual inferiority in particular has a long history that far predates the modern adoption of race-conscious admissions plans by colleges and universities and transcends the context of higher education.²¹⁷ Thus, even if the stigma of black academic inferiority could be reduced in this context by the curtailment of race-conscious admissions plans by colleges and universities,²¹⁸ this stigma would not be eliminated wholesale because it did not originate in nor is it confined to the context of higher education. Rather, assuming the form of "cultural

READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (2011), *available at* <http://nces.ed.gov/nationsreportcard/studies/gaps/>.

215 *Id.*

216 See Bowen, *Meeting Across the River*, *supra* note 66, at 781 (documenting a study of URM students demonstrating stigma higher among students without affirmative action and concluding that URMS "are under suspicion [of intellectual inferiority] whether they are admitted under a white normative meritocratic system or affirmative action system"); Delgado, *supra* note 184, at 139 (arguing that stigma predates and operates independently of affirmative action); Lenhardt, *supra* note 213, at 835 (acknowledging the pervasive effect of the racial stigma of black intellectual inferiority which he asserts operates as "cultural truths" and emanates from a cultural and historic context in which URMS have been delegitimized as outsiders and marginalized as undesirables); Onwuachi-Willig et al., *supra* note 54, at 124 (concluding that stigma predates and operates independently of affirmative action and in particular citing Christopher Bracey's work tracing stigma arguments to post-Civil War opposition to Reconstruction efforts).

217 While the modern race-conscious admissions plans at issue here can be traced to the late sixties and early seventies when affirmative action was adopted as a broad-based public policy, social beliefs, particularly among the white majority, about the intellectual inferiority of racial and ethnic minorities, and especially blacks, can be traced back as early as slavery and the early 19th Century pseudoscience of phrenology, which designated blacks as intellectually inferior based on the size and shape of their skulls.

218 It is questionable, given the evidence that stigma threat exists even at colleges and universities that do not employ race-conscious admissions plans (and even some that are precluded from doing so by state law), whether curtailment of these plans, as suggested by Sander, rather than total elimination would have any effect on stigma threat. See, e.g., Bowen, *Meeting Across the River*, *supra* note 66, at 781 (observing that feelings of stigma were higher among students attending schools without affirmative action than those with affirmative action and concluding that "affirmative action does not appear to be the cause of stigma . . .").

truth,” it pervades the American consciousness.²¹⁹ It is far from clear, therefore, that whatever marginal reduction in stigma/stereotype threat could be achieved by the elimination of race-conscious admissions plans by selective colleges and universities would justify the loss of their beneficial effects.²²⁰ Moreover, addressing the problem at its root by countering the belief in URMS’ academic and intellectual inferiority both by others (stigma threat) and URMS themselves (stereotype threat), rather than merely trying to treat the symptoms of this problem should be preferred for its ability to have a broader, deeper, and more sustained impact both for URMS and for higher education generally.

CONCLUSION

Mismatch theory documents important phenomena—the low entering academic credentials and subsequently low academic performance of URMS who receive “large racial preferences” relative to their same-school peers—about which we ought to be concerned, especially those of us who think student body diversity is an important and laudable goal to which colleges and universities should aspire, and that race-conscious admissions plans are an important tool for achieving that goal. However, mismatch theory would have us believe that those URMS who underperform academically do so largely because of a disparity in their entering academic credentials and that, therefore, the best way to redress this problem is to reduce or eliminate reliance on race-conscious admission plans. The reduction or elimination of the “large racial preferences” presumed to define the operation of race-conscious admissions plans, mismatch theory presumes, will appropriately redirect these underperforming URMS to less selective schools where their academic credentials are better matched to the rigor of the educational experience, thereby improving their prospects for academic and even later professional success. But what if mismatch theory is incomplete? What if academic credentials are not all that matter in predicting academic performance or determining student success? What if other important environmental factors also contribute to the impairment of URMS’ academic

219 Lenhardt, *supra* note 213, at 835; *see, e.g.*, Richard Sander, *supra* note 70 (asserting that URMS and blacks in particular are unable to compete with their white peers in elite corporate law firms due to their inferior academic abilities).

220 *See* Wightman, *supra* note 98, at 27 (similarly concluding that net gain in academic credentials obtained through the elimination of race-conscious admissions plans is negligible).

performance? Chief among the concerns raised by these inquiries are the extent to which mismatch theory overvalues academic credentials and devalues non-academic credentials, such as “grit,” in predicting a student’s likelihood of academic success, as well as the extent to which it discounts the harmful effects of stigma/stereotype threat and their associated environmental harms in directly suppressing the academic success of URMS who often encounter unique challenges in this regard. The evidence cited in support of these alternate hypotheses are well-documented in other contexts that offer insightful guidance on how colleges and universities might more fully understand these phenomena and effectively redress these issues on behalf of URMS if in fact they do influence the problem of URMS’ academic underperformance in ways unaccounted for by mismatch theory. At the very least, these additional hypotheses and alternate solutions are worthy of further exploration. The stakes are simply too high to ignore the growing consensus among researchers that these other variables are equally important for developing effective interventions to redress the problem of URMS’ academic underperformance. Before diverting large numbers of URMS from our nation’s most elite colleges and universities, depriving them of the benefits of an elite education and these schools of the benefits of the rich diversity which these URMS bring, we ought to assure ourselves that mismatch theory is correct in concluding that these students have truly been mismatched, rather than merely counted out.